

COURT FILE NUMBER 2401-00363
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF ATB FINANCIAL
DEFENDANTS STARKE CAPITAL CORP. and 1637102 ALBERTA LTD.
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LIST OF AUTHORITIES

STATUTES

1. *Condominium Property Act*, R.S.A. 2000, c. C-22, at sections 34.1(1), 39(2), 39.2(1), 39.2(3), 39.2(6)-(8), 39.2(11), and 42;
2. *Condominium Property Regulation*, Alta Reg 168/2000, at section 74.1;
3. *Land Titles Act*, RSA 2000, c. L-4, at sections 14, 14(3), 104, and 104(1);
4. *Municipal Government Act*, RSA 2000, c M-26, at section 348;
5. *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4, at section 11;

CASE LAW

6. *Alberta (Education) v The Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 SCR 345;
7. *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47;
8. *Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11 (CanLII);
9. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42;
10. *CHRC v Canada (sub nom Mowat)*, 2011 SCC 53 at para 38, [2011] 3 SCR 471;
11. *Condominium Plan No. 8222909 v. Francis*, 2003 ABCA 234;
12. *Kubota Canada Ltd. v Case Credit Ltd.*, 2005 ABCA 139;
13. *R v HB*, 2022 ABCA 240;
14. *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164;
15. *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094;
16. *Re Winnipeg Motor Express Inc*, 2009 MBQB 204;
17. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508; and,
18. *Westpoint Capital Corporation v Solomon Spruce Ridge Inc*, 2017 ABQB 497 (CanLII).

TAB 1



Province of Alberta

CONDOMINIUM PROPERTY ACT

Revised Statutes of Alberta 2000
Chapter C-22

Current as of May 14, 2026

Office Consolidation

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Amendments Not in Force

This consolidation incorporates only those amendments in force on the consolidation date shown on the cover. It does not include the following amendments:

2024 c20 s1 amends ss10.1(1) and (2), 28, 32(4)(a) and (b) and 36(6); repeals and substitutes s42; amends ss73 and 81(g.1).

2025 cP-25.5 s235 amends s1(1).

Conflict with bylaws

34.1(1) If there is a conflict between a bylaw and this Act or the regulations, this Act or the regulations, as the case may be, prevail.

(2), (3) Repealed 2024 c20 s1(17).

2014 c10 s25;2024 c20 s1(17)

Sanctions for failure to comply with bylaws

35(1) A corporation may by bylaw establish monetary or other sanctions that may be imposed on owners, tenants and occupants who fail to comply with the bylaws.

(2) A bylaw under which sanctions may be imposed must

- (a) set out the sanctions that may be imposed, and
- (b) in the case of monetary sanctions, set out the amount of the monetary sanctions or the range of monetary sanctions that may be imposed.

(3) A bylaw under which sanctions may be imposed may be general or specific in its application.

(4) A sanction imposed under a bylaw made under this section must be reasonable in the circumstances for which it is imposed.

(5) Where a person fails to abide by a sanction or to pay to the corporation a monetary sanction imposed under a bylaw, the corporation may proceed under section 36 to enforce the sanction.

(6) A sanction may not be imposed that has the effect of prohibiting or restricting the devolution of units or any transfer, lease, mortgage or other dealing with the units, or of destroying or modifying any easement implied or created by this Act.

(7) A monetary sanction imposed under a bylaw made under this section must not exceed the amount prescribed by the regulations.

RSA 2000 cC-22 s35;2014 c10 s26

Restriction on monetary sanctions

35.1 A corporation may impose a monetary sanction on an owner, tenant or occupant only where authorized by this Act, the regulations or the bylaws.

2014 c10 s26

Enforcement of sanctions

36(1) If a person fails to comply with a sanction or to pay a monetary sanction imposed pursuant to a bylaw, the corporation may, in respect of the contravention,

- (a) the removal of funds for that purpose is authorized by a special resolution or is necessary to maintain property referred to in subsection (1) to comply with health, building and maintenance and occupancy standards as required by law, and
- (b) there will be sufficient funds remaining in the reserve fund to meet the requirements of subsection (1).

(3) The money in the capital replacement reserve fund of the corporation is an asset of the corporation and no part of that money shall be refunded or distributed to any owner of a unit except where the owners and the property cease to be governed by this Act.

(4) For the purposes of this section and section 39.1, the following are not capital improvements:

- (a) the replacement of existing real and personal property of the corporation, the common property or managed property with
 - (i) the contemporary equivalent of an obsolete property, or
 - (ii) a lower cost equivalent of the existing property;
- (b) any other replacement prescribed by the regulations.

RSA 2000 cC-22 s38;2013 c10 s1;2014 c10 s29

Operating account

38.1 Subject to the regulations, a corporation shall, from funds levied under section 39(1)(a) or (c), establish and maintain an operating account to be used to provide sufficient funds for

- (a) the control, management and administration of the real and personal property of the corporation, the common property and managed property, and
- (b) the payment of any other obligation of the corporation,

that are not required to be paid out of the reserve fund.

2014 c10 s30;2024 c20 s1(19)

Contributions

39(1) A board may, by resolution, determine from time to time the following to be levied as contributions:

- (a) for the purposes of the operating account and the reserve fund, amounts levied on the owners at regular intervals

- (i) in proportion to the unit factors of the owners' respective units, or
- (ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;
- (b) amounts levied against owners as chargebacks under section 39.01;
- (c) a special levy in accordance with section 39.1.

(2) Subject to the regulations, a contribution may include reasonable and relevant administrative costs and legal fees, including expenses and interest, incurred by the corporation.

(3) A contribution shall not include

- (a) any amount for the purpose of collecting from an individual owner a monetary sanction under a bylaw made under section 35(1), or
- (b) any other prescribed amount.

RSA 2000 cC-22 s39;2013 cS-19.3 s3;2014 c10 s30;2024 c20 s1(20)

Chargebacks

39.01(1) Subject to subsections (2) and (3) and the regulations, and if provided for in the bylaws, a chargeback may be levied on an owner to recover the corporation's costs when an act or omission by the owner or an occupant, or a person or persons for whom the owner or occupant is responsible, requires the corporation to repair, replace, maintain or protect any unit, real and personal property of the corporation or common property affected by that act or omission, as the case may be.

(2) The amount of a chargeback levied under subsection (1) may include the actual costs and any reasonable related service costs incurred by the corporation to repair, replace, maintain or protect any affected unit, real and personal property of the corporation or common property.

(3) The amount levied under subsection (1) shall be the lesser of

- (a) the amount of the actual costs and reasonable related service costs referred to in subsection (2), and
- (b) the deductible limit of the insurance policy held by the corporation, regardless of whether or not an insurance claim is made in respect of the act or omission referred to in subsection (1).

(4) As soon as possible after the passing of a resolution referred to in subsection (1), the board must inform each owner of the following:

- (a) the purpose of the levy;
- (b) the total amount of the levy;
- (c) the method used to determine each unit's share of the levy;
- (d) the amount of the owner's unit's share of the levy;
- (e) the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid.

(5) If the amount collected exceeds the amount required or for any other reason is not fully used for the purpose set out in the resolution referred to in subsection (1), the corporation must pay the money into the reserve fund.

2014 c10 s30;2024 c20 s1(21)

Payment and enforcement of contributions

39.2(1) A contribution is due and payable on the passing of a resolution by the board under section 39 in accordance with the terms of the resolution of the board.

(2) A contribution referred to in subsection (1), and any interest charged under section 40, may be recovered by an action for debt by the corporation

- (a) from a person who was an owner at the time when the resolution of the board was passed, and
- (b) from a person who was an owner at the time when the action was instituted,

both jointly and severally.

(3) Where a contribution, including any interest owing, is not paid by the owner, the mortgagee may pay any amount owing in respect of that contribution and add that amount to the amount owing to the mortgagee under the mortgage.

(4) Where

- (a) a person other than the owner is in possession of a unit and pays rent to the owner in respect of the unit, and

- (b) contributions, including any interest owing in respect of that unit, are in arrears,

the corporation may require the person in possession of the unit to pay the rent owing to the owner in respect of that unit to the corporation so that that rent can be applied against the contributions, including any interest owing, that are in arrears.

(5) Where a person in possession of a unit other than the owner pays the rent to the corporation under subsection (4), that person is deemed to have paid that rent to the owner.

(6) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.

(7) On the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

(8) On and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

(9) The *Dower Act* and Part 10 of the *Civil Enforcement Act* do not apply to proceedings under subsection (8).

(10) If a corporation has filed a caveat under this section, the corporation shall withdraw the caveat on the payment to it of the amount of the charge.

(11) Notwithstanding subsection (8), if

- (a) a corporation has filed a caveat under this section,
- (b) subsequent to the caveat's being filed another person gains title to the unit pursuant to
 - (i) a foreclosure action,
 - (ii) an action for specific performance, or
 - (iii) a tax recovery proceeding under the *Municipal Government Act*,
- and
- (c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed,

the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

2014 c10 s30;2024 c20 s1(22)

Interest on outstanding accounts

40(1) A corporation may charge interest on any unpaid balance of a contribution owing to it by an owner.

(2) Notwithstanding subsection (1), the rate of interest charged under subsection (1) is not to be greater than the rate of interest provided for by regulation.

RSA 1980 cC-22 s32;1996 c12 s33;2000 c11 s9

41 Repealed 2014 c10 s31.

Recovery of costs

42 Where a corporation takes any steps to collect any amount owing under section 39, the corporation may

- (a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and
- (b) if a caveat is registered against the title to the unit, recover from the owner all reasonable prescribed expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

RSA 2000 cC-22 s42;2014 c10 s32

Investments

43 Subject to section 37(3) and the regulations, a corporation may invest any funds not immediately required by it only in accordance with the regulations.

RSA 2000 cC-22 s43;2001 c28 s6;2006 c9 s7;
2014 c10 s33

Trust money

43.1(1) Where the corporation or any person is in receipt of money paid to or for the benefit of the corporation, that money and all the proceeds arising from that money are

- (a) legally and beneficially owned by the corporation, and
- (b) deemed to be held in trust for the performance of the duties and obligations in respect of which the payment was made.

(2) Where the corporation is in receipt of money referred to in subsection (1), the corporation shall

TAB 2



Province of Alberta

CONDOMINIUM PROPERTY ACT

CONDOMINIUM PROPERTY REGULATION

Alberta Regulation 168/2000

With amendments up to and including Alberta Regulation 23/2026

Current as of February 15, 2026

Office Consolidation

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- (a) by resolution, levy a chargeback on the owner, or
- (b) decline to levy a chargeback on the owner.

AR 23/2026 s32

Statement of chargeback

73.92 For the purpose of section 39.01 of the Act, a board levying a chargeback shall serve on the owner subject to the chargeback a statement of chargeback that contains the following information:

- (a) the amount of the chargeback levied;
- (b) instructions on how to pay the chargeback levied;
- (c) the deadline for payment of the chargeback levied.

AR 23/2026 s32

Estoppel certificate must include information on chargeback

73.93(1) For the purpose of section 43.2(1)(e) of the Act, an estoppel certificate must include information on any proposed chargeback to be levied against the owner of a unit under section 39.01 of the Act.

(2) Subsection (1) applies in respect of a proposed chargeback for which the notice referred to in section 73.91(1) has been served on the owner.

AR 23/2026 s32

Appeal to Court

73.94(1) An owner may appeal to the Court a chargeback levied on the owner under section 39.01 of the Act.

(2) An appeal under this section must be made within 30 days of the service of the statement of chargeback under section 73.92.

AR 23/2026 s32

Fees under the Land Titles Act

74 The fees payable to the Registrar in respect of matters under the Act are the fees payable to the Registrar under the *Tariff of Fees Regulation* (AR 120/2000) or as otherwise provided for under an enactment.

Reasonable expenses re caveat

74.1 The following expenses are prescribed for the purposes of section 42(b) of the Act, up to an aggregate maximum amount of

the expenses equal to the original amount owing in respect of the unit:

- (a) legal and other professional fees and disbursements associated with preparing, registering and discharging the caveat;
- (b) the cost of registering and discharging the caveat under the *Land Titles Act*.

AR 154/2019 s30

Maximum rental deposit

74.2(1) For the purposes of section 53 of the Act, the maximum rental deposit that may be charged is prescribed to be \$1000 or one month's rent, whichever is greater.

(2) Despite subsection (1), any rental deposit that is greater than the amount prescribed in subsection (1) that was collected from an owner by a corporation before January 1, 2020 may be retained until the owner gives written notice that the owner's unit is no longer rented.

AR 154/2019 s30

Statement of account for rental deposits

74.3 A statement of account under section 53(7) of the Act must include an itemized list of the deductions from the rental deposit and the purpose for which each deduction was made.

AR 154/2019 s30

No compensation for transferred parking unit

74.4 An owner of a unit labelled in a condominium plan of redivision as a parking space for visitors or persons with disabilities that must be transferred to the corporation under section 20(9) of the Act is not entitled to any compensation respecting that unit or transfer.

AR 154/2019 s30

No unit factors for corporation-owned unit in condominium contribution calculation

74.5 A unit owned by the corporation is deemed to have been allocated zero unit factors for the purposes of calculating contributions under section 39 of the Act.

AR 154/2019 s30

Fee payable to a municipality

75 A municipal authority may require the payment of a fee of not more than \$40 per unit when application is made to the municipal authority for the certificate referred to in section 10(1)(b)(ii) of the Act.

AR 168/2000 s75;108/2004

TAB 3



Province of Alberta

LAND TITLES ACT

Revised Statutes of Alberta 2000
Chapter L-4

Current as of January 31, 2025

Office Consolidation

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Amendments Not in Force

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2026 c12 s9 amends ss1, 14, 14.1, 17, 27 and 34; adds s164(1.1); amends s213.

2026 c12 s9 amends s1; adds ss8.1 to 8.6 and 23.1; amends ss24(1), 28, 34 and 35; repeals s36(3); amends ss39(1) and 44; repeals and substitutes s45; amends s49(4); repeals and substitutes s50; amends ss50.1(1) and (2) and 53; amends the heading preceding s56.1; repeals ss56.1 to 56.4; amends ss56.41(1.1)(c), 56.5, 56.51, 56.6(b) and 56.61; repeals and substitutes s56.7(a) and (b); amends ss64(1) and (2), 64.1, 66(1), 73(1), 77(1), 85(3), 95(1), 98, 100(1), 101(4), 102(1)(a) and (b), 102.1, 106(1)(a), 107(1), 109, 113, 115, 116, 117(1), 120(1), 121, 122 and 123(2); repeals and substitutes s125; amends ss126, 127(b), 130, 131, 132(2), 134, 138(1), 141(2) and 148(1) and (2); repeals and substitutes s151(2); amends ss152, 153(2), 155, 156, 161(b)(ii), 164(3) and (8), 179(3), 185, 186, 187(1), 189, 191(3)(a), 193(5), 201, 205(2) and 213; repeals and substitutes s215.

Administration of oaths

9 The Registrar or any Deputy Registrar or Assistant Deputy Registrar may administer any oath or take any affirmation or declaration instead of an oath respecting titles to land from anyone entitled by law to affirm or declare.

RSA 2000 cL-4 s9;2006 c21 s7

Officials acting as agents, etc.

10 The Registrar or any Deputy Registrar, Assistant Deputy Registrar or clerk in any Land Titles Office shall not directly or indirectly act as the agent of any person investing money and taking securities on land within Alberta, advise, for any fee or reward or otherwise, on titles to land or practise as a conveyancer.

RSA 2000 cL-4 s10;2006 c21 s8

Business on premises

11 The Registrar or Deputy Registrar, Assistant Deputy Registrar or clerk in any Land Titles Office shall not carry on or transact within the Land Titles Office any business or occupation whatever other than that official's duties as Registrar, Deputy Registrar, Assistant Deputy Registrar or clerk.

RSA 2000 cL-4 s11;2006 c21 s9

Office hours

12 Every Land Titles Office shall be kept open during the hours and on the days fixed by the Minister.

RSA 1980 cL-5 s15;1985 c48 s2(5);1994 cG-8.5 s40

Keeping of records

13 Where records are required to be kept under this Act, the Registrar may keep those records

- (a) in written form,
- (b) by any graphic, photographic, magnetic or electronic means, or
- (c) by any other means or combination of means,

as the Registrar considers appropriate.

1988 c27 s6

Daily record

14(1) The Registrar shall keep a record that shall contain particulars of every instrument and caveat accepted by the Registrar for filing or registration.

(2) The Registrar shall cause each instrument or caveat received by the Registrar for filing or registration to be examined and if it is found to be complete and in the proper form and fit for filing or

registration, the Registrar shall endorse on the instrument or caveat the serial number assigned to it and the date on which the serial number is assigned.

(3) For purposes of priority between mortgagees, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

(4) Notwithstanding subsections (2) and (3), instead of assigning a serial number to an instrument or caveat, the Registrar may identify the instrument or caveat by a means other than a serial number so long as that other means of identification allows for the determination of priority between mortgagees, transferees and others.

RSA 1980 cL-5 s16;1985 c48 s2(6);1988 c27 s7;
1994 cC-10.5 s134;1996 c32 s5(5);1999 c10 s3

Pending registration queue

14.1(1) Subject to the regulations, this section applies to instruments and caveats affecting a parcel of land to which a land identification number has been assigned under section 51.

(2) The Registrar shall establish and maintain a pending registration queue.

(3) The Registrar shall ensure that instruments and caveats are entered in the pending registration queue in an order acceptable to the Registrar.

(4) Instruments and caveats in the pending registration queue must be examined and registered in accordance with section 14(2) in the order in which they are entered in the pending registration queue.

(5) Notwithstanding subsection (4), the regulations may provide that instruments and caveats in the pending registration queue may be examined and registered in an order other than the order in which they are entered in the pending registration queue.

(6) If an instrument or caveat in the pending registration queue is found to be incomplete, not in the proper form or not fit for registration, the Registrar may

- (a) return the instrument or caveat for correction, in which case the instrument or caveat shall,
 - (i) if it is returned to the Registrar within the time prescribed by the regulations, retain its place in the pending registration queue, or

Transitional

102.2(1) Section 102.1(1) does not apply to a caveator or mortgagor described in that subsection if the caveat or mortgage, as applicable, was submitted to the Registrar before the coming into force of section 102.1.

(2) If the caveat or mortgage, as applicable, was submitted to the Registrar before the coming into force of section 102.1, a caveator or mortgagor described in section 102.1(1) shall pay to the Registrar the fees for registration of the caveat or mortgage, as applicable, set out in the *Tariff of Fees Regulation* (AR 120/2000) as it read immediately before the coming into force of section 102.1.

(3) The Registrar shall not register the caveat or mortgage, as applicable, until the Registrar has received the fees referred to in subsection (2).

(4) If the Registrar does not accept the caveat or mortgage, as applicable, for registration, the Registrar shall return the fees described in subsection (2) to the caveator or mortgagor, as applicable.

2024 c4 s5

Transitional re levy amount

102.3 If a caveat or mortgage, as applicable, was submitted to the Registrar for registration before the repeal of section 102.1(3), the caveator or mortgagor described in section 102.1(1) shall pay to the Registrar, as applicable,

- (a) the levy for registration of the caveat or mortgage, as applicable, required under section 102.1 as it read immediately before the repeal of section 102.1(3), or
- (b) the fee for registration of the caveat or mortgage, as applicable, required under section 102.2.

2024 c15 s9

Mortgage as security

103 A mortgage or encumbrance under this Act has effect as security but does not operate as a transfer of the land charged by it.

RSA 1980 cL-5 s106

Priority of mortgage

104(1) On registration of a mortgage for a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that they are made or incurred

subsequent to the registration, on or after January 1, 1983, of any other instrument or caveat.

(2) On registration of a mortgage that provides for a revolving line of credit up to a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage notwithstanding

(a) that the advances and obligations are made or incurred subsequent to the registration, after December 31, 1982, of any other instrument or caveat, and

(b) that at any time during the term of the mortgage there may not be any outstanding advances to be secured.

(3) If a mortgagee refuses to make, or a mortgagor has and exercises a right to refuse to accept or be bound by, any further advances that would be secured under subsection (1) or (2), the mortgagee shall, on the request of the mortgagor, provide a discharge of the mortgage as to the further advances.

(4) The rights given under the *Prompt Payment and Construction Lien Act* and the *Personal Property Security Act* are not affected by this section.

RSA 2000 cL-4 s104;2020 c30 s29

Mortgages affected by conditional sales agreement

105(1) A mortgage, charge or encumbrance on land or on any estate or interest in land contained in, endorsed on or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels, is void to all intents and purposes whatsoever, notwithstanding anything in any Act.

(2) No such mortgage, charge or encumbrance, and no caveat founded on it, or on any such writing or instrument, shall be registered or filed under this Act.

(3) If any such writing or instrument, by inadvertence, accident or otherwise howsoever, is registered or filed in any Land Titles Office contrary to this section, the registration or filing is ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Court of King's Bench on the application of any person interested.

RSA 2000 cL-4 s105;2009 c53 s95;AR 217/2022

Discharge of mortgage or encumbrance

106(1) The Registrar shall discharge a mortgage or an encumbrance wholly or in part, or the land comprised in it wholly

TAB 4



Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of May 14, 2026

Office Consolidation

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2026 c10 s4(20) amends s326(1)(a)(v).

2020 c35 s24 amends s596(1)(b).

2025 c10 s39 amends s1(1)(m)(ii); repeals and substitutes ss250(2)(b) and 362(1)(g.1); amends s392(4).

2026 c10 s4 amends ss1(1) and 488(1); adds s619.1; amends s688(1)(b).

2026 c13 s24 amends s674(1.1).

Regulations

The following is a list of the regulations made under the *Municipal Government Act* that are filed as Alberta Regulations under the Regulations Act.

	Alta. Reg.	<i>Amendments</i>
Municipal Government Act		
Aeronautics Act Agreements	33/2014	10/2016, 157/2020
Airport Vicinity Protection Areas		
Calgary International	177/2009	192/2010, 71/2014, 186/2017, 177/2018, 124/2019, 158/2020,

Penalty for non-payment in current year

344(1) A council may by bylaw impose penalties in the year in which a tax is imposed if the tax remains unpaid after the date shown on the tax notice.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than 30 days after the tax notice is sent out.

1994 cM-26.1 s344

Penalty for non-payment in other years

345(1) A council may by bylaw impose penalties in any year following the year in which a tax is imposed if the tax remains unpaid after December 31 of the year in which it is imposed.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than January 1 of the year following the year in which the tax was imposed or any later date specified in the bylaw.

1994 cM-26.1 s345

Penalties

346 A penalty imposed under section 344 or 345 is part of the tax in respect of which it is imposed.

1994 cM-26.1 s346

Cancellation, reduction, refund or deferral of taxes

347(1) If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:

- (a) cancel or reduce tax arrears;
- (b) cancel or refund all or part of a tax;
- (c) defer the collection of a tax.

(2) A council may phase in a tax increase or decrease resulting from the preparation of any new assessment.

1994 cM-26.1 s347

Tax becomes debt to municipality

348 Taxes due to a municipality

- (a) are an amount owing to the municipality,

- (b) are recoverable as a debt due to the municipality,
- (c) take priority over the claims of every person except the Crown, and
- (d) are a special lien
 - (i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
 - (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

RSA 2000 cM-26 s348;2005 c14 s12;2018 c6 s5

Special priority lien for tax debt on linear property or machinery and equipment

348.1(1) In this section,

- (a) “assessable”, in respect of property or improvements, means property or improvements that have been or are subject to being assessed under Part 9;
- (b) “debtor” means a person who owes a debt to a municipality for tax on linear property or on machinery and equipment.

(2) Notwithstanding section 348(c) and (d), taxes due to a municipality on linear property or on machinery and equipment

- (a) take priority over the claims of every person except the Crown, and
- (b) are a special lien on all the debtor’s assessable property located within the municipality, including any assessable improvements to that property.

(3) A lien referred to in subsection (2)(b)

- (a) arises when the debtor fails to satisfy the debt when due, and
- (b) expires on full satisfaction of the debt.

TAB 5



Province of Alberta

PROMPT PAYMENT AND CONSTRUCTION LIEN ACT

Revised Statutes of Alberta 2000
Chapter P-26.4

Current as of April 1, 2025

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Prompt Payment and Construction Lien Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	<i>Amendments</i>
Prompt Payment and Construction		
Lien Act		
Prompt Payment and Adjudication.....	23/2022	265/2025
Prompt Payment and Construction		
Lien Forms	51/2002	108/2004, 217/2009, 164/2010, 227/2011, 130/2012, 124/2015, 114/2020, 46/2021, 22/2022, 218/2022, 98/2023, 101/2025
Prompt Payment and Construction		
Lien (Prescribed Persons, Entities and Project Agreements)	122/2023	

Furnishing material

9(1) Material is considered to be furnished to be used within the meaning of this Act when it is delivered either on the land on which it is to be used or on such land or in such place in the immediate vicinity of that land as is designated by the owner or the owner's agent or by the contractor or the subcontractor.

(2) Notwithstanding that material to be used in an improvement may not have been delivered in strict accordance with subsection (1), if the material is incorporated in the improvement the person furnishing the material has a lien as set out in section 6.

RSA 1980 cB-12 s7

Date of lien

10 The lien created by this Act arises when the work is begun or the first material is furnished.

RSA 1980 cB-12 s8

Priorities

11(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Notwithstanding subsection (1), a payment made pursuant to an assignment, attachment, garnishment or receiving order that is paid, before a lien is registered, to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, takes priority over the lien.

(3) Notwithstanding subsection (2), no judgment, execution, assignment, attachment, garnishment or receiving order shall affect the amount required to be retained under sections 18(1), (1.1) or (1.2) and 23(1), (1.1) or (1.2).

(4) A registered mortgage or a mortgage registered by way of a caveat has priority over a lien to the extent of the mortgage money in good faith secured or advanced in money prior to the registration of the statement of lien.

(5) Advances or payments made under a mortgage after a statement of lien has been registered rank after the lien, but a mortgagee who has applied mortgage money in payment of a statement of lien that has been registered is subrogated to the rights and priority of the lienholder who has been so paid to the extent of the money so applied.

(6) An agreement for sale of land in respect of which a caveat has been filed and any money in good faith secured or payable under the agreement has the same priority over a lien as is provided for a

mortgage and mortgage money in subsections (1) and (2), and for the purposes of this Act,

- (a) the seller is deemed to be a mortgagee, and
- (b) any money in good faith secured and payable under such an agreement is deemed to be mortgage money in good faith secured or advanced.

RSA 2000 cB-7 s11;2001 c20 s3;2020 c30 s6

Advancing of money

12 Where

- (a) a search is made of a certificate of title,
- (b) at the time of the search there is not any statement of lien endorsed on that certificate of title, and
- (c) on the day that search is made, in reliance on that search,
 - (i) mortgage money is advanced under a mortgage registered against that certificate of title, or
 - (ii) money is paid under a contract or subcontract for work done or materials furnished in respect of the land for which the certificate of title was issued,

that money is deemed to have been advanced before the registration of any statement of lien not disclosed by that search notwithstanding that a statement of lien was registered against that certificate of title on the day that the search was made.

1985 c14 s6

Priority for wages

13(1) A lien for the wages of a labourer has priority, to the extent of 6 weeks' wages, over all claims on that portion of the amount retained as required by section 18 or 23, as the case may be, to which the contractor or subcontractor through whom the lien is derived is entitled, and all such labourers rank without preference.

(2) Any device by an owner, contractor or subcontractor to defeat the priority given by this Act to a labourer for the labourer's wages is against public policy and void.

RSA 1980 cB-12 s10;1985 c14 s7

Land owned by married person or adult interdependent partner

14(1) When work is done or material is furnished in respect of land in which a married person or an adult interdependent partner has an estate or interest, if the work is done or the material is furnished with the privity of the spouse of the married person or the

TAB 6

Province of Alberta as represented by the Minister of Education, Province of British Columbia as represented by the Minister of Education, Province of Manitoba as represented by the Minister of Education, Citizenship and Youth, Province of New Brunswick as represented by the Minister of Education, Province of Newfoundland and Labrador as represented by the Minister of Education, Northwest Territories as represented by the Minister of Education, Culture and Employment, Province of Nova Scotia as represented by the Minister of Education, Territory of Nunavut as represented by the Minister of Education, Province of Ontario as represented by the Minister of Education, Province of Prince Edward Island as represented by the Minister of Education, Province of Saskatchewan as represented by the Minister of Education, Yukon Territory as represented by the Minister of Education, Airy and Sabine District School Area Board, Algoma District School Board, Algonquin and Lakeshore Catholic District School Board, Asquith-Garvey District School Area Board, Atikokan Roman Catholic Separate School Board, Avon Maitland District School Board, Bloorview MacMillan School Authority, Bluewater District School Board, Brant Haldimand Norfolk Catholic District School Board, Bruce-Grey Catholic District School Board, Campbell Children's School Authority, Caramat District School Area Board, Catholic District School Board of Eastern Ontario, Collins District School Area Board, Connell and Ponsford District School Area Board, Conseil des écoles catholiques du Centre-Est de l'Ontario, Conseil des écoles publiques de l'Est de l'Ontario, Conseil des écoles séparées catholiques de Dubreuilville, Conseil des écoles séparées catholiques de Foleyet, Conseil scolaire de district catholique Centre-Sud, Conseil scolaire de district catholique de l'Est Ontarien, Conseil scolaire

Province d'Alberta, représentée par le ministre de l'Éducation, Province de la Colombie-Britannique, représentée par le ministre de l'Éducation, Province du Manitoba, représentée par le ministre de l'Éducation, Citoyenneté et Jeunesse, Province du Nouveau-Brunswick, représentée par le ministre de l'Éducation, Province de Terre-Neuve-et-Labrador, représentée par le ministre de l'Éducation, Territoires du Nord-Ouest, représentés par le ministre de l'Éducation, de la Culture et de la Formation, Province de la Nouvelle-Écosse, représentée par le ministre de l'Éducation, Territoire du Nunavut, représenté par le ministre de l'Éducation, Province d'Ontario, représentée par le ministre de l'Éducation, Province de l'Île-du-Prince-Édouard, représentée par le ministre de l'Éducation, Province de la Saskatchewan, représentée par le ministre de l'Éducation, Territoire du Yukon, représenté par le ministre de l'Éducation, Airy and Sabine District School Area Board, Algoma District School Board, Algonquin and Lakeshore Catholic District School Board; Asquith-Garvey District School Area Board, Atikokan Roman Catholic Separate School Board, Avon Maitland District School Board, Bloorview MacMillan School Authority, Bluewater District School Board, Brant Haldimand Norfolk Catholic District School Board, Bruce-Grey Catholic District School Board, Campbell Children's School Authority, Caramat District School Area Board, Catholic District School Board of Eastern Ontario, Collins District School Area Board, Connell and Ponsford District School Area Board, Conseil des écoles catholiques du Centre-Est de l'Ontario, Conseil des écoles publiques de l'Est de l'Ontario, Conseil des écoles séparées catholiques de Dubreuilville, Conseil des écoles séparées catholiques de Foleyet, Conseil scolaire de district catholique Centre-Sud, Conseil scolaire de district catholique de l'Est Ontarien, Conseil scolaire

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District School Board, Northeastern Catholic District School Board, Northern District School Area Board, Northwest Catholic District School Board, Ottawa Children's Treatment Centre School Authority, Ottawa Catholic District School Board, Ottawa-Carleton District School Board, Parry Sound Roman Catholic Separate School Board, Peel District School Board, Peterborough Victoria Northumberland and Clarington Catholic District School Board, Rainbow District School Board, Rainy River District School Board, Red Lake Area Combined Roman Catholic Separate School Board, Renfrew County Catholic District School Board, Renfrew County District School Board, Simcoe County District School Board, Simcoe Muskoka Catholic District School Board, St. Clair Catholic District School Board, Sudbury Catholic District School Board, Superior North Catholic District School Board, Superior-Greenstone District School Board, Thames Valley District School Board, Thunder Bay Catholic District School Board, Toronto Catholic District School Board, Toronto District School Board, Trillium Lakelands District School Board, Upper Canada District School Board, Upper Grand District School Board, Upsala District School Area Board, Waterloo Catholic District School Board, Waterloo Region District School Board, Wellington Catholic District School Board, Windsor-Essex Catholic District School Board, York Catholic District School Board and York Region District School Board *Appellants*

v.

Canadian Copyright Licensing Agency Operating as "Access Copyright" *Respondent*

and

District School Board, Northeastern Catholic District School Board, Northern District School Area Board, Northwest Catholic District School Board, Ottawa Children's Treatment Centre School Authority, Ottawa Catholic District School Board, Ottawa-Carleton District School Board, Parry Sound Roman Catholic Separate School Board, Peel District School Board, Peterborough Victoria Northumberland and Clarington Catholic District School Board, Rainbow District School Board, Rainy River District School Board, Red Lake Area Combined Roman Catholic Separate School Board, Renfrew County Catholic District School Board, Renfrew County District School Board, Simcoe County District School Board, Simcoe Muskoka Catholic District School Board, St. Clair Catholic District School Board, Sudbury Catholic District School Board, Superior North Catholic District School Board, Superior-Greenstone District School Board, Thames Valley District School Board, Thunder Bay Catholic District School Board, Toronto Catholic District School Board, Toronto District School Board, Trillium Lakelands District School Board, Upper Canada District School Board, Upper Grand District School Board, Upsala District School Area Board, Waterloo Catholic District School Board, Waterloo Region District School Board, Wellington Catholic District School Board, Windsor-Essex Catholic District School Board, York Catholic District School Board et York Region District School Board *Appellants*

c.

Canadian Copyright Licensing Agency, connue sous la raison sociale « Access Copyright » *Intimée*

et

Canadian Publishers' Council, Association of Canadian Publishers, Canadian Educational Resources Council, Canadian Association of University Teachers, Canadian Federation of Students, Association of Universities and Colleges of Canada, Association of Canadian Community Colleges, CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Authors Association, Canadian Freelance Union, Canadian Society of Children's Authors, Illustrators and Performers, League of Canadian Poets, Literary Translators' Association of Canada, Playwrights Guild of Canada, Professional Writers Association of Canada, Writers' Union of Canada and Centre for Innovation Law and Policy of the Faculty of Law University of Toronto *Interveners*

Canadian Publishers' Council, Association of Canadian Publishers, Canadian Educational Resources Council, Association canadienne des professeures et professeurs d'université, Fédération canadienne des étudiantes et étudiants, Association des universités et collèges du Canada, Association des collèges communautaires du Canada, CMRRA-SODRAC Inc., Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Canadian Authors Association, Canadian Freelance Union, Société canadienne des auteurs, illustrateurs et artistes pour enfants, League of Canadian Poets, Association des traducteurs et traductrices littéraires du Canada, Playwrights Guild of Canada, Professional Writers Association of Canada, Writers' Union of Canada et Centre for Innovation Law and Policy of the Faculty of Law University of Toronto *Intervenants*

INDEXED AS: ALBERTA (EDUCATION) v. CANADIAN COPYRIGHT LICENSING AGENCY (ACCESS COPYRIGHT)

2012 SCC 37

File No.: 33888.

2011: December 7; 2012: July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Infringement — Exception — Fair dealing — Teachers making photocopies of excerpts of textbooks and other copyrighted works to distribute to students as part of class instruction — Collective society seeking to collect royalties for photocopies of excerpts — Whether elementary and secondary schools can claim the benefit of “fair dealing” exception for copies of works made at the teachers’ initiative with instructions to students that they read the material — Copyright Act, R.S.C. 1985, c. C-42, s. 29.

RÉPERTORIÉ : ALBERTA (ÉDUCATION) c. CANADIAN COPYRIGHT LICENSING AGENCY (ACCESS COPYRIGHT)

2012 CSC 37

N° du greffe : 33888.

2011 : 7 décembre; 2012 : 12 juillet.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Propriété intellectuelle — Droit d'auteur — Violation — Exception — Utilisation équitable — Photocopie d'extraits de manuels et d'autres ouvrages protégés par le droit d'auteur, par des enseignants, pour distribution en classe aux élèves — Demande présentée par une société de gestion collective afin qu'elle puisse percevoir des redevances pour la photocopie d'extraits — Les écoles des niveaux élémentaire et secondaire peuvent-elles bénéficier de l'exception de l'« utilisation équitable » à l'égard des copies que l'enseignant fait de son propre chef et qu'il donne à lire aux élèves? — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 29.

Administrative law — Judicial review — Standard of review — Copyright Board deeming that photocopies of excerpts of textbooks and other copyrighted works did not constitute fair dealing — Whether decision reviewable on standard of reasonableness or correctness — Whether Board made reviewable error.

Access Copyright represents authors and publishers of printed literary and artistic works. It filed a proposed tariff with the Copyright Board with respect to the reproduction of its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Copyright Board concluded that copies made at the teachers' initiative with instructions to students that they read the material were made for the allowable purpose of "research or private study" under s. 29 of the *Copyright Act*. They did not, however, constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing.

Held (Deschamps, Fish, Rothstein and Cromwell JJ. dissenting): The appeal should be allowed and the matter remitted to the Board for reconsideration.

Per McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ.: Fair dealing allows users to engage in activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH Canadian Ltd. v. Law Society of Upper Canada* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of "research or private study" under s. 29, "criticism or review" under s. 29.1, or "news reporting" under s. 29.2 of the *Copyright Act*. The second step assesses whether the dealing is "fair".

There is no dispute that the first step of the test set out in *CCH* was met and that the dealing — photocopying — was for the allowable purpose of research or private study. The dispute in this case centres on the second step of the test, namely, whether the copies were "fair" according to the factors set out in *CCH*: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

Droit administratif — Contrôle judiciaire — Norme de contrôle — Conclusion de la Commission du droit d'auteur selon laquelle la photocopie de passages de manuels et d'autres ouvrages protégés par le droit d'auteur n'équivaut pas à une utilisation équitable — La décision est-elle assujettie à la norme de contrôle de la décision raisonnable ou à celle de la décision correcte? — La Commission a-t-elle commis une erreur susceptible de contrôle judiciaire?

Access Copyright représente les auteurs et les éditeurs d'œuvres littéraires et artistiques. Elle a demandé à la Commission du droit d'auteur d'homologuer un projet de tarif applicable lorsque des œuvres de son répertoire sont reproduites en vue d'une utilisation dans les écoles élémentaires et secondaires de chacune des provinces (sauf le Québec) et de chacun des territoires. La Commission du droit d'auteur a conclu que les copies tirées du propre chef de l'enseignant et que ce dernier donne à lire à ses élèves sont produites aux fins d'« étude privée ou de recherche », comme le permet l'art. 29 de la *Loi sur le droit d'auteur*. Or, elle a estimé que ces copies ne résultaient pas d'une utilisation équitable et étaient par conséquent assujetties au tarif. Saisie d'une demande de contrôle judiciaire, la Cour d'appel fédérale a confirmé la conclusion de la Commission du droit d'auteur selon laquelle les copies ne satisfaisaient pas aux conditions de l'utilisation équitable.

Arrêt (les juges Deschamps, Fish, Rothstein et Cromwell sont dissidents) : Le pourvoi est accueilli et l'affaire est renvoyée à la Commission pour réexamen.

La juge en chef McLachlin et les juges LeBel, Abella, Moldaver et Karakatsanis : L'utilisation équitable permet certaines activités qui, sans cette exception, pourraient violer le droit d'auteur. Énoncé dans l'arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada*, le critère qui permet de déterminer s'il y a utilisation équitable comporte deux volets. Dans le cadre du premier, il s'agit de savoir s'il y a utilisation aux fins « d'étude privée ou de recherche » suivant l'art. 29, « de critique ou de compte rendu » suivant l'art. 29.1, ou encore, de « communication des nouvelles », suivant l'art. 29.2 de la *Loi sur le droit d'auteur*. Le second volet s'attache à déterminer si l'utilisation est « équitable ».

Les parties conviennent que le premier volet du critère de l'arrêt *CCH* est respecté et que l'utilisation — la photocopie — a lieu aux fins permises d'étude privée ou de recherche. Le litige porte en l'espèce sur le second volet : les copies résultent-elles d'une utilisation « équitable » au regard des éléments énoncés dans *CCH*, à savoir le but, la nature et l'ampleur de l'utilisation, l'existence de solutions de rechange à l'utilisation, la nature de l'œuvre et l'effet de l'utilisation sur l'œuvre?

The Board concluded that the predominant purpose was that of the teacher as the copier. This meant that the purpose was instruction, not research or private study. When considering the first stage of *CCH* — whether the dealing is for an allowable purpose — the relevant perspective is that of the user. This does not mean, however, that the copier's purpose is irrelevant at the second stage. The copier's purpose will be relevant to the fairness analysis if the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose — such as a commercial one — that can make the dealing unfair. There is no separate purpose on the part of the teachers in this case. They have no ulterior or commercial motive when providing copies to students. They are there to facilitate the students' research and private study and to enable the students to have the material they need for the purpose of studying. The teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study. The Copyright Board's approach drives an artificial wedge into these unified purposes of instruction and research/private study by drawing a distinction between copies made by the teacher at the request of a student and copies made by the teacher without a prior request from a student. The word "private" in "private study" should not be understood as requiring users to view copyrighted works in isolation.

The Copyright Board's approach to the "amount of the dealing" factor was also flawed. Having found that teachers only copied short excerpts of each textbook, the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. This factor is not a quantitative assessment based on aggregate use, but an examination of the proportion between the excerpted copy and the entire work.

With respect to the "alternatives to the dealing" factor, contrary to the Copyright Board's conclusion, buying books for every student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. Purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks.

As for the "effect of the dealing on the work" factor, there was no evidence of a link between photocopying short excerpts and a decline in textbook sales. There were several factors, in fact, other than photocopying,

La Commission a estimé que la fin prédominante de l'utilisation devait être celle de l'enseignant lorsqu'il effectue la photocopie, à savoir l'enseignement, et non l'étude privée ou la recherche. Il convient d'adopter le point de vue de l'utilisateur pour déterminer, au premier volet du critère de l'arrêt *CCH*, s'il y a utilisation à une fin permise. Il ne s'ensuit toutefois pas que le but de celui qui tire les copies n'est pas pris en compte au second volet. Ce but importe dans l'analyse du caractère équitable lorsque, sous le couvert d'une fin permise à l'utilisateur, l'auteur des copies poursuit une fin distincte (telle une fin commerciale) qui est de nature à rendre l'utilisation inéquitable. En l'espèce, l'enseignant ne poursuit pas une fin distincte. Il n'a pas de motif inavoué ou commercial lorsqu'il fournit les copies aux élèves. Son rôle consiste à faciliter la recherche et l'étude privée des élèves et de permettre à ceux-ci de disposer du matériel nécessaire à l'apprentissage. L'enseignant/auteur des copies et l'élève/utilisateur qui s'adonne à la recherche ou à l'étude privée poursuivent en symbiose une même fin. La Commission du droit d'auteur vient artificiellement enfoncer un coin entre les fins réunies en une seule que sont l'enseignement et la recherche/étude privée en établissant une distinction entre les copies produites par l'enseignant à la demande d'un élève et celles produites en l'absence d'une telle demande. Dans le terme « étude privée », l'adjectif « privée » ne doit pas être interprété comme exigeant de l'utilisateur qu'il consulte l'œuvre protégée dans l'isolement.

L'approche adoptée par la Commission du droit d'auteur à l'égard de « l'ampleur de l'utilisation » était également erronée. Puisqu'elle a conclu que l'enseignant ne reproduit que de courts extraits de chacun des manuels, elle devait se demander si la proportion entre chacun des courts extraits et l'œuvre en entier était équitable. Cet élément ne commande pas une appréciation quantitative en fonction de l'utilisation globale, mais appelle un examen du rapport entre l'extrait et l'œuvre entière.

Contrairement à l'opinion de la Commission du droit d'auteur, l'achat de livres pour tous les élèves ne constitue pas une « solution de rechange » réaliste à la reproduction par l'enseignant de courts extraits complémentaires. L'achat d'exemplaires supplémentaires pour les distribuer aux élèves n'est pas une solution raisonnable étant donné que, selon la Commission, les enseignants ne photocopient que de courts extraits pour compléter les manuels existants.

En ce qui a trait à « l'effet de l'utilisation sur l'œuvre », rien ne démontre l'existence d'un quelconque lien entre la photocopie de courts extraits et la diminution des ventes de manuels. Outre la photocopie, plusieurs

that were more likely to have contributed to any such decline. Moreover, the Board's finding that the teachers' copying was limited to short excerpts of complementary texts, makes it difficult to see how the teachers' copying competes with the market for textbooks.

The Copyright Board's decision as to whether the photocopies amount to fair dealing is to be reviewed on a reasonableness standard. Because its finding of unfairness was based on a misapplication of the *CCH* factors, its outcome was unreasonable.

Per Deschamps, Fish, Rothstein and Cromwell JJ. (dissenting): Whether a dealing is fair is a question of fact. The *CCH* factors help assess whether a dealing is fair but they are not statutory requirements. The Copyright Board's application of these factors to the facts of a case should be treated with deference and a reasonableness standard should be applied on judicial review. In this case, the Board made no reviewable error in principle.

It was neither artificial nor unreasonable to conclude that the photocopies mainly serve the teacher's purpose of teaching and that this was the relevant and predominant purpose of the dealing. The Board did not draw an artificial distinction between copies made at the request of a student and at the teacher's own initiative. The Board did not err by equating "instruction" with "non-private study". The word "private" in s. 29 of the *Copyright Act* cannot be stripped of meaning. A copy made on a teacher's own initiative may be for private study if, for example, the material is tailored to the particular learning needs or interests of a single or small number of students but "private study" cannot include large quantities of copies made as part of an organized program of instruction.

It is important not to look to the same aspect of the dealing under more than one *CCH* factor. The Board's analysis of the amount of the dealing remained focused on the overall proportion of the copied pages of a work in relation to the entire work over a period of time. Its analysis of the character of the dealing focused on the fact that multiple copies of the same excerpt are made, at any one time, to be disseminated to a whole class.

autres considérations sont en fait davantage susceptibles d'expliquer la baisse. Aussi, étant donné la conclusion de la Commission voulant que les enseignants n'en reproduisent que de courts extraits à titre complémentaire, il est difficile de concevoir que les photocopies tirées par les enseignants puissent concurrencer les manuels sur le marché.

C'est en fonction de la norme de la raisonabilité que doit être contrôlée la décision de la Commission du droit d'auteur quant à savoir si la photocopie équivaut à une utilisation équitable. Comme elle a conclu au caractère inéquitable de l'utilisation à l'issue d'une application erronée des éléments énoncés dans *CCH*, sa décision était déraisonnable.

Les juges Deschamps, Fish, Rothstein et Cromwell (dissidents) : Ce qu'il faut entendre par utilisation équitable est une question de fait. Les éléments établis dans *CCH* contribuent à la détermination du caractère équitable ou non équitable de l'utilisation, mais il ne s'agit pas d'exigences légales. L'application de ces éléments aux faits d'une affaire par la Commission du droit d'auteur appelle la déférence, et la norme de la décision raisonnable est celle qui convient en cas de contrôle judiciaire. En l'espèce, la Commission n'a pas commis, sur le plan des principes, d'erreur susceptible de contrôle judiciaire.

Il n'était ni artificiel ni déraisonnable d'inférer que la reproduction servait principalement la fin poursuivie par l'enseignant et que cette fin importait et était prédominante quant à l'utilisation. La Commission n'a pas établi une distinction artificielle entre les copies faites par l'enseignant à la demande d'un élève et celles faites de sa propre initiative. Elle n'a pas eu tort de faire équivaloir « enseignement » et « étude non privée ». On ne saurait interpréter l'art. 29 de la *Loi sur le droit d'auteur* de manière à dépouiller de tout sens l'adjectif « privée » qui y est employé. La reproduction effectuée à l'initiative d'un enseignant peut avoir pour fin l'étude privée lorsque, par exemple, le matériel est adapté aux besoins d'apprentissage spéciaux ou aux intérêts particuliers d'un seul élève ou d'un petit nombre d'élèves, mais l'« étude privée » ne saurait englober la photocopie à grande échelle dans le cadre établi d'un programme d'enseignement.

Il importe de ne pas considérer un même aspect dans l'examen de plus d'un des éléments dégagés dans *CCH*. L'analyse de la Commission concernant l'ampleur de l'utilisation est demeurée axée sur le rapport global entre les pages photocopées et l'œuvre entière dans un laps de temps donné. Son analyse relative à la nature de l'utilisation s'est attachée au fait que de multiples copies d'un même extrait étaient distribuées à une classe

There is no basis to disturb the Board's assessments of these factors.

The Board's analysis of alternatives to the dealing was not unreasonable. Furthermore, in a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives will not automatically render a dealing fair. The Board's conclusion that the dealing competes with the original work to an extent that makes the dealing unfair is unsupported by evidence and unreasonable. However, no one *CCH* factor is determinative and the Board considered the purpose of the dealing and the amount of the dealing to be the most important factors, therefore this error is not sufficient to render the Board's decision unreasonable. The Board's decision was intelligible, transparent and justifiable and cannot be said to fall outside of a reasonable range of outcomes.

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By Abella J.

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By Rothstein J. (dissenting)

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339, rev'g 2002 FCA 187, [2002] 4 F.C. 213; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

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Copyright, Designs and Patents Act 1988 (U.K.), 1988, c. 48, s. 178 "private study".

entière. Il n'y a pas lieu de revenir sur l'appréciation de ces éléments par la Commission.

L'analyse de la Commission concernant les solutions de rechange à l'utilisation n'était pas déraisonnable. Qui plus est, lorsque de nombreux courts extraits de l'œuvre sont utilisés, l'inexistence de solutions de rechange non protégées par le droit d'auteur ne rend pas automatiquement l'utilisation équitable. La conclusion de la Commission selon laquelle l'utilisation fait concurrence à l'œuvre originale au point de devenir inéquitable n'est ni étayée par la preuve ni raisonnable. Nul élément issu de *CCH* n'est à lui seul déterminant, et la Commission a accordé plus d'importance au but de l'utilisation et à son ampleur qu'aux autres éléments. L'erreur commise ne rend donc pas sa décision déraisonnable. La décision de la Commission était à la fois intelligible et transparente et elle se justifiait. De plus, on ne saurait prétendre qu'elle n'appartient pas aux issues possibles raisonnables.

Jurisprudence

Citée par la juge Abella

Arrêts mentionnés : *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, inf. 2002 CAF 187, [2002] 4 C.F. 213; *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Bell Canada*, 2012 CSC 36, [2012] 2 R.C.S. 326; *Sillitoe c. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545; *University of London Press, Ltd. c. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *Copyright Licensing Ltd. c. University of Auckland*, [2002] 3 N.Z.L.R. 76; *Hubbard c. Vosper*, [1972] 1 All E.R. 1023.

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APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Noël and Trudel J.J.A.), 2010 FCA 198, [2011] 3 F.C.R. 223, 405 N.R. 354, 85 C.P.R. (4th) 349, [2010] F.C.J. No. 952 (QL), 2010 CarswellNat 2481, reversing in part a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf, [2009] C.B.D. No. 6 (QL), 2009 CarswellNat 1930. Appeal allowed, Deschamps, Fish, Rothstein and Cromwell JJ. dissenting.

Wanda Noel, James Aidan O'Neill and Ariel A. Thomas, for the appellants.

Neil Finkelstein and Claude Brunet, for the respondent.

Barry B. Sookman and Daniel G. C. Glover, for the interveners the Canadian Publishers' Council, the Association of Canadian Publishers and the Canadian Educational Resources Council.

Written submissions only by *Wendy Matheson, Andrew Bernstein and Alexandra Peterson*, for the interveners the Canadian Association of University Teachers and the Canadian Federation of Students.

Marcus A. Klee, for the interveners the Association of Universities and Colleges of Canada and the Association of Canadian Community Colleges.

Timothy Pinos, Casey M. Chisick and Jason Beitchman, for the intervener CMRRA-SODRAC Inc.

Written submissions only by *David Fewer and Jeremy de Beer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Doctrine et autres documents cités

D'Agostino, Giuseppina. « Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use » (2008), 53 *R.D. McGill* 309.

POURVOI contre un arrêt de la Cour d'appel fédérale (le juge en chef Blais et les juges Noël et Trudel), 2010 CAF 198, [2011] 3 R.C.F. 223, 405 N.R. 354, 85 C.P.R. (4th) 349, [2010] A.C.F. n° 952 (QL), 2010 CarswellNat 4045, qui a infirmé en partie une décision de la Commission du droit d'auteur, www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf, [2009] D.C.D.A. n° 6 (QL), 2009 CarswellNat 1931. Pourvoi accueilli, les juges Deschamps, Fish, Rothstein et Cromwell sont dissidents.

Wanda Noel, James Aidan O'Neill et Ariel A. Thomas, pour les appelants.

Neil Finkelstein et Claude Brunet, pour l'intimée.

Barry B. Sookman et Daniel G. C. Glover, pour les intervenants Canadian Publishers' Council, Association of Canadian Publishers et Canadian Educational Resources Council.

Argumentation écrite seulement par *Wendy Matheson, Andrew Bernstein et Alexandra Peterson*, pour les intervenantes l'Association canadienne des professeures et professeurs d'université et la Fédération canadienne des étudiantes et étudiants.

Marcus A. Klee, pour les intervenantes l'Association des universités et collèges du Canada et l'Association des collèges communautaires du Canada.

Timothy Pinos, Casey M. Chisick et Jason Beitchman, pour l'intervenante CMRRA-SODRAC Inc.

Argumentation écrite seulement par *David Fewer et Jeremy de Beer*, pour l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko.

Written submissions only by *Marian Hebb, Warren Sheffer* and *Brendan van Niejenhuis*, for the interveners the Canadian Authors Association, the Canadian Freelance Union, the Canadian Society of Children's Authors, Illustrators and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and the Writers' Union of Canada.

Written submissions only by *Howard P. Knopf* and *Ariel Katz*, for the intervener the Centre for Innovation Law and Policy of the Faculty of Law University of Toronto.

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

[1] ABELLA J. — Many authors create textbooks and other literary works to sell to primary and secondary level educational institutions across Canada. Photocopying short excerpts of these works is a common practice in Canadian schools, and is often used as an important administrative and teaching tool by teachers. The issue in this appeal is whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing under the *Copyright Act*, R.S.C. 1985, c. C-42.

Background

[2] Access Copyright represents authors and publishers of literary and artistic works in printed materials which are subject to copying. It administers the reproduction of published materials by issuing licences and collecting and distributing royalties to affiliated copyright owners. When Access Copyright does not reach a licensing or royalty agreement with users who photocopy published works in its repertoire, it can apply to the Copyright Board to certify a royalty in the form of a tariff.

Argumentation écrite seulement par *Marian Hebb, Warren Sheffer* et *Brendan van Niejenhuis*, pour les intervenantes Canadian Authors Association, Canadian Freelance Union, la Société canadienne des auteurs, illustrateurs et artistes pour enfants, League of Canadian Poets, l'Association des traducteurs et traductrices littéraires du Canada, Playwrights Guild of Canada, Professional Writers Association of Canada et Writers' Union of Canada.

Argumentation écrite seulement par *Howard P. Knopf* et *Ariel Katz*, pour l'intervenant Centre for Innovation Law and Policy of the Faculty of Law University of Toronto.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Abella, Moldaver et Karakatsanis rendu par

[1] LA JUGE ABELLA — De nombreux auteurs créent des œuvres littéraires, notamment des manuels scolaires, qu'ils destinent à la vente aux établissements d'enseignement des niveaux élémentaire et secondaire à la grandeur du Canada. La photocopie de courts extraits de ces œuvres est monnaie courante dans les écoles canadiennes, et les copies ainsi tirées constituent souvent un outil didactique et administratif important pour les enseignants. La question qu'il faut trancher en l'espèce est celle de savoir si le fait, pour les enseignants, de faire des photocopies en vue de les distribuer en classe aux élèves peut constituer une utilisation équitable pour l'application de la *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42.

Contexte

[2] Access Copyright représente les auteurs et les éditeurs d'œuvres littéraires et artistiques publiées et reproductibles. Elle gère la reproduction de ces œuvres en délivrant des licences et en percevant les redevances pour le compte des titulaires du droit d'auteur qui lui sont affiliés. Lorsque aucune entente d'octroi de licence en contrepartie de redevances n'intervient entre elle et les utilisateurs qui photocopient les œuvres de son répertoire, Access Copyright peut demander à la Commission du droit d'auteur d'homologuer un tarif de redevances.

[3] At elementary and secondary schools across Canada, teachers often make photocopies of portions of textbooks or other published works which are part of Access Copyright's repertoire. Between 1991 and 1997, Access Copyright reached royalty agreements with each of the provinces and territories (other than Quebec) with respect to the reproduction of its repertoire for use in these schools. In 1999, all the provincial parties and the Ontario School Boards (the "Coalition") signed a five-year agreement, providing for royalty increases based on a per student calculation, not on the number of pages copied.

[4] When the time came to renew the royalty agreement in 2004, Access Copyright wanted the royalties revised to reflect the volume and content of what was being copied. The parties were unable to reach an agreement, based largely on the fact that they could not agree on how a "volume study" was to be conducted. Access Copyright therefore filed a proposed tariff with the Copyright Board in accordance with s. 70.13(2) of the *Act*.

[5] During the course of the proceedings before the Board, the parties eventually agreed to the terms of a volume study. It was carried out between February 2005 and March 2006. In accordance with the agreed-upon terms, information was recorded by observers on stickers posted next to each photocopier, including who made the copy, who would be using the copy, and the purpose of the copy.

[6] Based on information collected from the stickers, each incident of photocopying was divided into one of four categories. The first three dealt with copies made by teachers either for themselves or at the request of a student. All parties agreed that copies falling under these categories — about 1.7 million pages — constituted fair dealing.

[3] Les enseignants des niveaux élémentaire et secondaire de partout au pays photocopient souvent des extraits de manuels ou d'autres publications qui figurent dans le répertoire d'Access Copyright. Entre 1991 et 1997, cette société a conclu avec chacune des provinces (sauf le Québec) et chacun des territoires une entente sur les redevances exigibles pour la reproduction d'œuvres de son répertoire en vue d'une utilisation dans les écoles de ces ressorts. En 1999, les provinces qui sont parties au pourvoi et les conseils scolaires de l'Ontario (la « coalition ») ont conclu une entente d'une durée de cinq ans prévoyant l'augmentation du montant des redevances, lequel était fixé au prorata du nombre d'élèves, et non en fonction du nombre de pages reproduites.

[4] En 2004, au moment de renouveler l'entente, Access Copyright a demandé la modification du calcul des redevances, de sorte que leur montant tienne compte du volume et de la teneur de l'objet de la reproduction. Les parties n'ont pu s'entendre, en raison surtout de leur désaccord sur les modalités de l'« enquête de volume ». Access Copyright a donc déposé un projet de tarif auprès de la Commission du droit d'auteur conformément au par. 70.13(2) de la *Loi*.

[5] Avant que la Commission ne rende sa décision, les parties ont convenu des modalités de l'enquête sur le volume, laquelle a eu lieu de février 2005 à mars 2006. Conformément aux conditions arrêtées, des renseignements (l'auteur de la copie, son destinataire, la fin poursuivie, etc.) étaient consignés sur une étiquette d'enregistrement par des observateurs postés près des photocopieurs.

[6] À partir des données recueillies grâce aux étiquettes, pour chacun des épisodes de reproduction, les photocopies ont été attribuées à l'une de quatre catégories. Les trois premières catégories rassemblent les copies faites par un enseignant pour lui-même ou pour un élève à sa demande. Les parties conviennent que les copies appartenant à ces catégories — et qui représentent environ 1,7 million de pages — correspondent à une utilisation équitable.

[7] The fourth category (Category 4) dealt with copies of works made at the teachers' initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used.

[8] At a hearing before the Board, Access Copyright argued that the Category 4 copies did not meet the test for fair dealing identified by McLachlin C.J. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339. The Coalition countered with the argument that the approximately 16.9 million pages in Category 4 should be excluded from any tariff because the copies constituted fair dealing under ss. 29 or 29.1 of the *Act*.

[9] Based on the evidence from the stickers used in the volume study, the Board concluded that the Category 4 copies were made for the allowable purpose of "research or private study" under s. 29 of the *Act*, but found, applying the *CCH* fairness factors, that the Category 4 copies did not constitute fair dealing and were therefore subject to a royalty. The Board also rejected the Coalition's argument that the Category 4 copies fell within the exception for educational institutions under s. 29.4 of the *Act* (online).

[10] On judicial review, the Federal Court of Appeal remitted the s. 29.4 issue back to the Board, stating that the Board failed to address an aspect of the "educational institutions" test. But the court found the Board's conclusion that the Category 4 copies were not fair dealing to be reasonable (2010 FCA 198, [2011] 3 F.C.R. 223).

[11] The Coalition appealed only the fair dealing issue to this Court, maintaining that the Board's

[7] Les copies font partie de la catégorie 4 lorsque l'enseignant les fait de son propre chef puis demande aux élèves d'en prendre connaissance. Elles résultent de la reproduction de courts extraits de manuels et elles sont distribuées aux élèves par l'enseignant en guise de complément au manuel principal utilisé.

[8] À l'audience devant la Commission, Access Copyright a fait valoir que les copies de la catégorie 4 ne respectaient pas le critère relatif à l'utilisation équitable établi par la juge en chef McLachlin dans l'arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada*, [2004] 1 R.C.S. 339. La coalition a répliqué que les copies de la catégorie 4 — soit environ 16,9 millions de pages — résultaient d'une utilisation équitable pour l'application des art. 29 et 29.1 de la *Loi* et ne devaient donc être assujetties à aucun tarif.

[9] Se fondant sur la preuve provenant des étiquettes employées lors de l'enquête sur le volume, la Commission conclut que les copies de la catégorie 4 ont été produites « aux fins d'étude privée ou de recherche », deux fins permises à l'art. 29 de la *Loi*. Or, eu égard aux éléments qui, selon *CCH*, permettent de conclure au caractère équitable de l'utilisation, elle estime que ces copies ne résultent pas d'une utilisation équitable et sont par conséquent assujetties au tarif. La Commission rejette également la prétention de la coalition selon laquelle ces copies bénéficient de l'exception prévue à l'art. 29.4 de la *Loi* pour les établissements d'enseignement (en ligne).

[10] Saisie d'une demande de contrôle judiciaire, la Cour d'appel fédérale a renvoyé à la Commission la question liée à l'art. 29.4 au motif que l'un des volets du critère applicable aux « établissements d'enseignement » n'avait pas été considéré. Elle a néanmoins jugé raisonnable la conclusion de la Commission selon laquelle les copies de la catégorie 4 ne remplissaient pas les conditions de l'utilisation équitable (2010 CAF 198, [2011] 3 R.C.F. 223).

[11] La coalition n'interjette appel devant notre Cour que sur la question de l'utilisation équitable et

conclusion was not in accordance with the *CCH* test and was therefore unreasonable. I agree and would therefore remit the matter to the Board for reconsideration in accordance with these reasons.

Analysis

[12] As discussed in the companion appeal *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326 (*SOCAN v. Bell*), the concept of fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of “research or private study” under s. 29, “criticism or review” under s. 29.1, or “news reporting” under s. 29.2 of the *Act*. The second step of *CCH* assesses whether the dealing is “fair”. The onus is on the person invoking “fair dealing” to satisfy all aspects of the test. To assist in determining whether the dealing is “fair”, this Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

[13] The Board accepted that where the photocopier stickers indicated that the copying was for an allowable purpose — “research” or “private study” — no further inquiry under the first step of the *CCH* test was required. The Board also found that where the sticker indicated that the purpose of the copy was “criticism or review”, the purpose was also to be treated as “research or private study”.

[14] Before this Court, there was generally no dispute that the first step in *CCH* was met and that the dealing — photocopying — was for the allowable purpose of research or private study. The dispute essentially centred on the second step of the test: whether the Category 4 copies were “fair” in

elle fait valoir que la conclusion de la Commission ne respecte pas le critère établi dans *CCH*, ce qui la rend déraisonnable. Je fais droit à sa prétention. Je suis donc d’avis de renvoyer l’affaire à la Commission pour qu’elle la réexamine à la lumière des présents motifs.

Analyse

[12] Comme il est expliqué dans le pourvoi connexe *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Bell Canada*, [2012] 2 R.C.S. 326 (*SOCAN c. Bell*), l’utilisation équitable s’entend de certaines activités qui, sans cette exception, pourraient violer le droit d’auteur. Énoncé dans l’arrêt *CCH*, le critère qui permet de déterminer si une utilisation est équitable ou non comporte deux volets. Premièrement, l’utilisation a-t-elle pour objet l’« étude privée ou [la] recherche », la « critique ou [le] compte rendu », ou encore, la « communication des nouvelles », soit l’une ou l’autre des fins permises aux art. 29, 29.1 et 29.2 de la *Loi*? Deuxièmement, l’utilisation est-elle « équitable »? Il incombe à la personne qui invoque l’« utilisation équitable » de satisfaire aux deux volets. Selon la Cour, un certain nombre d’éléments permettent de déterminer si une utilisation est « équitable » : le but, la nature et l’ampleur de l’utilisation, l’existence de solutions de rechange à l’utilisation, la nature de l’œuvre et l’effet de l’utilisation sur l’œuvre.

[13] Tenant pour avéré, sur la foi des étiquettes, que les copies ont été faites aux fins permises de « recherche » ou d’« étude privée », la Commission ne pousse pas l’analyse plus loin au premier volet du critère énoncé dans *CCH*. Elle assimile également à la reproduction aux fins susmentionnées celle qui a lieu, selon l’étiquette, « aux fins de critique ou de compte rendu ».

[14] En l’espèce, les parties conviennent généralement que le premier volet du critère est respecté et que l’utilisation — en l’occurrence la photocopie — a lieu à la fin permise de recherche ou d’étude privée. Le litige porte essentiellement sur le deuxième volet : les copies de la catégorie 4

accordance with the *CCH* factors. I have concerns over how the Board applied several of those factors.

[15] In my view, the key problem is in the way the Board approached the “purpose of the dealing” factor. The Board concluded that since the Category 4 copies were not made as a result of a student request, they were no longer for the purpose of research or private study at the second stage. This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the *predominant* purpose was that of the teacher, namely, “instruction” or “non-private study”. The Board therefore found that this factor tended to make the Category 4 copies unfair. The Federal Court of Appeal, agreeing with the Board, stated that the real purpose or motive behind the copies was instruction, not private study.

[16] Access Copyright argued that the purpose of the dealing should be seen, as it was by the Board and the Federal Court of Appeal, from the copier’s, or teacher’s perspective. It relied particularly on three key Commonwealth cases which found the copier’s purpose in reproducing the work to be determinative. In *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545 (Ch. D.), an importer and seller of “study notes” which reproduced a substantial part of a literary work, argued that the notes were intended as a supplementary aid for students engaging in research and private study. The court held that the seller was unable to invoke the fair dealing exception since it was not *itself* engaged in private study or research, but was merely facilitating this activity for others (p. 558).

[17] The court in *Sillitoe* relied on *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601, where a publisher issued a

résultent-elles d’une utilisation « équitable » au regard des éléments énoncés dans *CCH*? J’ai des réserves sur l’application que fait la Commission de plusieurs de ces éléments.

[15] À mon avis, le problème principal réside dans la manière dont elle conçoit l’élément qui correspond au « but de l’utilisation ». Parce que les copies de la catégorie 4 ne sont pas faites à la demande d’un élève, la Commission conclut au second volet que la reproduction n’a plus pour fin la recherche ou l’étude privée. Elle invoque à l’appui de sa conclusion le fait que, dans l’affaire *CCH*, la Grande bibliothèque produisait des copies à la demande d’avocats. En l’espèce, puisque les copies de la catégorie 4 ne résultent pas d’une telle demande, la Commission estime que l’utilisation a pour but *prédominant* la fin poursuivie par l’enseignant, c’est-à-dire « l’étude non privée » ou « l’enseignement ». Cet élément fait selon elle pencher la balance du côté de l’utilisation inéquitable. La Cour d’appel fédérale convient avec la Commission que le but ou le motif réel de la reproduction est l’enseignement, non l’étude privée.

[16] Access Copyright a fait valoir qu’il fallait déterminer le but de l’utilisation du point de vue de la personne qui fait la copie, en l’occurrence l’enseignant, ce dont conviennent la Commission et la Cour d’appel fédérale. Elle a cité à l’appui trois arrêts fondamentaux de ressorts du Commonwealth selon lesquels la fin que poursuit la personne qui reproduit l’œuvre est déterminante. Dans *Sillitoe c. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545 (Ch. Div.), un importateur et vendeur de « notes d’étude » qui reproduisait de larges extraits d’œuvres littéraires faisait valoir que son produit constituait un outil complémentaire offert aux étudiants qui se livraient à la recherche et à l’étude privée. La cour a écarté l’utilisation équitable dont s’excipait le vendeur, puisqu’il ne s’adonnait pas *lui-même* à la recherche ou à l’étude privée, mais facilitait seulement le travail d’autres personnes (p. 558).

[17] Dans *Sillitoe*, la conclusion de la cour se fonde sur l’arrêt *University of London Press, Ltd. c. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601,

publication reproducing old exams and sold it to students who were preparing for their own exams. The publisher argued that the publication amounted to fair dealing “for the purposes of private study” by university students preparing for exams. The court held that the company could not bring itself within the fair dealing exception, rejecting the argument that the purpose of the publication was “private study”:

It could not be contended that the mere republication of a copyright work was a “fair dealing” because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of “fair dealing”. [p. 613]

[18] In the New Zealand case *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 N.Z.L.R. 76 (H.C.), several universities provided copies of copyrighted works to students as part of course packs, and charged the students for these materials through various school fees. The universities argued that the copying constituted fair dealing for the purposes of research or private study. The court held that the “purpose” must be that of the person “doing the copying” (paras. 43 and 52). Since the copiers — the universities — were not themselves dealing with the work for the purposes of research or private study, the copying did not amount to fair dealing.

[19] With respect, I do not find these authorities particularly helpful. Firstly, courts in the U.K. have tended to take a more restrictive approach to determining the “purpose” of the dealing than does *CCH*. Based on s. 178 of the *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, for example, which defines “private study” to exclude “a commercial purpose”, courts in the U.K. have asserted that both research and private study must be for a non-commercial purpose: see G. D’Agostino, “Healing Fair Dealing? A Comparative Copyright

rendu dans une affaire où un éditeur avait reproduit des examens antérieurs qu’il avait ensuite vendus à des étudiants qui préparaient les leurs. Selon l’éditeur, il s’agissait d’une utilisation équitable [TRADUCTION] « aux fins d’étude privée » par des étudiants se préparant à subir leurs examens universitaires. Estimant que la maison d’édition ne pouvait invoquer à son propre bénéfice l’exception de l’utilisation équitable, la cour a rejeté sa thèse selon laquelle la publication avait pour but l’« étude privée » :

[TRADUCTION] L’on ne saurait prétendre que la simple publication nouvelle d’une œuvre protégée par le droit d’auteur constitue une « utilisation équitable » parce qu’elle intervient aux fins d’étude privée; nul ne pourrait non plus publier à nouveau impunément à l’intention d’étudiants un cahier des questions auquel il ajouterait seulement les réponses. À mon sens, il n’y a d’« utilisation équitable » ni dans un cas ni dans l’autre. [p. 613]

[18] Dans l’affaire néo-zélandaise *Copyright Licensing Ltd. c. University of Auckland*, [2002] 3 N.Z.L.R. 76 (H.C.), plusieurs universités avaient distribué aux étudiants des cahiers de cours contenant des extraits d’œuvres protégées et avaient exigé en contrepartie des frais à divers titres. Les universités ont prétendu que la reproduction constituait une utilisation équitable aux fins de recherche ou d’étude privée. La cour a statué que la [TRADUCTION] « fin » est celle que poursuit la personne qui « reproduit » (par. 43 et 52). Comme les personnes qui produisaient les copies, en l’occurrence les universités, n’étaient pas celles qui les utilisaient aux fins de recherche ou d’étude privée, la reproduction ne constituait pas une utilisation équitable.

[19] En toute déférence, je ne trouve pas cette jurisprudence très utile. D’abord, les tribunaux du Royaume-Uni conçoivent la « fin » de l’utilisation plus restrictivement que ne le fait la Cour dans *CCH*. Par exemple, comme l’art. 178 de la *Copyright, Designs and Patents Act 1988* (R.-U.), 1988, ch. 48, définit l’[TRADUCTION] « étude privée » de manière à exclure « tout objet commercial », ils étendent l’absence de caractère commercial à la recherche et à l’étude privée: voir G. D’Agostino, « Healing Fair Dealing? A Comparative Copyright Analysis

Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008), 53 *McGill L.J.* 309, at p. 339. This expressly contradicts the statement in *CCH* that the allowable purposes must be given a "large and liberal interpretation", and that "research" is not limited to non-commercial or private contexts (para. 51).

[20] More importantly, as noted by Linden J.A. of the Federal Court of Appeal in *CCH*, 2002 FCA 187, [2002] 4 F.C. 213, at para. 132 (reversed on other grounds), these "course pack" cases involved copiers with demonstrably ulterior — i.e. commercial — motives. They invoked the allowable purposes of "research" or "private study", in effect, in order to appropriate their customers' or students' purposes as their own and escape liability for copyright infringement.

[21] These cases, then, to the extent that they are germane, do not stand for the proposition that "research" and "private study" are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.

[22] As noted in the companion appeal *SOCAN v. Bell*, fair dealing is a "user's right", and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user (*CCH*, at paras. 48 and 64). This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the "course pack" cases, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.

[23] In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be

of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use » (2008), 53 *R.D. McGill* 309, p. 339. Cette position s'oppose manifestement à celle de la Cour dans *CCH*, à savoir que les fins permises doivent être interprétées « de manière large » et que la « recherche » ne s'entend pas uniquement de celle effectuée dans un contexte non commercial ou privé (par. 51).

[20] Mais surtout, et le juge Linden de la Cour d'appel fédérale le souligne dans *CCH*, 2002 CAF 187, [2002] 4 C.F. 213, par. 132 (infirmé pour d'autres motifs), dans ces affaires relatives aux cahiers de cours, les intéressés étaient de toute évidence animés par un motif inavoué, tel un motif commercial. S'appuyant sur les fins permises que sont la « recherche » ou l'« étude privée », ils tentaient en fait de s'attribuer les fins de leurs clients ou des étudiants afin d'échapper à des allégations de violation du droit d'auteur.

[21] Donc, dans la mesure où elles sont pertinentes, ces affaires permettent d'affirmer non pas que la « recherche » et l'« étude privée » sont incompatibles avec l'enseignement, mais plutôt que l'auteur des copies ne peut dissimuler la fin distincte qu'il poursuit en l'amalgamant avec la recherche ou l'étude à laquelle s'adonne l'utilisateur final.

[22] Comme il est mentionné dans le pourvoi connexe *SOCAN c. Bell*, l'utilisation équitable est un « droit des utilisateurs ». Il convient d'adopter le point de vue de ces derniers pour déterminer, au premier volet du critère de l'arrêt *CCH*, s'il y a utilisation à une fin permise (*CCH*, par. 48 et 64). Il ne s'ensuit toutefois pas que le but de l'auteur des copies ne compte pas au second volet. Lorsque, comme dans les affaires relatives aux cahiers de cours, sous le couvert d'une fin permise à l'utilisateur, l'auteur des copies se livre à une utilisation distincte qui est de nature à rendre l'utilisation inéquitable, cette autre fin distincte est également prise en compte dans l'analyse du caractère équitable.

[23] Cependant, en l'espèce, l'enseignant ne poursuit pas une telle fin distincte. Il n'a pas de motif inavoué lorsqu'il fournit des copies à ses élèves. On ne saurait non plus soutenir qu'il poursuit une fin

characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.

[24] The Board’s approach, on the other hand, drives an artificial wedge into these unified purposes by drawing a distinction between copies made by the teacher at the request of a student (Categories 1-3), and copies made by the teacher without a prior request from a student (Category 4). Nowhere in *CCH* did the Court suggest that the lawyer had to “request” the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of “research”. On the contrary, what the Court found was that the copies of legal works were “necessary conditions of research and thus part of the research process”:

The reproduction of legal works is for the purpose of research in that it is an *essential element of the legal research process*. . . . Put simply, [the Great Library’s] custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. [Emphasis added; para. 64.]

[25] Similarly, photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.

[26] Nor, with respect, do I accept the statement made by the Board and endorsed by the Federal

d’« enseignement » totalement distincte, car il est là pour faciliter la recherche et l’étude privée des élèves. Il est à mon avis axiématique que la plupart des élèves sont incapables de trouver ou de demander les documents que requièrent leurs propres recherche et étude privée et qu’ils dépendent à cet égard de l’enseignant. Ils étudient ce qu’on leur dit d’étudier, et la fin que poursuit l’enseignant lorsqu’il fait des copies est celle de procurer à ses élèves le matériel nécessaire à leur apprentissage. L’enseignant/auteur des copies et l’élève/utilisateur qui s’adonne à la recherche ou à l’étude privée poursuivent en symbiose une même fin. Dans le contexte scolaire, enseignement et recherche ou étude privée sont tautologiques.

[24] Or, la Commission vient artificiellement enfoncer un coin entre ces fins réunies en une seule en établissant une distinction entre les copies produites par l’enseignant à la demande d’un élève (catégories 1 à 3) et celles produites en l’absence d’une telle demande (catégorie 4). Dans *CCH*, la Cour ne laisse aucunement entendre que les photocopies d’ouvrages juridiques doivent avoir été « demandées » à la Grande bibliothèque pour que l’on puisse considérer qu’elles ont été faites aux fins « de recherche ». Au contraire, elle conclut que les copies d’ouvrages juridiques « sont nécessaires au processus de recherche et en font donc partie » :

La reproduction d’ouvrages juridiques est effectuée aux fins de recherche en ce qu’il s’agit d’un *élément essentiel du processus de recherche juridique*. [. . .] Le service de photocopie [de la Grande bibliothèque] contribue simplement à faire en sorte que les juristes de l’Ontario aient accès aux ouvrages nécessaires à la recherche que demande l’exercice du droit. [Italiques ajoutés; par. 64.]

[25] De même, les photocopies que l’enseignant distribue à l’élémentaire ou au secondaire constituent un élément essentiel de la recherche et de l’étude privée des élèves. Le fait que des copies sont fournies sur demande et d’autres pas n’altère en rien leur importance pour les élèves lorsqu’ils s’adonnent à ces deux activités.

[26] En tout respect, je ne peux faire miens non plus les propos de la Commission, auxquels adhère

Court of Appeal, relying on *University of London Press*, that the photocopies made by teachers were made for an unfair purpose — “non-private study” — since they were used by students as a group in class, and not “privately”. As discussed above, the holding was simply that the publisher could not hide behind the students’ research or private study purposes to disguise a separate unfair purpose — in that case, a commercial one. The court did *not* hold that students in a classroom setting could never be said to be engaged in “private study”.

[27] With respect, the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.

[28] The Board’s skewed characterization of the teachers’ role as being independent and differently motivated from that of the student users, also led to a problematic approach to the “amount of the dealing” factor. In considering this factor, the Board accepted that teachers generally limit themselves to reproducing relatively short excerpts of each textbook. Having found that the teachers only copied “short excerpts”, the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. Instead, it then cited a passage from *CCH*, at para. 68, that said “if a specific patron . . . submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time”, the dealing might not be fair. Relying on this quote, the Board concluded that a teacher was analogous to a specific patron, and that the repeated copying of the same “class set” of books — that is, a set shared by more than one class or by many students in the same class — tended to make the dealing unfair.

la Cour d’appel fédérale, les deux instances prenant appui sur *University of London Press*, à savoir que les photocopies, parce qu’elles sont utilisées collectivement par les élèves en classe, ne sont pas faites à l’une des fins de l’utilisation équitable, soit l’étude « privée ». Rappelons que la cour dit seulement que l’éditeur ne peut invoquer les fins de recherche et d’étude privée poursuivies par les élèves pour dissimuler une fin inéquitable distincte, en l’occurrence une fin commerciale. La cour *ne* statue *pas* que lorsqu’ils sont en classe les élèves ne peuvent jamais être considérés comme s’adonnant à l’« étude privée ».

[27] À mon humble avis, l’adjectif « privée » n’exige pas de l’utilisateur qu’il consulte une œuvre protégée dans un splendide isolement. Étudier et apprendre sont des activités intrinsèquement personnelles, qu’on s’y adonne seul ou avec d’autres. En s’attachant au lieu physique de l’enseignement dispensé en classe plutôt qu’à la *notion* d’étude, la Commission dissocie encore de manière artificielle l’enseignement dispensé par l’enseignant et l’étude à laquelle se livre l’élève.

[28] Sa qualification erronée du rôle de l’enseignant, auquel elle prête une motivation indépendante et distincte de celle des élèves utilisateurs, fausse l’examen d’un autre élément, celui de « l’ampleur de l’utilisation ». La Commission reconnaît que l’enseignant ne reproduit généralement que des extraits relativement courts de chacun des manuels. Puisqu’elle conclut que l’enseignant ne reproduit que de « courts extraits », la Commission doit se demander si la proportion entre chacun des courts extraits et l’œuvre complète est équitable. Or, elle cite plutôt un passage du par. 68 de l’arrêt *CCH* où la Cour dit que « lorsque, dans un court laps de temps, un usager [. . .] présente de nombreuses demandes visant de multiples décisions judiciaires publiées dans les mêmes recueils », l’utilisation peut être inéquitable. Elle conclut dès lors que l’enseignant peut être assimilé à l’usager [de la Grande bibliothèque] et que la reproduction répétée de mêmes exemplaires d’un manuel — ceux que se partagent plus d’une classe ou bon nombre d’élèves d’une même classe — rend généralement l’utilisation inéquitable.

[29] This, with respect, was a flawed approach. First, unlike the single patron in *CCH*, teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*. Moreover, as discussed in the companion case *SOCAN v. Bell*, the “amount” factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a different factor: the “character of the dealing”.

[30] The Board had, in fact, already considered the quantification of the dissemination when it assessed the character of the dealing, finding that multiple copies of the texts were distributed to entire classes. In reapplying this same quantitative concern when assessing the “amount of the dealing”, it conflated the two factors, which had the effect of erasing proportionality from the fairness analysis.

[31] I also have difficulty with how the Board approached the “alternatives to the dealing” factor. A dealing may be found to be less fair if there is a non-copyrighted equivalent of the work that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose (*CCH*, at para. 57). The Board found that, while students were not expected to use only works in the public domain, the educational institutions had an alternative to photocopying textbooks: they could simply buy the original texts to distribute to each student or to place in the library for consultation.

[32] In my view, buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers

[29] En toute déférence, il s’agit d’une approche erronée. À la différence de l’usager individuel considéré dans *CCH*, l’enseignant fait de multiples copies des exemplaires de classe, non pas à son propre usage, mais à celui de ses élèves. De plus, comme il est souligné dans le pourvoi connexe *SOCAN c. Bell*, l’élément de l’« ampleur » ne commande pas une appréciation quantitative en fonction de l’utilisation globale; il appelle un examen du rapport entre l’extrait et, non pas la quantité totale de ce qui est diffusé, mais bien l’œuvre complète. Dans *CCH*, la Cour fait observer que le nombre total de pages reproduites ressortit à un autre élément, celui de la « nature de l’utilisation ».

[30] En fait, la Commission tient déjà compte de la diffusion d’ordre quantitatif lorsqu’elle se penche sur la nature de l’utilisation et elle constate que de multiples copies ont été distribuées à des classes entières. Lorsqu’elle revient sur la même considération au moment d’apprécier l’« ampleur de l’utilisation », elle confond les deux éléments, ce qui a pour effet d’évincer la proportionnalité de l’analyse du caractère équitable.

[31] J’ai également des réserves quant à la manière dont la Commission soupèse le troisième élément, celui des « solutions de rechange à l’utilisation ». La balance risque de pencher en faveur d’une utilisation inéquitable lorsqu’un équivalent non protégé peut remplacer l’œuvre ou que l’utilisation de cette dernière n’est pas raisonnablement nécessaire eu égard à la fin visée (*CCH*, par. 57). Tout en précisant que l’on ne s’attend pas à ce que les élèves n’utilisent que des œuvres du domaine public, la Commission conclut que les établissements d’enseignement disposent d’une solution de rechange à la reproduction des manuels : ils peuvent simplement acquérir des exemplaires pour tous les élèves ou les mettre à leur disposition à la bibliothèque.

[32] À mon avis, l’achat de livres pour tous les élèves ne constitue pas une solution de rechange réaliste à la reproduction par l’enseignant de courts extraits complémentaires. D’abord, les écoles ont déjà acquis des exemplaires qui sont

make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board's approach, schools would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study.

[33] The final problematic application of a fairness factor by the Board was its approach to the "effect of the dealing on the work", which assesses whether the dealing adversely affects or competes with the original work. Access Copyright pointed out that textbook sales had shrunk over 30 percent in 20 years. However, as noted by the Coalition, there was no evidence that this decline was linked to photocopying done by teachers. Moreover, it noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.

[34] Despite this evidentiary vacuum, the Board nonetheless concluded that the impact of photocopies, though impossible to quantify, was "sufficiently important" to compete with the original texts to an extent that made the dealing unfair. The Board supported its conclusion with the finding that the schools copy "more than a quarter of a billion textbook pages each year", even though this total number included the pages for which

conservés dans les salles de classe ou à la bibliothèque, et dont les enseignants tirent des copies. L'enseignant ne fait que faciliter l'accès au nombre limité d'exemplaires en produisant des copies pour tous les élèves qui en ont besoin. En outre, l'achat d'exemplaires supplémentaires pour les distribuer aux élèves n'est pas une solution raisonnable étant donné que, selon la Commission, les enseignants ne photocopient que de courts extraits pour compléter les manuels utilisés. La solution préconisée par la Commission obligerait les écoles à acheter, pour chacun des élèves, un exemplaire de tous les manuels, magazines et journaux qui figurent dans le répertoire d'Access Copyright et qu'utilise l'enseignant. Cette avenue est manifestement impraticable. La reproduction de courts extraits est donc raisonnablement nécessaire eu égard aux fins visées que sont la recherche et l'étude privée des élèves.

[33] Enfin, l'examen de la Commission se révèle discutable en ce qui concerne « l'effet de l'utilisation sur l'œuvre », l'élément en fonction duquel on détermine si l'utilisation nuit à l'œuvre originale ou y fait concurrence. Access Copyright souligne que les ventes de manuels scolaires ont diminué de plus de 30 pour cent en 20 ans. Toutefois, comme le fait valoir la coalition, rien ne prouve que cette diminution résulte des photocopies faites par les enseignants. En outre, elle relève plusieurs autres considérations susceptibles d'expliquer la baisse, dont l'enseignement par semestre, la diminution du nombre d'inscriptions, l'augmentation de la durée de vie des manuels, le recours accru aux outils électroniques, dont Internet et l'apprentissage axé sur une grande variété de ressources.

[34] Malgré l'absence de preuve sur ce point, la Commission estime néanmoins que l'effet des photocopies, bien qu'il soit impossible à quantifier, est « suffisamment important » pour que l'on conclue à une concurrence avec les œuvres originales qui rend l'utilisation inéquitable. Elle invoque à l'appui sa conclusion selon laquelle les écoles copient « plus d'un quart de milliard de pages de manuels scolaires chaque année », même si

the schools *already* pay a tariff. The Category 4 copies in dispute account for under 7% of those pages.

[35] In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales.

[36] In addition, it is difficult to see how the teachers' copying competes with the market for textbooks, given the Board's finding that the teachers' copying was limited to short excerpts of complementary texts. If such photocopying did not take place, it is more likely that students would simply go without the supplementary information, or be forced to consult the single copy already owned by the school.

[37] This Court in *CCH* stated that whether something is "fair" is a question of fact and "a matter of impression" (para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). As a result, the Board's decision as to whether the photocopies amount to fair dealing is to be reviewed, as it was by the Federal Court of Appeal, on a reasonableness standard. Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable.

[38] I would therefore allow the appeal with costs and remit the matter to the Board for reconsideration based on these reasons.

ce nombre englobe les pages pour lesquelles les établissements paient *déjà* des redevances. Les copies de la catégorie 4, qui sont l'objet du litige, représentent moins de sept pour cent de ces pages.

[35] Dans *CCH*, parce que les maisons d'édition juridiques n'ont pas établi que le marché de leurs œuvres a fléchi à cause des copies produites par la Grande bibliothèque, la Cour se dit non convaincue de l'effet préjudiciable allégué. De même, outre le simple fait que les ventes ont chuté sur une période de 20 ans, Access Copyright n'avance rien qui soit susceptible de démontrer l'existence d'un quelconque lien entre la photocopie de courts extraits et la diminution des ventes de manuels scolaires.

[36] De plus, je vois difficilement comment les photocopies peuvent concurrencer les manuels sur le marché, car au dire de la Commission, les enseignants n'en reproduisent que de courts extraits à titre complémentaire. Selon toute vraisemblance, si ces photocopies n'étaient pas tirées, les élèves seraient tout simplement privés du complément d'information ou se verraient contraints de consulter le seul exemplaire que possède l'école.

[37] Dans *CCH*, la Cour opine que ce qu'il faut entendre par « équitable » est une question de fait et « une question d'impression » (par. 52, citant *Hubbard c. Vosper*, [1972] 1 All E.R. 1023 (C.A.), p. 1027). C'est donc en fonction de la norme de la raisonnable — celle appliquée en l'espèce par la Cour d'appel fédérale — qu'il faut contrôler la décision de la Commission sur la question de savoir si la photocopie équivaut à une utilisation équitable. Comme j'estime que la Commission conclut au caractère inéquitable à l'issue d'une application erronée des éléments énoncés dans *CCH*, sa décision est déraisonnable.

[38] Je suis donc d'avis d'accueillir le pourvoi avec dépens et de renvoyer l'affaire à la Commission pour qu'elle l'examine à nouveau, à la lumière des présents motifs.

The reasons of Deschamps, Fish, Rothstein and Cromwell JJ. were delivered by

Version française des motifs des juges Deschamps, Fish, Rothstein et Cromwell rendus par

ROTHSTEIN J. (dissenting) —

LE JUGE ROTHSTEIN (dissident) —

I. Introduction

[39] This appeal is about fair dealing under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42 (“Act”). Whether something is fair is a question of fact (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 52 (“*CCH*”). Fair dealing is “a matter of impression” (*CCH*, at para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). In *CCH*, this Court found that the factors proposed by Linden J.A., at the Federal Court of Appeal (2002 FCA 187, [2002] 4 F.C. 213, at para. 150), to help assess whether a dealing is fair, provided a “useful analytical framework to govern determinations of fairness in future cases” (para. 53). While useful for purposes of the fair dealing analysis, the factors are not statutory requirements.

[40] The application of these factors to the facts of each case by the Copyright Board should be treated with deference on judicial review. A principled deferential review requires that courts be cautious not to inadvertently slip into a more intrusive, correctness review.

[41] Justice Abella finds that the Board misapplied several of the *CCH* factors and that its conclusion is, as a result, unreasonable. I respectfully disagree. In my view, the Board made no reviewable error in principle in construing the *CCH* factors and, with one relatively minor exception, its factual analysis, application of the *CCH* factors to the facts and its conclusions were not unreasonable. I would therefore dismiss the appeal.

I. Introduction

[39] Le présent pourvoi porte sur l'utilisation équitable prévue à l'art. 29 de la *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42 (« Loi »). Ce qu'il faut entendre par équitable est une question de fait (*CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, par. 52 (« *CCH* »)). En outre, qu'une utilisation soit équitable ou non est « une question d'impression » (*CCH*, par. 52, citant *Hubbard c. Vosper*, [1972] 1 All E.R. 1023 (C.A.), p. 1027). De l'avis de notre Cour dans *CCH*, les éléments proposés par le juge Linden de la Cour d'appel fédérale (2002 CAF 187, [2002] 4 C.F. 213, par. 150) offrent « un cadre d'analyse utile pour statuer sur le caractère équitable d'une utilisation dans des affaires ultérieures » (par. 53). Bien que la prise en compte de ces éléments soit utile à l'analyse, il ne s'agit pas d'une exigence de la loi.

[40] Lors du contrôle judiciaire, l'application de ces éléments aux faits par la Commission du droit d'auteur appelle la déférence. Un examen véritablement déférent exige de la cour de révision qu'elle se garde de s'engager par inadvertance dans un contrôle plus approfondi fondé sur la norme de la décision correcte.

[41] Selon la juge Abella, la Commission a mal apprécié plusieurs éléments énoncés dans l'arrêt *CCH*, ce qui rendrait sa conclusion déraisonnable. En toute déférence, je ne suis pas de son avis. J'estime que, sur le plan des principes, la Commission n'a commis aucune erreur susceptible de contrôle dans son interprétation de ces éléments et, sauf sur un point relativement peu important, ni son analyse factuelle, ni sa prise en compte des éléments à partir des faits de l'espèce, ni ses conclusions ne sont déraisonnables. Je suis donc d'avis de rejeter le pourvoi.

II. Fair DealingA. *Purpose of the Dealing*(1) Whose Purpose Is Relevant

[42] In my respectful opinion, it was not unreasonable for the Board to have considered that the teacher's purpose was relevant and *predominant on the facts in this case*. At para. 98 of its reasons (online), the Board stated:

Conversely, with respect to copies of excerpts made on the teacher's initiative for his or her students or at the student's request with instructions to read them, we consider that the teacher's stated purpose must predominate. Most of the time, this real or predominant purpose is instruction or "non-private" study. We attribute a certain degree of importance to the fact that the teacher's role is scarcely comparable to that of staff at the Great Library, the subject of *CCH*. That staff makes copies at the clients' request. A teacher, in deciding what to copy and for whom, just as when directing students' conduct, is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair. [Emphasis added.]

[43] In my view, even if the selecting of passages and photocopying them carried out by teachers for their students were to be seen as an integral part of the students' private study, the teacher also has a purpose. It is to utilize the photocopied excerpts in the process of instructing and educating the students, the essence of the job of teaching. This purpose cannot be ignored and was not by the Board. The teacher's role in selecting and photocopying excerpts of works is significantly different from the role of the Great Library staff in *CCH*, which was completely passive. The Board noted this difference at para. 98 and concluded that, *on the facts*, the teacher's purpose predominated in these circumstances. There is nothing unreasonable in this *factual* conclusion.

[44] Nor do I think that the Board's approach draws an artificial distinction between copies made by the teacher at the request of a student and those made at the teacher's own initiative. In my opinion,

II. Utilisation équitableA. *But de l'utilisation*(1) De quel point de vue doit-on déterminer la fin poursuivie?

[42] À mon humble avis, il n'est pas déraisonnable de conclure, comme le fait la Commission, que la fin poursuivie par l'enseignant importe et qu'elle est *prédominante eu égard aux faits de l'espèce*. Voici ce qu'elle dit au par. 98 de ses motifs (en ligne):

Par contre, en ce qui a trait aux copies d'extraits faites à l'initiative de l'enseignant pour ses élèves ou à la demande de l'étudiant avec instruction de lire, nous estimons que c'est la fin que poursuit l'enseignant qui doit prédominer. La plupart du temps, cette fin réelle ou principale est l'enseignement ou l'étude « non privée ». Nous accordons une certaine importance au fait que le rôle de l'enseignant se compare difficilement à celui du personnel de la Grande bibliothèque, objet de l'arrêt *CCH*. Ce personnel effectue des copies à la demande de sa clientèle. L'enseignant qui décide [de] ce qu'il reproduit et à qui il le remet, [comme lorsqu'il] dicte à l'étudiant sa conduite, le fait pour accomplir son travail, qui est d'enseigner. [Suivant] ce critère, l'utilisation tend donc à être inéquitable. [Je souligne.]

[43] Selon moi, même si l'on considère que le choix des extraits et leur reproduction à l'intention des élèves font partie intégrante de l'étude privée de ces derniers, l'enseignant poursuit aussi une fin qui lui est propre. Il fait les copies dans le dessein d'instruire et d'éduquer ses élèves, ce qui est l'essence même de l'enseignement. Cette fin ne peut être ignorée et elle ne l'est pas par la Commission. Le rôle de l'enseignant qui photocopie des extraits choisis diffère grandement de celui, complètement passif, du personnel de la Grande bibliothèque dans l'affaire *CCH*. Soulignant cette différence au par. 98, la Commission conclut *au vu des faits* que la fin poursuivie par l'enseignant prédomine dans les circonstances, une conclusion *factuelle* qui n'est en rien déraisonnable.

[44] Je ne crois pas non plus que la Commission établit à tort une distinction entre les copies que fait l'enseignant à la demande d'un élève et celles qu'il fait de sa propre initiative. Selon moi, cette

the distinction drawn by the Board remains consistent with and reasonable in light of *CCH*. It was quite clear in *CCH* that the photocopies made by the staff of the Great Library were made at the request of the lawyers. That is, without that request from the lawyers, there would have been no photocopies. Considering, as the Board did, that the fact that the initiative for a copy came from a teacher was an indicator that the photocopy would mainly serve the teacher's purpose of teaching is not artificial or unreasonable. This is a realistic assessment of the facts and circumstances of classroom teaching.

[45] At para. 88, the Board explained that since the dealing in issue was for more than one purpose, it would look, under the first step of *CCH*, at whether any one of the purposes was an allowable purpose for fair dealing under the Act; if so, it would proceed to assess the *predominant* purpose of the dealing in the analysis of whether the dealing is fair. The parties agreed that this appeal should be decided solely on the assessment of the Board's analysis of fairness under the second step of *CCH*. In these circumstances, there is no basis for the suggestion that the finding by the Board under the "purpose of the dealing" factor — that the copies were made predominantly for the teacher's purpose of instruction — contradicts its finding under the first step of the analysis — that Category 4 copies were made for an allowable purpose.

(2) The Meaning of "Private Study"

[46] I do not think that the Board and the Federal Court of Appeal erred in equating "instruction" with "*non-private study*", and that this tended to make the purpose of the dealing unfair (Board, at para. 98; 2010 FCA 198, [2011] 3 F.C.R. 223, at paras. 37-38).

[47] While I agree with Justice Abella that "[s]tudying and learning are essentially personal endeavours", in the sense that each individual applies his or her own mind to the acquisition of knowledge, studying may occur in different settings (para. 27).

distinction est raisonnable au vu de *CCH* et elle est conforme à celui-ci. Dans l'affaire *CCH*, c'était clairement à la demande des avocats que le personnel de la Grande bibliothèque réalisait les photocopies. Autrement dit, sans demande de la part d'un avocat, aucune copie n'était produite. Il n'est ni artificiel ni déraisonnable d'inférer, comme le fait la Commission, à partir du constat que la copie résulte de l'initiative de l'enseignant, que cette reproduction sert principalement la fin que poursuit ce dernier, soit l'enseignement. Il s'agit d'une appréciation réaliste des tenants et aboutissants de l'enseignement en classe.

[45] Au paragraphe 88, la Commission explique que, l'utilisation en cause ayant plus d'une fin, il faut se demander, au premier volet du critère établi dans *CCH*, si l'une ou l'autre fin est permise par la Loi. Dans l'affirmative, il convient de déterminer la fin *principale* de l'utilisation dans le cadre de l'analyse portant sur le caractère équitable de celle-ci. Les parties reconnaissent que la Cour doit statuer sur le pourvoi uniquement en fonction de son appréciation de l'analyse de la Commission à la seconde étape du critère de l'arrêt *CCH*, à savoir celle relative au caractère équitable. On ne saurait donc laisser entendre que la conclusion tirée par la Commission relativement à un élément — celui du « but de l'utilisation » —, à savoir que les copies ont principalement été faites à la fin d'enseignement poursuivie par l'enseignant, contredit celle qu'elle tire à la première étape, à savoir que les copies de la catégorie 4 ont été faites à une fin permise.

(2) Sens du terme « étude privée »

[46] J'estime que la Commission et la Cour d'appel fédérale n'ont pas tort de faire équivaloir « enseignement » et « étude *non* privée » et de conclure au caractère inéquitable de l'utilisation compte tenu de la fin poursuivie (Commission, par. 98; 2010 CAF 198, [2011] 3 R.C.F. 223, par. 37-38).

[47] Je conviens certes avec la juge Abella qu'« [é]tudier et apprendre sont des activités intrinsèquement personnelles » en ce que chacun voue individuellement son esprit à l'acquisition de connaissances (par. 27). Or, l'étude peut avoir lieu

The *Copyright Act* itself requires that to be fair dealing, use of a copyrighted work must be for “private study”, which indicates that the Act foresees private and non-private study (s. 29). This point was made in *CCH* by the majority of the Federal Court of Appeal at paras. 128-29. Parliament does not speak in vain (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 110). Words used by the legislator should be construed to give them *some* meaning. The section cannot be interpreted to strip the word “private” in “private study” of *any* meaning.

[48] The Board relied on prior jurisprudence on this point (para. 90). The Federal Court of Appeal upheld the Board’s conclusion as reasonable because

“[p]rivate study” presumably means just that: study by oneself. . . . A large and liberal interpretation means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear. When students study material with their class as a whole, they engage not in “private” study but perhaps just “study”. [para. 38]

[49] I agree with the distinction made by the Federal Court of Appeal. When included in the Act, the expression “private study” arguably refers to the situation of a scholar or student dealing with a work for his individual study. This does not mean that the scholar or student may not collaborate with others. I would hesitate to endorse the Board’s apparent view, at para. 90, that a copy made at the request of a teacher can *never* be for the purpose of private study. In my view, a copy made on a teacher’s own initiative would indeed be for private study if, for example, the material is tailored to the particular learning needs or interests of a single or small number of students. However, “private study” cannot have been intended to cover situations where tens, hundreds or thousands of copies are made in a school, school district or across a province as part of an organized program

dans différents contextes. Dans la *Loi sur le droit d’auteur*, le législateur précise que pour être équitable, l’utilisation d’une œuvre protégée doit avoir pour fin l’« étude privée » (art. 29), ce qui porte à croire qu’il conçoit que l’étude peut être privée ou non. C’est ce que font observer les juges majoritaires de la Cour d’appel fédérale dans *CCH*, par. 128-129. Le législateur ne parle pas pour ne rien dire (*Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, par. 110), et les mots qu’il choisit doivent donc être interprétés de manière à avoir *un* sens. On ne saurait interpréter la disposition en cause de manière à dépouiller l’adjectif « privée » de *tout* sens.

[48] La Commission invoque la jurisprudence à l’appui de sa position (par. 90), et la Cour d’appel fédérale juge sa conclusion raisonnable et la confirme en ces termes :

Selon toute vraisemblance, l’expression « étude privée » signifie précisément cela : étude personnelle. [. . .] Interpréter de façon large et libérale signifie que l’on reconnaît une portée généreuse aux dispositions en question, ce qui ne veut pas dire que le texte de loi doit se voir attribuer un sens qu’on ne peut normalement lui prêter. Lorsque des élèves étudient collectivement des documents en classe, ils ne se livrent pas à une étude « privée »; on peut dire qu’ils « étudient », tout simplement. [par. 38]

[49] Je fais mienne la distinction établie par la Cour d’appel fédérale. Ainsi, on pourrait soutenir que le terme « étude privée » employé dans la Loi renvoie à la situation du chercheur, de l’étudiant ou de l’élève qui consulte une œuvre dans le cadre d’une étude individuelle. Une telle interprétation n’écarte pas pour autant la possibilité que l’intéressé collabore avec autrui. J’hésite à partager l’opinion que paraît exprimer la Commission au par. 90, à savoir que la reproduction effectuée à la demande d’un enseignant ne peut *jamais* avoir comme fin l’étude privée. À mon sens, la reproduction effectuée à l’initiative d’un enseignant aurait en fait comme fin l’étude privée si, par exemple, le matériel était adapté aux besoins d’apprentissage spéciaux ou aux intérêts particuliers d’un seul élève ou d’un petit nombre d’élèves. Mais le législateur n’a pu vouloir que le terme « étude privée » s’entende de la situation où

of instruction. The Board's conclusion at para. 98 that, in the case of Category 4 copies, "[m]ost of the time, [the] real or predominant purpose is instruction or 'non-private' study" is reasonable on the facts of this case.

B. Amount of the Dealing and Character of the Dealing

[50] I agree with my colleague that as a matter of analytical coherence, the "amount of the dealing" factor is concerned with "the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated" (para. 29). The number of copies and the extent of the dissemination are properly considered under the "character of a dealing" factor (*CCH*, at para. 55). I also agree that it is important to avoid double counting in assessing the fairness of a dealing by looking to the same aspect of the dealing under more than one factor.

[51] However, in my opinion, the Board's analysis under the "amount of the dealing" factor remained focused on the proportion of the photocopied excerpt to the entire work. In its factual assessment of the "amount of the dealing" factor, the Board found "that class sets will be subject to 'numerous requests for [. . .] the same [. . .] series'" (para. 104, citing *CCH*, at para. 68). I do not read the Board's reliance on this finding as indicating that it improperly considered the overall number of copies of the same excerpt distributed to a whole class.

[52] As I understand the Board's reasons, while teachers usually made short excerpts at any one time, this was offset by the fact that the teachers would return to copy other excerpts from the same books — the ones contained in class sets — thereby making the *overall proportion* of the copied pages unfair in relation to the entire work *over a period of time*. The Board found:

des dizaines, des centaines, voire des milliers de copies sont faites à l'échelle d'une école, d'un district scolaire ou d'une province dans le cadre établi d'un programme d'enseignement. La conclusion que tire la Commission au par. 98, à savoir que, en ce qui concerne les copies de la catégorie 4, « [l]a plupart du temps, cette fin réelle ou principale est l'enseignement ou l'étude "non privée" », est raisonnable eu égard aux faits de l'espèce.

B. Ampleur et nature de l'utilisation

[50] Je conviens avec ma collègue que, par souci de cohérence de l'analyse, « l'élément de l'"ampleur" [. . .] appelle un examen du rapport entre l'extrait et, non pas la quantité totale de ce qui est diffusé, mais bien l'œuvre complète » (par. 29). Le nombre de copies et la portée de la diffusion ressortissent plutôt à l'élément « nature d'une utilisation » (*CCH*, par. 55). Je conviens également que pour statuer sur le caractère équitable, il importe d'éviter la double prise en compte qui consiste à considérer un même aspect de l'utilisation dans l'examen de plus d'un élément.

[51] Je suis toutefois d'avis que l'analyse à laquelle se livre la Commission au chapitre de l'"ampleur de l'utilisation" demeure axée sur le rapport entre l'extrait photocopié et l'œuvre complète. Dans l'application de cet élément aux faits, elle souligne que « les [exemplaires] de classe font l'objet "de nombreuses demandes visant [. . .] les mêmes recueils" » (par. 104, citant *CCH*, par. 68). Cette constatation de fait ne permet pas de conclure que la Commission tient compte à tort du nombre total de copies d'un extrait qui sont distribuées à une classe entière.

[52] Selon mon interprétation de ce passage des motifs de la Commission, même si les extraits photocopiés par les enseignants sont généralement courts, la reproduction ultérieure par ces derniers d'autres extraits des mêmes ouvrages — les exemplaires de classe — rend inéquitable le *rapport global* entre les pages copiées et l'œuvre entière *dans un laps de temps donné*. La Commission conclut d'ailleurs :

With respect to the copies made on the teacher's initiative for his or her students, there are factors weighing on each side. . . . [I]t seems that teachers generally limit themselves to reproducing relatively short excerpts from a work to complement the main textbook. On the other hand, in our view, it is more than likely that class sets will be subject to "numerous requests for [. . .] the same [. . .] series", which would tend to make the amount of the dealing unfair on the whole. [Emphasis added; para. 104.]

The Board's conclusion is consistent with the *CCH* direction that "the [amount of the] dealings might not be fair if a specific patron . . . submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time" (para. 68). In this context, it was not unreasonable for the Board to compare a teacher with a specific patron of the Great Library, given its earlier conclusion that the teacher's purpose must predominate.

[53] Under the "character of the dealing" factor, the Board focused its analysis on the fact that multiple copies of the *same* excerpt are made, at any one time, to be *disseminated to the whole class* (Board, at para. 100). Accordingly, on my reading of the Board's reasons, there was no double counting; the Board's conclusions of unfairness under the "character of the dealing" and the "amount of the dealing" factors were arrived at independently, taking into consideration different aspects of the dealing.

[54] On the whole, unless it is shown that the Board's conclusion of fact that the books from the "class sets will be subject to 'numerous requests . . .'" was unreasonable — and I would observe that the appellants specifically state in their factum that "the Board's findings of fact are not in dispute" (para. 50) — I would not disturb the Board's assessment under the "amount of the dealing" and "character of the dealing" factors.

C. *Alternatives to the Dealing*

[55] According to my colleague's analysis, at para. 32, the Board also unreasonably assessed

Pour ce qui est des copies faites à l'initiative de l'enseignant pour ses élèves, il existe des facteurs qui vont dans les deux sens. [. . .] [I]l semble que l'enseignant se limite généralement à reproduire des extraits relativement courts d'un ouvrage comme mesure d'appoint au manuel scolaire principal. Par contre, il nous semble plus que probable que les [exemplaires] de classe font l'objet « de nombreuses demandes visant [. . .] les mêmes recueils », ce qui tendrait à rendre inéquitable l'ampleur de l'utilisation dans son ensemble. [Je souligne; par. 104.]

Ce constat va dans le même sens que celui de notre Cour dans *CCH*, à savoir que « [l'ampleur de l']utilisation peut être inéquitable lorsque, dans un court laps de temps, un usager [. . .] présente de nombreuses demandes visant de multiples décisions judiciaires publiées dans les mêmes recueils » (par. 68). Dans ce contexte, il n'est pas déraisonnable que la Commission compare l'enseignant à l'usager de la Grande bibliothèque puisqu'elle reconnaît par ailleurs que la fin poursuivie par l'enseignant doit prédominer.

[53] En ce qui concerne la « nature de l'utilisation », la Commission s'attache au fait que de multiples copies d'un *même* extrait sont *distribuées à l'ensemble de la classe* (Commission, par. 100). Suivant mon interprétation, ses motifs ne révèlent donc pas de double prise en compte; elle considère la « nature » et l'« ampleur » séparément et tient compte pour chacun de ces éléments d'aspects différents de l'utilisation avant de conclure au caractère inéquitable de l'utilisation.

[54] Tout compte fait, sauf s'il est démontré que Commission relève déraisonnablement que « les [exemplaires] de classe font l'objet "de nombreuses demandes" » — et je rappelle que dans leur mémoire les appelants disent expressément que [TRADUCTION] « les conclusions de fait tirées par la Commission ne sont pas contestées » (par. 50) —, j'estime qu'il n'y a pas lieu de revenir sur son appréciation de l'« ampleur » et de la « nature » de l'utilisation.

C. *Solutions de rechange à l'utilisation de l'œuvre*

[55] Suivant l'analyse de ma collègue au par. 32, l'appréciation de cet élément par la Commission est

whether there were any alternatives to the dealing, because “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks”. I agree that buying books to distribute to all students does not seem like a realistic option if we are speaking of photocopies of short excerpts only, used to supplement the main textbooks already in possession of the students.

[56] However, on the premise that the same class sets of books will be subject to numerous requests for short excerpts, as found by the Board at para. 104, it was not unreasonable for the Board to consider, at para. 107, that from a practical standpoint, the schools had the option of buying more books to distribute to students or to place in the library or in class sets instead of photocopying the books. While buying books may not be a non-copyrighted alternative such as those envisaged in *CCH*, these were relevant facts for the Board to consider in a case where it found systematic copying from the same books. In addition, the Board considered the schools’ resources and found that in this case, “[t]he fact that the establishment has limited means does not seem to bar the recognition of this point” (para. 107). In a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives to the dealing does not automatically render the dealing fair. Therefore, I am not persuaded that the Board’s analysis under the “alternatives to the dealing” factor was unreasonable.

D. *Effect of the Dealing on the Work*

[57] I agree with Justice Abella that the Board’s conclusion that the photocopying of Category 4 copies “compet[e]s with the original to an extent that

déraisonnable, car « l’achat de livres pour tous les élèves ne constitue pas une solution de rechange réaliste à la reproduction par l’enseignant de courts extraits complémentaires ». Je conviens que l’achat d’un exemplaire pour chacun des élèves ne paraît pas réaliste lorsqu’il s’agit d’utiliser de courts extraits pour compléter un manuel principal.

[56] En revanche, à supposer que les mêmes ouvrages constituant les exemplaires de classe feront l’objet de nombreuses demandes de reproduction de courts extraits, ce que conclut la Commission au par. 104, il n’est pas déraisonnable que cette dernière conclut ensuite au par. 107 que, du point de vue pratique, les établissements d’enseignement ont la possibilité de se procurer un plus grand nombre d’exemplaires pour les distribuer aux élèves ou les mettre à leur disposition à la bibliothèque ou en classe, au lieu de photocopier les ouvrages en cause. L’achat d’exemplaires supplémentaires ne constitue peut-être pas une solution de rechange non protégée de la nature de celles considérées dans *CCH*, mais il s’agit d’un fait pertinent dont la Commission peut tenir compte dans une affaire où elle constate que les mêmes ouvrages sont systématiquement copiés. En outre, la Commission se penche sur les ressources dont disposent les établissements d’enseignement et elle arrive à la conclusion que, dans la présente affaire, « [l]e fait que l’établissement dispose de moyens limités ne [...] semble pas constituer une fin de non-recevoir à ce titre » (par. 107). Lorsque de nombreux courts extraits sont tirés d’un ouvrage, l’inexistence de solutions de rechange non protégées par le droit d’auteur ne rend pas automatiquement l’utilisation équitable. Partant, je ne suis pas convaincu du caractère déraisonnable de l’analyse à laquelle se livre la Commission en ce qui concerne l’élément correspondant aux « solutions de rechange » à l’utilisation.

D. *Effet de l’utilisation sur l’œuvre*

[57] Je conviens avec la juge Abella que la preuve ne semble pas étayer la conclusion de la Commission selon laquelle les photocopies de la catégorie 4

makes the dealing unfair” seems unsupported by evidence (Board, at para. 111). Even accepting that it was reasonable for the Board to conclude, based on the evidence of declining book sales, that photocopying had a negative impact on the work, it appears from para. 111 that the Board came to this conclusion by referring to the *total* amount of photocopying across Canada — 250 million pages, the bulk of which is already paid for through the tariff — and not the 16.9 million Category 4 copies. Determining the effect of the Category 4 dealing on the work required relating *those* photocopies to the work and determining whether the effect of those copies was sufficiently important to “compete with the market of the original work” (*CCH*, at para. 59). I would be inclined to find this conclusion unreasonable.

[58] However, I do not think that an unreasonable observation under this one factor is sufficient to render the Board’s overall assessment unreasonable. As noted in *CCH*, no one factor is determinative and the assessment of fairness remains fact specific (paras. 59-60). In the appellants’ own submission, the Board in this case considered the “purpose of the dealing” and the “amount of the dealing” factors to be the most important (A.F., at para. 45). In light of my conclusion that the Board’s assessment under those and other factors was reasonable, I would not find the entire decision unreasonable because of this one finding.

III. Conclusion

[59] Tribunal decisions can certainly be found to be unreasonable (see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471). However, I do not think it is open on a deferential review, where a tribunal’s decision is multifaceted and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.

« [font] concurrence à l’original au point [de rendre l’utilisation non] équitable » (Commission, par. 111). À supposer même que la Commission puisse raisonnablement inférer de la diminution des ventes de livres que la photocopie nuit aux œuvres, il appert du par. 111 que sa conclusion est fondée sur le nombre *total* de transactions de photocopie au pays — soit 250 millions de pages, dont la plupart sont déjà visées par le tarif —, et non sur les 16,9 millions de copies de la catégorie 4. En effet, ce sont *ces* dernières qu’il fallait comparer aux œuvres pour déterminer si « [l]a concurrence que la reproduction [. . .] exerc[e] sur le marché de l’œuvre originale » est suffisamment importante (*CCH*, par. 59). Je suis porté à juger cette conclusion déraisonnable.

[58] Néanmoins, je ne crois pas qu’une telle conclusion déraisonnable à l’égard de ce seul élément suffise à vicier toute l’analyse. Comme le dit la Cour dans *CCH*, aucun élément n’est à lui seul déterminant, et le caractère équitable ou inéquitable de l’utilisation demeure une question de fait (par. 59-60). Au dire des appelants eux-mêmes, la Commission accorde en l’espèce plus d’importance au « but » de l’utilisation et à son « ampleur » qu’aux autres éléments (m.a., par. 45). L’analyse de la Commission étant à mon avis raisonnable en ce qui concerne ces deux éléments, ainsi que d’autres, je ne puis conclure que sa décision est déraisonnable à cause de cette seule inférence.

III. Conclusion

[59] La décision d’un tribunal administratif peut sans conteste être déclarée déraisonnable (voir, p. ex., *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471). Or, je ne crois pas que l’on puisse conclure, à l’issue d’un contrôle au regard d’une norme déférente, qu’une décision complexe et fondée sur l’examen de multiples éléments est déraisonnable sur la foi de quelques affirmations discutables ou conclusions préliminaires de la part du tribunal administratif en cause. C’est tout particulièrement vrai lorsque, comme dans l’analyse relative au caractère équitable de l’utilisation, les questions qui se posent ont trait aux faits.

[60] This Court has stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that reviewing courts are to look for “justification, transparency and intelligibility within the decision-making process” of the tribunal and with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 47). In my respectful view, the Board’s detailed and extensive analysis and decision in this case were intelligible, transparent and justifiable. Its conclusion cannot be said to fall outside of a reasonable range of outcomes. For these reasons, I would dismiss the appeal with costs.

Appeal allowed with costs, DESCHAMPS, FISH, ROTHSTEIN and CROMWELL JJ. dissenting.

Solicitors for the appellants: Wanda Noel, Ottawa; Fasken Martineau DuMoulin, Ottawa.

Solicitors for the respondent: McCarthy Tétrault, Toronto; Norton Rose Canada, Montréal.

Solicitors for the interveners the Canadian Publishers’ Council, the Association of Canadian Publishers and the Canadian Educational Resources Council: McCarthy Tétrault, Toronto.

Solicitors for the interveners the Canadian Association of University Teachers and the Canadian Federation of Students: Torys, Toronto.

Solicitors for the interveners the Association of Universities and Colleges of Canada and the Association of Canadian Community Colleges: Osler, Hoskin & Harcourt, Ottawa.

Solicitors for the intervenor CMRRA-SODRAC Inc.: Cassels Brock & Blackwell, Toronto.

Solicitor for the intervenor the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the interveners the Canadian Authors Association, the Canadian Freelance Union, the Canadian Society of Children’s

[60] Dans l’arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, la Cour dit que la cour de révision doit s’attacher « à la justification de la décision, à la transparence et à l’intelligibilité du processus décisionnel » du tribunal et à « l’appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (par. 47). À mon humble avis, l’analyse détaillée et exhaustive de la Commission et la décision qui en résulte sont à la fois intelligibles et transparentes et elles se justifient. On ne saurait prétendre que sa conclusion n’appartient pas aux issues possibles raisonnables. Pour ces motifs, je suis d’avis de rejeter le pourvoi avec dépens.

Pourvoi accueilli avec dépens, les juges DESCHAMPS, FISH, ROTHSTEIN et CROMWELL sont dissidents.

Procureurs des appelants : Wanda Noel, Ottawa; Fasken Martineau DuMoulin, Ottawa.

Procureurs de l’intimée : McCarthy Tétrault, Toronto; Norton Rose Canada, Montréal.

Procureurs des intervenants Canadian Publishers’ Council, Association of Canadian Publishers et Canadian Educational Resources Council : McCarthy Tétrault, Toronto.

Procureurs des intervenantes l’Association canadienne des professeures et professeurs d’université et la Fédération canadienne des étudiantes et étudiants : Torys, Toronto.

Procureurs des intervenantes l’Association des universités et collèges du Canada et l’Association des collèges communautaires du Canada : Osler, Hoskin & Harcourt, Ottawa.

Procureurs de l’intervenante CMRRA-SODRAC Inc. : Cassels Brock & Blackwell, Toronto.

Procureur de l’intervenante la Clinique d’intérêt public et de politique d’internet du Canada Samuelson-Glushko : Université d’Ottawa, Ottawa.

Procureurs des intervenantes Canadian Authors Association, Canadian Freelance Union, la Société canadienne des auteurs, illustrateurs et

Authors, Illustrators and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and the Writers' Union of Canada: Hebb & Sheffer, Toronto; Stockwoods, Toronto.

Solicitors for the interveners the Centre for Innovation Law and Policy of the Faculty of Law University of Toronto: Macera & Jarzyna, Ottawa.

artistes pour enfants, League of Canadian Poets, l'Association des traducteurs et traductrices littéraires du Canada, Playwrights Guild of Canada, Professional Writers Association of Canada et Writers' Union of Canada : Hebb & Sheffer, Toronto; Stockwoods, Toronto.

Procureurs de l'intervenant Centre for Innovation Law and Policy of the Faculty of Law University of Toronto : Macera & Jarzyna, Ottawa.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Haro-Thurlow Street
Project Limited Partnership*,
2024 BCSC 47

Date: 20240111
Docket: H230802
Registry: Vancouver

Between:

Bank of Montreal

Petitioner

And

**Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd.,
Harlow Holdings Ltd., 1104227 B.C. Ltd., Cloudbreak Holdings Ltd., CM
(Canada) Asset Management Co. Ltd., Forseed Haro Holdings Ltd., 1115830
B.C. Ltd., Terrapoint Developments Ltd., Kang Yu Zou, Wei Dong, Wei Zou, Xia
Yu and Treasure Bay HK Limited**

Respondents

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

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M. Gill

Counsel for Haro-Thurlow Street Project
Limited Partnership, Harlow Holdings Ltd.,
Haro and Thurlow GP Ltd., 1104227 B.C.
Ltd., Cloudbreak Holdings Ltd., CM
(Canada) Asset Management Co. Ltd.
,1115830 B.C. Ltd. and Kang Yu Zou:

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Counsel for Forseed Haro Holdings Ltd.:

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Counsel for Terrapoint Developments Ltd.:

C. Brousson

Counsel for Wei Dong, Wei Zou and Xia Yu: D. Fitzpatrick

Counsel for Treasure Bay HK Limited: D. Shouldice

Counsel for Deloitte Restructuring Inc, the
Proposed Receiver: C. Hildebrand

Place and Date of Hearing: Vancouver, B.C.
December 22 and 28, 2023

Place and Date of Judgment: Vancouver, B.C.
January 11, 2024

Table of Contents

INTRODUCTION	4
BACKGROUND FACTS.....	4
The Parties	4
The Property.....	5
Financing of the Property	6
BMO Debt / Security.....	7
The Borrowers' Sale / Refinance Efforts	8
BMO Default / Forbearance.....	9
Treasure Bay.....	10
Further Refinancing Efforts.....	10
BMO Present Position / Concerns.....	11
POSITIONS OF THE PARTIES.....	13
DISCUSSION.....	14
Receiverships Generally	15
Borrowers' / Forseed's Equity of Redemption	16
Nature of the Property	23
BMO's Security.....	24
Risk to BMO / Terrapoint.....	25
Dysfunction of HTLP?	27
Balance of Convenience to the Parties	30
CONCLUSION.....	32

INTRODUCTION

[1] The petitioner, Bank of Montreal (“BMO”), is a secured creditor of the respondent limited partnership who owns a development property in downtown Vancouver, BC. BMO is owed over \$82.2 million in principal and interest (the “Debt”). BMO’s Debt has been in default since July 2023.

[2] In October 2023, BMO commenced this proceeding, seeking to enforce its mortgage and personal security against the property, the debtors and the guarantors of the Debt. On this application, BMO seeks the appointment of a receiver of the real and personal property secured in its favour, effective in early 2024, with the principal purpose of arranging a sale of the property by spring 2024 to repay the Debt.

[3] All of the respondent debtors/guarantors, with one exception, oppose the appointment of a receiver, particularly one having the power of sale. The opposing respondents seek further time – to June 2024 - to arrange a refinancing of the lands, asserting that they are entitled to and need this further time to allow them an opportunity to redeem their equity of redemption.

BACKGROUND FACTS

[4] There is little controversy about the facts as relevant to the issues.

The Parties

[5] The respondent, Haro-Thurlow Street Project Limited Partnership (“HTLP”), is the beneficial owner of the development property in Vancouver (the “Property”). The respondent, Harlow Holdings Ltd. (“Harlow Holdings”), is the legal owner of the Property. The respondent, Haro and Thurlow GP Ltd. (“HTGP”), is the general partner of HTLP. I will refer to all of these respondents collectively as the “Borrowers”.

[6] HTLP is beneficially owned by its limited partners, the respondents, 11044227 B.C. Ltd. (“110”), as to 45%; Forseed Haro Holdings Ltd. (“Forseed”), as to 45%; and Terrapoint Developments Ltd. (“Terrapoint”), as to 10%. 110, Forseed and Terrapoint are collectively called the “Partners”.

[7] 110 is beneficially owned by the respondent, 1115830 B.C. Ltd. (“111”), which is, in turn, beneficially owned by the respondent Kang Yu Canning Zou (“Mr. Zou”). Mr. Zou is a director of HTGP, Harlow Holdings, 110 and 111. He is also a director of the respondents, Cloudbreak Holdings Ltd. (“Cloudbreak”) and CM (Canada) Asset Management Co. Ltd. (“CM”). I will refer to all of these respondents collectively as the “CM Group”.

[8] Forseed, the members of CM Group and Terrapoint are guarantors of the Debt.

[9] The respondent Wei Dong is Mr. Zou’s wife. The respondents, Wei Zou and Xia Yu, are Mr. Zou’s parents (the “Parents”).

[10] The shareholders of HTGP (111 and Forseed being majority), and Intracorp Projects Ltd. (“Intracorp”), an entity related to Terrapoint, a minority shareholder, are parties to a shareholders’ agreement dated September 26, 2018 (the “SH Agreement”). The SH Agreement provides, in essence, that 111 and Forseed shall at all times have a majority of four out of five directors on the board of directors. In addition, the SH Agreement provides that “Major Decisions” by HTLP can be made by majority rule, with any dissenting shareholders having the right to seek arbitration.

[11] In Section 1.1(s) of the SH Agreement, “Major Decisions” include (vi) Incurring any indebtedness in connection with the Lands or Project other than indebtedness under the land and pre-development loan ...”. I assume this means any indebtedness other than the Debt and would include any refinancing of the Debt.

The Property

[12] In August 2018, HTLP was formed for the purpose of purchasing the Property, which is currently a mixed commercial and residential rental building located at the south-east corner of the intersection of Haro and Thurlow Streets in Vancouver.

[13] The Property comprises a rectangular-shaped parcel of land with a total gross surface area of about 43,250 square feet. The Property includes a seven-story

residential strata building and a low-rise commercial building over a common underground parking structure.

[14] The overall plan was to redevelop the existing buildings and construct a 55-story residential condominium tower on the site.

[15] The rental of the buildings on the Property is managed by FirstService Residential BC Ltd. (“First Service”). FirstService manages the buildings, collects the residential and commercial rents and remits the net monthly rental revenue to HTLP’s account at BMO. The Borrowers have undertaken to continue this practice through any redemption period.

[16] Net monthly revenue from the Property is about \$175,000 per month. Although these funds are paid to BMO, the amount is insufficient to service the monthly interest expense of the Debt. Historically, this shortfall was paid by some or all of the Partners to BMO.

[17] The Borrowers have carried out extensive pre-application work for the proposed high-rise building or buildings on the Property. Apparently, they have paid more than \$4 million for this work to Intracorp, the development manager of the Property.

Financing of the Property

[18] In August 2018, the Property was purchased for a total cost of \$172,750,000, which includes the purchase price of \$164,750,000, property transfer taxes, commissions and other expenses.

[19] The acquisition costs on closing were financed by the Debt from BMO of approximately \$94 million. In addition, the Partners provided the remainder of the necessary funds by advancing loans totalling approximately \$84.5 million to HTLP.

[20] By January 1, 2023, the Partners had advanced over \$18 million to fund ongoing costs of HTLP. Further contributions by the Partners, or some of them, to

HTLP continued into 2023. As of December 2023, the Partners' total contributions to HTLP exceed \$106 million.

BMO Debt / Security

[21] BMO's security against the Borrowers is set out in a credit agreement dated August 21, 2018 (the "Credit Agreement"). The security includes both a first ranking mortgage against the Property and a general security agreement against the Borrowers' personal property.

[22] The Credit Agreement required \$50 million guarantees from Cloudbreak and CM and a \$10 million guarantee from Terrapoint. In addition, the Credit Agreement required the deposit of cash collateral and CM Group and Forseed provided some of this collateral to BMO to secure the Debt, as I will discuss below.

[23] The original term of BMO's loan was to have been for two years, from August 2018 to August 2020.

[24] 110, Forseed and another company have a second mortgage against the Property that was registered in October 2018 (the "Forseed Mortgage"). There is no evidence as to the amount owed, if any, under the Forseed Mortgage.

[25] The Borrowers say that, for many reasons, they have not met the requirements of the City of Vancouver (the "COV") to proceed with the development of the Property, despite substantial efforts to do so over the last five years. The Borrowers have not yet formally applied for a development permit for the Property.

[26] As a result of these delays, the Borrowers and BMO negotiated several amendments to the Credit Agreement. In September 2022, the last amendment to the Credit Agreement provided for an extension of the "Outside Date" to August 31, 2023, which is when the term of the Debt ended.

[27] Various iterations of the Credit Agreement also provided for guarantees to a maximum of \$50 million from 110, 111, CM, Cloudbreak and Mr. and Ms. Zou and guarantees to a maximum of \$7 million from the Parents. The guarantees from the

individuals are secured against various lands held by them, by way of a first mortgage or undertakings not to encumber those lands. The value of the lands held by the individual guarantors, Mr. and Ms. Zou and the Parents, is said to be approximately \$16.9 million.

[28] In early 2023, BMO advised the Borrowers that it would not grant any further extensions of the Debt beyond August 31, 2023. The Debt has now matured and is fully owing.

The Borrowers' Sale / Refinance Efforts

[29] In the face of BMO's refusal to further extend the Loan, in early spring 2023, the Borrowers retained CBRE Limited to solicit offers to purchase the Property.

[30] In May 2023, the Borrowers received six different offers, ranging in value from \$81.5-100 million. Incentives were built into some of the offers which might have resulted in higher purchase prices if certain conditions subsequent had been met. 110 signed a letter of intent ("LOI") in respect of one offer for almost \$93 million (the "Chard Offer"), which was supported by Terrapoint. Forseed refused to approve the Chard Offer and 110 also backed away from its support of it.

[31] Ultimately, none of these offers was accepted by the Borrowers. Mr. Zou states that, while these offers would have generated sufficient proceeds to pay the Debt in full, even with incentives for potential price increases based on favourable development approvals by the COV, all of the offers would have resulted in the Partners, collectively, suffering tens of millions of dollars of losses on their investments.

[32] Terrapoint asserts that the majority partners of HTLP (111 and Forseed) did not provide any "good faith" reason for refusing to proceed with the Chard Offer.

[33] The CM Group and Forseed deny that their rejection of the Chard Offer was done in bad faith. They say that, rather than accepting the loss that would have

occurred, they decided to attempt a refinance of the Debt. They acknowledge that, in the long run, this may prove to be a “bad decision” or “bad business decision”.

[34] In late August 2023, the Borrowers’ provided the only firm evidence of their efforts to refinance the Debt to BMO. This amounted to a very “high level” brief one-page document delivered on August 29, 2023 that provided for a \$80 million first mortgage, which is, of course, not even sufficient to repay the Debt.

[35] Even Terrapoint, a minority stakeholder in HTLP, has little information regarding this proposed refinancing and no information as to any other refinancing options. Terrapoint is not prepared to be a part of any refinancing of the Property. This may or may not prove to be a sticking point, since Terrapoint, through Intracorp, has been involved in the management of the development and construction of the Property to the present time.

BMO Default / Forbearance

[36] In July 2023, the Borrowers defaulted in payment of the interest amount, when BMO received the rent amounts from First Service, but the shortfall was not remitted by the Partners. There is no evidence from Forseed or Mr. Zou as to what caused the default. Terrapoint offers an explanation, as I will discuss below.

[37] On August 29, 2023, BMO made demand for payment. At that time, the Debt was outstanding at \$95,520,027.39. BMO also made demand on the guarantors. BMO gave notice of its intention to enforce its security against the Borrowers’ property, including the Property, and the collateral security provided by the guarantors.

[38] In August/September 2023, the Borrowers engaged in discussions with BMO with a view to entering into a forbearance agreement. BMO negotiated a forbearance agreement that it understood was acceptable to the Borrowers. Ultimately, in early October 2023, the Borrowers refused to sign the agreement.

[39] On October 23, 2023, BMO filed this proceeding.

Treasure Bay

[40] One significant circumstance relating to the Property and any potential refinancing of the Debt is Mr. Zou's dispute with Treasure Bay HK Limited ("Treasure Bay").

[41] On November 12, 2021, Treasure Bay filed an action in this Court against 111, 110, Mr. Zou, Harlow Holdings and GM International Holding Limited ("GMIH"). Treasure Bay is a minority shareholder of GMIH. Treasure Bay alleges that Mr. Zou breached his fiduciary obligations to GMIH by causing GMIH to advance \$30 million to himself, 111 and 110 without adequate security (the "TB Action"). Treasure Bay alleges that the monies were intended to assist Mr. Zou in purchasing the Property.

[42] On November 12, 2021, Treasure Bay also filed a certificate of pending litigation ("CPL") against the Property, asserting that GMIH is entitled to an equitable mortgage or alternatively, is entitled to trace its loan into the Property pursuant to a remedial constructive trust.

[43] Since March 2022, Treasure Bay and the defendants in the TB Action have been engaged in resolving what the parties call the "pleadings dispute", namely whether Treasure Bay is entitled to proceed with its derivative action without leave of the Court. After this Court's finding that no leave was required (2022 BCSC 761), that decision was upheld in *1115830 B.C. Ltd. v. Treasure Bay HK Limited*, 2022 BCCA 380. On July 20, 2023, leave to the SCC was dismissed: 2023 CanLII 64850 (SCC).

[44] The defendants have now filed an application to remove Treasure Bay's CPL against the Property, arguing that Treasure Bay is not asserting any interest in the Property to support the filing of the CPL as against an interest in land. That application is scheduled for late January 2024.

Further Refinancing Efforts

[45] In Mr. Zou's affidavit sworn December 12, 2023, he provides the only update on the Borrowers' refinancing efforts in the face of BMO's foreclosure.

[46] Mr. Zou states:

In late September 2023, at or about the time forbearance negotiations with the petitioner came to an end, the Borrowers retained consultants to assist them in securing take-out financing.

These consultants have identified a syndicate of three lenders who have indicated a strong willingness to provide the Borrowers with a loan or loans in amounts sufficient to fully repay the Petitioner's loan.

However, the Borrowers' consultants have identified the CPL registered against title to the property in favour of the Respondent Treasure Bay HK Ltd. ("Treasure Bay") as an impediment to the new lenders proceeding to finalize their commitments and provide funding. Accordingly, Borrowers are proceeding with an application to have the Treasure Bay CPL discharged from title. That application is set for January 22, 2024.

The Borrowers are confident that they will be able to secure take-out financing by no later than June 30, 2024.

[47] BMO emphasizes that absolutely no documents have been provided by the Borrowers to support any of Mr. Zou's statements, including the identity or involvement of the "three lenders" or their "strong willingness" to provide financing sufficient to repay the Debt.

[48] As can be seen from Mr. Zou's evidence, the Borrowers are still facing significant headwinds in achieving any refinancing. They could only do so by removing Treasure Bay's CPL or obtaining Treasure Bay's consent. In addition, even assuming that occurs, they have not secured any concrete offers to refinance the Debt.

[49] They are, at best, "hoping" that they will be able to refinance by June 2024.

BMO Present Position / Concerns

[50] In July 2023, BMO held \$23.6 million of cash collateral as follows:

- a) \$13,625,000 pledged by Forseed;
- b) \$1,375,000 pledged by 110; and
- c) \$8.6 million pledged by CM Grouse Mountain (LP) Ltd. ("CM Grouse"), which is a company related to the CM Group. Although it is somewhat

unclear, the \$8.6 million seems to be comprised of \$5.6 million in CM Grouse's account and \$3 million in 110's account.

[51] Subsequent to the interest default and the maturity of the Debt, BMO applied the amounts pledged by Forseed and 110 to the principal owing under the Debt.

[52] BMO continues to hold the deposit made by CM Grouse. BMO has not applied that amount to the Debt as BMO has identified some issues that may impede its ability to do so. One of those issues is that Treasure Bay is a minority shareholder of CM Grouse and holds a position on the board of directors. Treasure Bay refuses to consent to BMO applying the cash pledged by CM Grouse against the Debt.

[53] In addition, BMO continues to hold the balance in 110's account of approximately \$3 million. 110 placed those funds in the account pursuant to the Credit Agreement, which required that 110 maintain a cash balance of not less than \$3 million as cash collateral security for repayment of the Debt. However, BMO's counsel states that Treasure Bay has indicated that it may potentially have claims against the \$3 million on deposit for 110. In light of that potential difficulty, BMO has declined to apply those funds to the Debt.

[54] Accordingly, despite the CM Group's attempts to free up further cash in the various accounts at BMO to service the Debt going forward, or pay down outstanding interest, so as to attenuate the risk to BMO going forward, the offered amounts are not issue free and readily available to be used for that purpose.

[55] Currently, the gross monthly interest cost under the Debt is approximately \$620,000 per month. Net monthly revenue from the Property is about \$175,000 per month, resulting in a monthly shortfall of about \$445,000.

[56] As of December 19, 2023, the principal amount owing under the Debt was \$78,256,373.16. Accrued interest amounted to just under \$4 million, resulting in a total amount owing in excess of \$82.2 million.

[57] Peter Mullin, BMO's director of the Special Accounts Management Unit, states that the Borrowers' failure to list or market the Property or pay the monthly interest shortfall has caused BMO to lose confidence that they are working to repay the Debt. In addition, Mr. Mullin is concerned about BMO's position eroding given the accruing interest amounts and the risk of deterioration in the market.

[58] By June 2024, the Debt will be at approximately \$85 million.

POSITIONS OF THE PARTIES

[59] BMO seeks declarations of its mortgage and personal property security and declarations as to their priority. BMO also seeks judgment against the Borrowers. BMO has agreed not to seek any judgments or declaration of security at this time in respect of any of the guarantors.

[60] In addition, BMO seeks the appointment of a receiver of the Borrowers' property that is secured in its favour, including the Property. BMO points to the fact that the Borrowers have now been in default for five months. BMO says that the Borrowers are simply seeking more time for a market reversal or "miracle", all the while disregarding the delay and prejudice that is being visited upon BMO in the face of their unsupported hope that the Property may be worth more than what is owed on the Debt. BMO has lost confidence in the Borrowers' ability to repay the Debt.

[61] BMO wants a timely sale of the Property to be arranged by the receiver. BMO says that it is unreasonable to allow the Borrowers another six months (to June 2024) within which to possibly find the solution to their financing woes, beyond the five months already provided to them, over which time no sale or refinancing has occurred.

[62] After some negotiations with Terrapoint, BMO's proposed order would appoint the receiver effective January 10, 2024. This date would notionally result in the Borrowers having had six months from default to refinance or sell. The proposed order would include the power to manage, although BMO has indicated that it does

not wish the receiver to address the collection of monthly rents, which is currently being done by First Service.

[63] In addition, BMO has agreed that, save with the consent of Terrapoint, the receiver would not set down any application for sale approval until after March 16, 2024, which would allow the Borrowers a total time to redeem of eight months.

[64] Terrapoint supports the relief sought by BMO, stating that it is concerned that BMO is not well secured and may be facing a shortfall, such that it will be called upon its guarantee. Terrapoint wishes to restrict any receiver's ability to manage the Property, given the current arrangements, presumably to reduce costs.

[65] Treasure Bay would like to see a sale of the Property, but it takes no position on the appointment of a receiver.

[66] The Borrowers, the Partners and guarantors (with the exception of Terrapoint) want more time to refinance the Debt – i.e., another six months to June 2024. They dispute that the appointment of a receiver is appropriate, particularly one having a power to sell the Property. They rely on their continued cooperation in remitting the monthly rents to partially pay the interest and in responding to any other request for documentation or information by BMO.

[67] In addition, the Borrowers assert that they are entitled to a six-month redemption period following this hearing prior to any order being granted to authorize a sale of the Property.

DISCUSSION

[68] BMO seeks the appointment of a receiver pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which allows a court to do so if it is “just or convenient” in the circumstances.

[69] BMO does not seek an appointment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as it initially did, so as to avoid any finding that the Borrowers are insolvent.

Receiverships Generally

[70] As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 81, the granting of a receivership order is “extraordinary relief which should be granted cautiously and sparingly”.

[71] I have been referred to what seems to be most of the BC jurisprudence addressing receiverships.

[72] As is well-known, for at least over a decade now, those authorities have invariably endorsed the Court’s consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 [*Maple Trade*] at para. 25; *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 [*Textron Financial*] at para. 50 and many other cases.

[73] The *Maple Trade* factors include:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

[74] In *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348 [*Gian's*] at para. 23, I stated that all relevant factors should be viewed holistically. Recently, Justice Gomery commented to the same effect: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc.*, 2023 BCSC 514 at para. 9.

[75] In *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32 [*Ward Western BCCA*] at para. 49, the court upheld this Court's reasons indexed at *Ward Western Holdings Corp. v. Brosseuk*, 2021 BCSC 919, and confirmed that the above approach remained valid in relation to whether a receiver should be appointed.

[76] Below, I discuss the various circumstances relevant here. While I have not done so for each of the specific *Maple Trade* factors listed above, I have considered them all. Those factors can be considered conveniently within the following headings.

Borrowers' / Forseed's Equity of Redemption

[77] The main plank of the Borrowers' and Forseed's argument is that BMO is attempting to do an "end run" around the usual foreclosure practice so as to defeat their equity of redemption. They stridently object to the appointment of a receiver. In addition, they object to any receiver having a power of sale until after the expiry of a six-month redemption period.

[78] They contend that they are entitled to a six-month redemption period because BMO has failed to establish any "special circumstances" to shorten the "usual"

period. Finally, they say that BMO should be denied any relief at this time and be required to return to the Court for any appropriate relief only after that six-month redemption period which should begin to run from the time of this hearing (i.e. to June 2024).

[79] Both the Borrowers and Forseed have referred to many of the well-known foreclosure authorities that have been applied in BC for decades. In addition to numerous case authorities, this includes Chief Justice McEachern's "On Foreclosure Practice", (1983) 41:6 The Advocate (Vancouver Bar Association) 583. As the Chief Justice states, the "usual" case is that, in the absence of special circumstances, a six-month redemption period will be set, which recognizes the right of the mortgagor to seek either a sale or refinance of the debt in a foreclosure. The onus of proving any special circumstances rests on the mortgagee, usually said to arise from a lack of equity or wasting of the property.

[80] McEachern C.J. was intending by his remarks to bring about consistency in foreclosure proceedings in what were then difficult financial circumstances, a result that was undeniably achieved. However, it is worth noting that he emphasized that his remarks were not "authoritative" and that judges were required to exercise their discretion based on the facts of each case and with regard to the law.

[81] In support of their position, the Borrowers and Forseed refer to *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (C.A.) [Mrazek], where the court upheld an immediate order for sale in foreclosure in light of what this Court found were special circumstances. In *F.B.D.B. v. F.J.H. Constructions Ltd.* (1988), 24 B.C.L.R. (2d) 100 (C.A.), the court discussed the usual procedures in foreclosures.

[82] They also refer to *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252 (C.A.) [Astor Hotel] where the court stated:

[34] In a case like the present, where the fixed charge forms a significant part of the debenture security, I see no reason why the usual rules commonly followed in the foreclosure of real property should not apply. These rules require that except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale in a mortgage until the expiry of the normal redemption period (six months):

see *South West Marine Estates Ltd. v. Bank of B.C.* (1985), 65 B.C.L.R. 328 at 332, 37 R.P.R. 137 (C.A.), where my judgment reads as follows:

If I am wrong in concluding that the courts of equity would intervene to prevent the exercise of a contractual power of sale during the redemption period, it appears to me that this is a proper case for bringing the rules of equity into accordance with modern practice. Firstly, in order that there be certainty in commercial matters it is, in my opinion, necessary that the same principles apply to all proceedings whether by way of foreclosure or by way of exercise of a contractual power of sale. This rule is as follows:

“Except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale until the expiry of the normal redemption period (6 months).”

Secondly, the courts should intervene to protect the equity of redemption. To distinguish between a sale in foreclosure proceedings and a sale made pursuant to a contractual power of sale as a means of permitting the mortgagee to effectively eradicate the equity of redemption is not in accordance with the basic tenets of equity.

[Emphasis added.]

[83] Another authority referred to is *Sun Life Assurance Co. of Canada v. 535401 B.C. Ltd.*, 2001 BCSC 605, where the Court set a six-month redemption period and denied the first mortgagee conduct of sale. Conduct of sale was granted in favour of the second mortgage effective five months into the redemption period.

[84] In *Textron Financial*, Justice Willcock, as he then was, was addressing relief sought by a secured lender, similar to what BMO seeks in this action. That secured creditor sought the appointment of a receiver over a hotel property. It was not a foreclosure. In reviewing the *Maple Trade* factors, at paras. 57–74, Willcock J. considered whether there should be an order for sale before judgment. He referred to the well-settled case law in relation to foreclosures, the power of sale and the right to redeem, including *Mrazek* and *Astor Hotel*. In particular, at para. 57, he referred to the law being clear that an immediate order for sale can only be made in “exceptional circumstances”. I need not repeat his extensive discussion of those case authorities, other than to note that many of them have also been referred to me on this application.

[85] In *Textron Financial*, Willcock J. then framed the issue as being whether a receiver of a business should be appointed with power to sell, given the “general rule” in foreclosures:

[63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

[86] The Borrowers and Forseed also rely on *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899 [*IMOR Capital*]. In that case, the secured creditor sought to enforce its debenture security and appoint a receiver with power of sale. The debtor did not oppose the appointment, but disagreed that the receiver should have the power to sell.

[87] In *IMOR Capital*, Justice Burnyeat reviewed many of the foreclosure authorities. At para. 24, he stated that he was satisfied that a redemption period should be set. He found that the secured creditor was “amply” secured. He then set a six-month redemption period and adjourned the application to empower the receiver to sell.

[88] Arguments similar to those advanced by the Borrowers - concerns about truncating a redemption period - were considered by Justice Horsman, as she then was, in *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Inc.*, 2021 BCSC 2449 [*Prospera*] at para. 27. In that foreclosure, Order *Nisi* had been granted and a redemption period set. Prior to the expiry of the redemption period, the petitioner applied to appoint a receiver with power of sale. At paras. 34 and 40, Horsman J. addressed these concerns by granting the receivership order but adjourning the application with respect to the power of sale, with liberty to apply after the expiry of the redemption period.

[89] The Borrowers and Forseed refer to the granting of a sale power to a receiver as negatively affecting their ability to redeem. They point to the comment in *Textron Financial* at para. 86 that:

As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

[90] In making the above comment, Willcock J. appears to have been referring to *Mrazek*, where the court stated:

[13] The law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances. See *Devany v. Brackpool* (1981), 31 B.C.L.R. 256, 21 R.P.R. 100, 127 D.L.R. (3d) 498 (S.C.) where a number of authorities are reviewed by Taylor J. See also *Canlan Invt. Corp. v. Gibbons*, 42 B.C.L.R. 199, [1983] 3 W.W.R. 226 (S.C.) and, in particular at p. 228, where the judgment of van der Hoop L.J.S.C. reads in part as follows:

The petitioner may be granted an order for sale in lieu of an immediate order absolute at the hearing of the petition where the facts set out in the material justifies such an order. If a sale is approved, the mortgagor then loses the right to redeem, except in very unusual circumstances, but is still liable for any deficiency outstanding on the judgment on the personal covenant to pay. *It is therefore only under very clear circumstances that an immediate order for sale should be granted.* [The italics are mine.]

[91] However, a reading of the cases referred to in *Mrazek* confirms that the order that results in an extinguishment of the equity of redemption – or “precludes” it - is not one for “conduct of sale”, but an order *approving* a sale, which has the same effect as the one arising from the granting of an order absolute of foreclosure.

[92] This result is in accordance with well-established BC law which follows *Pew v. Zinck*, [1953] 1 S.C.R. 285, as was recently described in *Accepted Financial Corporation v. 1225614 B.C. Ltd.*, 2022 BCSC 942 by Justice Weatherill:

[34] Accepted Financial points to the general rule that an owner cannot redeem, and the court has no jurisdiction to order the redemption of, a mortgage after an order approving sale has been made: *Montreal Trust Company v. Brown et al.*, 1974 CanLII 1108 (B.C.C.A.) [*Montreal Trust*]; *Farmers & Merchants Trust Company v. Church*, 1977 CanLII 312 (B.C.S.C.).

See also *Galway Capital Corp. v. Nikolov*, 2005 BCCA 375 at para. 6; *Pollard v. Regional District of Central Okanagan*, 2005 BCCA 159 at para. 30.

[93] Accordingly, a redemption can take place at any time prior to a sale being approved by the Court on application by any receiver.

[94] Here, even if the receiver was granted the power to sell, and with BMO having undertaken not to apply for any sale approval until after March 15, 2024, there could not be any extinguishment of the equity of redemption until court approval of a sale. Having said that, I accept that any power to sell does affect the Borrowers' equity of redemption in terms of shortening the time allowed to the debtor to refinance or sell.

[95] The issue could be considered through the lens of either foreclosure or receivership, as both are paths that a secured creditor, such as BMO may follow. As many cases illustrate, even within a foreclosure, receivership appointments may be sought. A secured creditor is entitled to elect the means by which the security will be enforced, as provided in the Credit Agreement, subject of course to the Court granting any relief sought from it.

[96] In foreclosure law, the Court is able to exercise its equitable jurisdiction to fashion a redemption period. The practice in most cases is to set a six-month redemption period, save in special or extraordinary circumstances. The onus in establishing that a shortened redemption period should be set rests on the mortgagee to prove such "extraordinary" or "special" circumstances. In most cases, those circumstances will be a proven risk by a lack of equity (either presently or over the redemption period) or some jeopardy to the property that requires immediate attention.

[97] In this case, BMO has chosen to pursue a receivership, not a foreclosure.

[98] In receivership, as I stated above, a secured creditor also bears the onus of establishing the appropriateness of the appointment, again recognizing that it is "extraordinary relief which should be granted cautiously and sparingly". If the

appointment is appropriate, the Court will then proceed to consider what powers should be granted to the receiver, including whether there should be a power of sale and, if so, when any sale powers should be effective.

[99] To that extent, there is great similarity in the test to be applied in both paths – whether foreclosure and/or receivership - in that the onus rests of the secured creditor/mortgagee to show special circumstances or justify the extraordinary relief sought.

[100] BMO does not dispute that there is an equity of redemption, although at this point, it is technically held by Forseed given that the Borrowers transferred their equity of redemption to Forseed under the Forseed Mortgage which is registered after BMO's mortgage. BMO also does not dispute the equity of redemption is a relevant consideration here.

[101] In my view, the above case authorities support the proposition that the Court should consider the debtor's equity of redemption in terms of whether a receiver will be appointed and, if so, whether that receiver will be granted the power of sale and when. Such a consideration is clearly relevant to the question as to whether any such appointment and power is "just or convenient", again having regard to the nature of the relief sought. In addition, a consideration of any equity of redemption also comes within the *Maple Trade* factors – factor (k) – in relation to the "effect of the order upon the parties".

[102] I respectfully agree with the comments of Justice Gomery in *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406 emphasizing that procedures in receivership, perhaps more so than in foreclosures, are flexible. This is consistent with the needs and often complexity of insolvency scenarios which require consideration of many factors. He stated:

[73] The procedure in receivership proceedings is flexible. There is no requirement that a creditor obtain an order nisi before applying for an order for sale, for example. However, deference is still afforded to a debtor who wishes to redeem. *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, involved a sale by a court-appointed receiver/manager in which the debtor sought to tender the amount owing and redeem at the

hearing of an application to approve a sale of the debtor's assets. At paragraph 27, Justice Tysoe, as he then was, observed that:

Whenever there is a court-ordered-sale process, it is always implicit that the conduct of sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court. I am aware of no authority to the effect that the granting of conduct of sale precludes the debtor from redeeming the property. Allowing a redemption of the mortgaged property in these circumstances does not blemish the integrity of the court process but, rather, it represents the court process at work.

[103] Seen in that light, and recognizing that an equity of redemption exists, even in a receivership, the true issue in that event is what amount of time should be afforded to the Borrowers and/or Forseed to redeem BMO's mortgage, in the context of whether BMO has established sufficient factors to justify whatever period of time is sought. Again, that will be a decision of the Court taking all of the circumstances into account.

[104] The Borrowers also assert that, since a redemption period should be set, it should be six months from the date of order, citing *Dass v. Rumball*, 2015 BCSC 343 at para. 70 and *Century Services Corp. v. LeRoy*, 2021 BCSC 1285 at para. 192. Both cases allowed a six-month redemption period in foreclosure proceedings, as there was no basis to shorten the period. These cases illustrate the usual procedure, but do not stand for the proposition put forward by the Borrowers in the sense of *requiring* that a redemption period run from the date of the hearing.

[105] In any event, what BMO proposes is the receiver having the power of sale in the near future, which effectively amounts to recognizing a six-month redemption period from the date of default (July 2023) or a shortening of the time for redemption, which is open to the Court to consider.

Nature of the Property

[106] Attempts by the Borrowers and Forseed to minimize the complexity of the property secured in favour of BMO, including the Property, are without merit.

[107] The Property is not a residential home that can be easily listed on the MLS.

[108] The Property is a tenanted commercial and residential complex, i.e. an operating business. It is also a unique development property, which will attract only a certain cohort of potential purchasers. It is well taken on this application that the Borrowers' own lack of success in advancing the development over the last five years may be relevant to any purchaser who would similarly seek to develop the Property.

[109] I agree with BMO that selling the Property will require the specialized expertise of a receiver to competently list and market the property. This may include the receiver retaining a commercial real estate brokerage, just as the Borrowers did in spring 2023.

[110] Any receiver will have to undertake certain investigations and complete due diligence to prepare an appropriate sales process. I would expect that financial information would be reviewed as part of that process. I expect that there will be the need to prepare complex sale documentation, such as teasers, non-disclosure agreements and the like. I expect a data room will be set up and populated to assist prospective buyers with the necessary due diligence to make an informed offer.

[111] It is uncertain whether the Borrowers will be cooperative in the context of a sales process, although I acknowledge their counsel's submission that they have not refused to satisfy any request to date.

[112] All of this is to say that a sales process for the Property can be expected to take some time, perhaps months. Toward that end, it will be necessary to grant an order appointing a receiver with appropriate powers relating to access to the Property.

BMO's Security

[113] Under the *Maple Trade* factor (g), BMO has the right to appoint a receiver under the documentation provided for the loan. BMO has not appointed a receiver; rather, BMO seeks a court appointment, as it is entitled to do in the Credit

Agreement, particularly since any sale would require court approval and a vesting order.

[114] As was stated in *Prospera* at para. 24, where a secured party is entitled to appoint a receiver, the “extraordinary nature of the remedy is less central to the inquiry”.

[115] The undisputed fact is that BMOs’ Debt and security have been in default since July 2023 and demand for payment in full was made in August 2023.

[116] Nevertheless, I accept that this factor is but one factor to be considered and no presumption of entitlement to a court appointment arises from the fact that the Credit Agreement allows for such an appointment: *Textron Financial* at para. 55; *Prospera* at para. 24; *Ward Western BCCA* at paras. 62–66; *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, 2023 BCSC 1158 at paras. 76–80.

Risk to BMO / Terrapoint

[117] The parties very much disagree as to whether or not BMO is at risk in terms of recovering the Debt.

[118] The amount of the Debt is significant. Further, the ongoing increase in the debt is also significant, with over \$4 million of accrued interest already owed.

[119] The Borrowers refer to an appraisal dated July 31, 2023 prepared by L.W. Property Advisors. This document indicates an appraised value of \$192 million as at July 31, 2023. However, this valuation is based on the Property’s development potential, not its current value as is. In my view, this appraisal is more aspirational, than real, particularly since the Borrowers have been singularly unsuccessful in advancing their development efforts over the last five years and no doubt significant funds must be spent in the future toward creating the development that is being “appraised”.

[120] Further, there is no evidence that any lender would consider this appraisal as supporting lending value in respect of any refinancing.

[121] The 2023 BC Assessment indicates that, as of July 2021, the Property had a value of \$107,980,400; as of July 2022, the Property had a value of \$98,042,000. BMO emphasizes that this represents a 9% decline from 2021-2022.

[122] The sales process conducted in spring 2023 is undeniably the most reliable indication of value, assuming no change in the market has taken place since then.

[123] In addition to the BMO default, HTLP is also in default of paying its 2023 property taxes. As of December 2023, the amount owed is \$355,850.09.

[124] The only evidence, such as it is, concerning refinancing, indicates a lending value of \$80 million, suggestive of the fact that the value of the Property is not as high as the Borrowers would suggest.

[125] Evan Allegretto, Terrapoint's representative, states in his affidavit sworn in December 2023 that the real estate market has changed considerably since August 2023, likely resulting in a lower value for the Property than even the Chard Offer. He points to: higher interest rates; weaker sales data; increased tightening of credit; increased rates of foreclosures reducing overall valuations; limited number of potential purchasers who are able to purchase the Property due to its size, price and development requirements; and, increased construction costs.

[126] Forseed objects to Mr. Allegretto's evidence as being impermissible expert evidence and not properly before the Court as such. I agree that no expert evidence is before me, however, Mr. Allegretto's evidence is not put forward as expert evidence of value; rather, it represents his actual observations of factors which are well taken as being relevant to the real estate market, particularly in relation to development lands, such as the Property.

[127] Terrapoint supports the appointment of a receiver to sell the Property. It does not believe that BMO is well secured and it is concerned that any delay of repayment will be result in BMO suffering a shortfall, which could result in Terrapoint being called upon under its guarantee.

[128] The Borrowers' position, that BMO should be delayed in being granted any right of sale until after June 2024, would significantly expose BMO to more risk. When one considers that any sales approved after that time would further delay repayment, any sale would have to achieve *in excess of* \$85 million (to account for a further six-months interest (\$2.7 million)) and pay outstanding and accruing property taxes, commissions on a sale and receiver expenses.

[129] Even if one accepts that the real estate market is not declining, but remaining stable, this scenario puts BMO into a far riskier recovery situation than what presently exists.

[130] I reject the Borrowers' submission that there is "sufficient equity" in the Property to justify further delay to June 2024.

[131] I conclude that BMO is at some risk now and faces increasing risk of being under-secured in respect of the Property if there is any further delay. It is no answer that the guarantors point to their own risk under the guarantees and the collateral security that some of them have given. At this stage, BMO is entitled to relief in respect of the assets of the Borrowers that secure the Debt. This risk is not mitigated by the exposure of the guarantors who have their own real assets and properties at risk, particularly given Mr. Zou's own refusal to fund 110's capital contributions to HTLP since 2022.

Dysfunction of HTLP?

[132] Terrapoint asserts that the management of HTLP is dysfunctional.

[133] Terrapoint states that Forseed has, since August 2022, failed to make required capital contributions to HTLP. Currently, Forseed owes approximately \$3.4 million. 110 has also failed to make required capital contributions to HTLP and currently owes approximately \$360,000.

[134] To avoid default in the Debt, Terrapoint made capital shortfall loans of approximately \$1.4 million to May 2023. When that funding stopped, the default in the Debt occurred.

[135] The CM Group and Forseed acknowledge that they have not made certain contributions to HTLP when required. They defend that position by pointing to the \$15 million cash collateral that they provided to BMO, which has now been applied to the Debt.

[136] Terrapoint remains frustrated by the fact that all of the Partners agreed on the sales process in spring 2023 and 110, at least initially, signed the LOI for the Chard Offer. Only later did 110 and Forseed vote against proceeding with any sale.

[137] I agree that the see-sawing of actions on the part of 110 is puzzling. Mr. Zou's stated reason to reject the offers given that substantial losses would occur is understandable, but only to a point. It is difficult to see that the Borrowers could have deluded themselves into thinking that the Property was worth the same or more than they had invested in it some years ago.

[138] The Property is worth what third parties will pay for it. The Property is not worth what an owner may have initially paid for it. Further, any refinancing of the Property by a lender will inevitably be tied to what the Property is worth now, not what it might be worth in the future.

[139] The only way to avoid the potential difficulty of a delta arising between what the property is worth and what amount can be secured by way of refinance is to offer financial resources from other persons – such as the guarantors – to backstop the loan. There is also the difficulty of servicing the debt, and the fact that the current rents from the Property do not service the Debt. No lender would advance funds without this shortfall being addressed.

[140] Here, all of this difficulty would have been avoided if 110 and Forseed had continued to make their capital contributions so as to allow ongoing interest payments to BMO to August 2023, during which time they should have arranged for

refinancing to repay BMO in August 2023. Presumably, such contributions would also have allowed HTLP to make property tax payments.

[141] It is telling that the CM Group and Forseed are unwilling to make any further payments to BMO to cure the interest defaults, which may have alleviated risk to BMO and may have allowed them more time to address the CPL issue and refinance the Debt. This is contrast to the debtor's proposal to make significant payments to delay the receivership in *Maple Trade* (paras. 3 and 27) and *Textron Financial* (para. 17), which were both factors considered by the Court in delaying either the receivership or granting the receiver the power of sale.

[142] What is also concerning is the apparent sequential approach of the Borrowers to resolving what was a well-known financial deadline in August 2023 when the Debt matured. In April 2023, the decision was to only pursue a sale, not a sale or refinance in tandem. Only after the sale efforts were abandoned, were some efforts made in August 2023 to refinance. By any measure, those were completely inadequate to even pay out BMO.

[143] Now, four months later, the Borrowers are still only suggesting some refinancing efforts, without providing anything concrete to support their bald statements. Those supposed refinancing efforts are, to use BMO's counsel's word, "opaque" and not illuminating at all in terms of what has been tentatively done and what results, if any, achieved: *Textron Financial* at para. 78; *Gian's* at paras. 30–32.

[144] I agree that BMO and Terrapoint's concerns about the ability of the Borrowers to refinance are valid. No credible term sheet has been provided to date, even one that assumes the removal of Treasure Bay's CPL. There is nothing to indicate what financing might be available to the Borrowers, including whether other financial supports are required and, if so, whether those are available. There is some uncertainty as to whether the Borrowers can even refinance without the involvement of Terrapoint, who point blank now refuses to be a part of any such effort.

[145] Further, there is a complete lack of evidence as to how the Borrowers and Forseed intend to address the Forseed Mortgage in terms of any refinancing. As the saying goes, you foreclose down, redeem up. There is no information even as to what is owed under the Forseed Mortgage, let alone any comment by Forseed as to it having any intention to redeem the Property in respect of the Debt, which it is entitled to do.

[146] The Borrowers and Forseed have known since September 2022 that the Debt was going to mature in August 2023. Since at least that time, they have had the ability to redeem the Property, but they had failed to do so. It can hardly be suggested that they have acted with any sense or urgency, or even timeliness, toward resolving the issue with BMO.

[147] While I would not necessarily agree with Terrapoint that the management of HTLP by the Partners is “dysfunctional”, it is certainly challenged and somewhat in disarray in terms of direction and results.

Balance of Convenience to the Parties

[148] The CM Group and Forseed’s response to Terrapoint’s concerns regarding the lack of any sale or lack of support that a refinance is even possible is that, if it turns out that their decisions were “bad business decisions”, they will suffer greater losses than Terrapoint.

[149] At bottom, the CM Group and Forseed now seem keenly focussed on seeking to minimize their own downside, and hope for an upside, while remaining unconcerned about the risks faced by BMO and Terrapoint as the matter is delayed.

[150] The Borrowers also allege that a receivership will result in prejudice to them arising from the stigma associated with the appointment of a receiver such they will be unable to secure new financing. They cite *Korion Investments Corporation v. Vancouver Trade Mart Inc.*, [1993] B.C.W.L.D. 2928 (S.C.) at para. 12, which was referenced in *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 at para. 44.

[151] BMO disagrees, referring to *Prospera* at para. 32, where Horsman J. found that the reputational impacts of the appointment of a receiver would not significantly impair a debtor's ability to refinance, beyond the impairment that had already accrued at the outset from the foreclosure proceedings themselves.

[152] BMO's legal proceedings have already begun and the result has been that the Borrowers' financial difficulties have now been fully disclosed to the public. In light of this, I agree with BMO that any receiver appointment is unlikely to give rise to any further "stigma" or difficulties. In some quarters, the appointment may be seen as beneficial toward maximizing value for the Property in the sense of telling the market that professionals who have expertise in the real estate market will be addressing the matter.

[153] BMO says that the Borrowers and Forseed have been given substantial time already to remedy their default. After the July 2023 interest was not paid, BMO engaged in good faith discussions with them upon which BMO would forbear from any enforcement action.

[154] That forbearance agreement was not signed. This resulted in further delay in filing the action and now a five months delay after the first default. BMO says that the Borrowers have had time to address the Debt, by either paying the interest, securing a financing commitment, even a conditional one, or list the Property for sale.

[155] The Borrowers object to any suggestion that they have deliberately delayed BMO in taking steps under its security. Somewhat surprising, they say that there was nothing to prevent BMO from commencing proceedings sooner than it did and that BMO could have commenced proceedings in July 2023.

[156] I agree with the Borrowers that they have not deliberately delayed BMO in proceeding under its security. However, on the other hand, BMO has acted in commercially reasonable manner in entering into further negotiations with the Borrowers by agreeing to terms upon which the Borrowers would be given more time

to solve their financial difficulties. It cannot be doubted that this negotiation process was for the benefit of the Borrowers, particularly given their current allegations that the proceedings are publicizing their financial difficulties to the world, including prospective lenders.

[157] At bottom, the Borrowers cannot have it both ways. Having effectively asked BMO to delay matters while a potential forbearance agreement was pursued, they cannot now suggest that the ensuing delay is irrelevant to a consideration of the issues relating to the receivership. I agree with BMO that it would be a perverse situation to do so, and would encourage lenders to immediately commence proceedings and disregard any potential negotiated interim solutions. Generally speaking, in insolvency proceedings, a solution without litigation is one that benefits all stakeholders.

[158] I acknowledge that a receivership, including one that entails sale powers, will have an effect on the Borrowers. However, that must be balanced against the interests of BMO that is entitled to appoint a receiver and is entitled to realize on its security, failing repayment, within a reasonable period of time, after default (here, July 2023) and where risk of repayment exists.

CONCLUSION

[159] I conclude from all the circumstances that BMO has met its burden to establish that it is just and convenient to appoint the receiver. I agree with BMO that it is necessary to have the receiver appointment effective as of January 12, 2024 so as to allow the receiver to investigate the circumstances of the Property and the rental business with a view to considering how a sales process might be implemented.

[160] I am also satisfied that the receiver should be granted the ability to access the Property and the books and records of the Borrowers. The receiver will also have the ability to manage and operate the business (para. 2(c) of the initial draft order), although it is my intention that the receiver will seek to maintain the current operations as much as possible, so as to minimize receivership costs. This would

include continuing to allow for the collection of rents by First Service, as before. I do so on the basis that some oversight by the receiver is appropriate given the ongoing leaseholds, particularly as to how those might affect any sale or refinance in the future.

[161] I would also expect that, if the receiver considers that changes to the current management of the Property are required to be made, advance notice will be given to the Borrowers and the Partners so that they may provide input or, if necessary, apply to the Court.

[162] In light of the somewhat minimal, and what are described as “hopeful” efforts on the part of the Borrowers to refinance, I intend to allow them more time to do that, before the receiver embarks on a sales process.

[163] I have concluded that the further time to be allowed to the Borrowers will be more than what was sought by BMO, but less than what was sought by them. I cannot conclude that it is appropriate to allow the Borrowers and Forseed to delay matters until after June 2024, which would effectively allow them a total period of 12 months to redeem. During that time, there would be increasing risk to BMO, particularly given the additional \$2.7 million in interest that would accrue.

[164] The receiver is appointed as of January 12, 2024, but will not be empowered to undertake any sales efforts until after February 23, 2024. In addition, the receiver will be unable to file any application for approval of any sale until after April 26, 2024.

[165] Forseed made certain submissions in relation to the provisions in the draft order regarding the execution of documents by the receiver. As that provision is in relation to the Property only, and not relating to the Borrowers generally, that is appropriate. I agree that amendments are necessary to the order with respect to the initiation or management of legal proceedings in relation to the Borrowers, which would include their ability to defend this proceeding and also the TB Action. That provision regarding the powers of the receiver should be amended to exclude those legal proceedings.

[166] Finally, I decline to authorize the receiver to exercise shareholder, partnership, joint venture or other rights that may be held by the Borrowers. Such a provision may restrict their ability to refinance. Generally speaking, nothing in the receivership order should be taken as restricting the ability of the Borrowers to pursue refinancing of the Debt. The receiver has liberty to apply to exercise any such rights as may be appropriate beyond what is already granted.

“Fitzpatrick J.”

TAB 8

Court of King's Bench of Alberta

Citation: Bank of Nova Scotia v Smiling Simba Learning Academy Inc, 2025 ABKB 11

Date: 20250110
Docket: 2401 04463
Registry: Calgary

Between:

Bank of Nova Scotia

Plaintiff/Applicant

- and -

**Smiling Simba Learning Academy Inc.,
Uma Pujari and Prince Chahal**

Defendants/Respondents

Reasons for Decision of the Honourable Justice M.A. Marion

I. Introduction

[1] Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

[2] For the reasons set out below, the receivership order requested is granted.

II. Background

[3] BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as

“Special Purpose – Community Service (S-CS)”, which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

[4] BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of \$8.2 million.

[5] From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal’s involvement in the potential childcare operator in March 2023.

[6] SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

[7] The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the “**Loans**”.

[8] By March 31, 2024, the amount outstanding on the Loans was over \$9 million.

[9] The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS’s security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

[10] SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

[11] On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[12] On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to “collateralized debt” in the amount of approximately \$900,000. SSLA did not obtain BNS’ consent to this registration.

[13] On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of \$200,000. SSLA did not obtain BNS’ consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was \$164,487.56 (based on Mortgagequote’s Statement of Claim against SSLA).

[14] In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

[15] On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

[16] On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024.¹ Chahal's evidence is that the tenant is currently paying monthly rent of \$28,200². SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

[17] On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

[18] On April 2, 2024, BNS filed a receivership application in respect of SSLA.

[19] The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

[20] In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of \$9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

[21] SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

[22] SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

[23] On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

¹ The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

² The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

[24] As of December 30, 2024, the amount outstanding under the Loans was \$10,170,652.26.

[25] The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

[26] The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

[27] The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

[28] The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24.

[29] As noted in ***Higgerty***, at para 25, which I adopt:

[25] A receivership order “should not be lightly granted”: ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[30] Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd***, 2024 ABKB 635 at para 65 [***Mayfield***]; ***Worth Ventures Ltd v MegaSys Enterprises Ltd***, 2024 ABKB 385 at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd***, 2023 ABKB 718 at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at para 33; ***Schendel Management Ltd***, 2019 ABQB 545 at paras 44-45; ***Murphy v Cahill***, 2013 ABQB 335 at para

71; *Kasten* at para 13; *Romspen Investment Corporation v Hargate Properties Inc*, 2011 ABQB 759 at para 20; *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27. Those factors include:

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- (b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the apprehended or actual waste of the debtor's assets;
- (e) the preservation and protection of the property pending judicial resolution;
- (f) the balance of convenience to the parties;
- (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- (h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- (i) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;
- (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (k) the effect of the order upon the parties;
- (l) the conduct of the parties;
- (m) the length of time that a receiver may be in place;
- (n) the cost to the parties;
- (o) the likelihood of maximizing return to the parties;
- (p) the goal of facilitating the duties of the receiver; and
- (q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

[31] In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: *Mayfield* at para 40. The applicable principles were summarized by Justice Lema in *Servus Credit Union Ltd v Proform Management Inc*, 2020 ABQB 316 at paras 60-63 (footnotes omitted):

- [60] On how to approach a consent order, the guiding principles are as follows:
- the Court is not obliged, from the mere fact of consent, to grant a consent order; and

- the Court must be satisfied (at minimum) that:
 - it has the jurisdiction to grant the order;
 - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
 - consent has actually been provided;
 - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
 - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
 - the proposed relief does not exceed that consented to; and
 - consent aside, the ordered relief is warranted in the circumstances.

[61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the “we have consented” message, the Court can usually proceed on the basis that all of these elements are satisfied.

[62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

[63] A safeguard here is the Court’s power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

[32] In assessing the effect of a debtor’s consent to a receivership order, Justice Lema went on to point out in *Servus*, at para 66 (emphasis in original): “by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*”. In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

[33] No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what

should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

[35] I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

[36] BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in *Paragon*, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

[37] Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 at para 43; *Murphy* at para 72.

b. Risk to Security

[38] SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

[39] SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

[40] I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: *Braile v Calgary (Police Service)*, 2018 ABCA 109 at para 23; *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2005 ABCA 46 at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was \$6,790,000 (and the Property is in tax arrears of \$359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

[41] While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

[42] It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

c. Nature of the Property

[43] BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

[44] SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

[45] Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): *Mayfield* at para 40; *Servus* at paras 42-50; *Royal Bank of Canada v Walker Hall Winery Ltd*, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

[46] I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

[47] This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

[48] SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

[49] SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

[50] A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

[51] SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

[52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 [*Haro-Thurlow Street Project*] at para 95.

[53] In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: *Haro-Thurlow Street Project* at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

[54] SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

[55] SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

3. Conclusion re: Receivership

[56] For those reasons, I find the appointment of a receiver is just and convenient.

[57] Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

[58] I grant the receivership order as proposed by BNS.

Heard on the January 6th and 9th, 2025.

Dated at Calgary, Alberta this 10th day of January, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Natalie Thompson
for Bank of Nova Scotia

Randolph W. Mitchell
for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal

Cale W. Ellis Toddington (January 9, 2025 only) and Madona Markaj (student-at-law)
for Mortgagequote Canada Corp.

Anthony Merah
for 2499311 Alberta Ltd

Derek Pontin (January 9, 2025 only)
for the proposed receiver

TAB 9

Bell ExpressVu Limited Partnership

Appellant

v.

**Richard Rex, Richard Rex, c.o.b. as ‘Can-Am Satellites’,
and c.o.b. as ‘Can Am Satellites’ and c.o.b. as
‘CanAm Satellites’ and c.o.b. as ‘Can Am Satellite’ and
c.o.b. as ‘Can Am Sat’ and c.o.b. as ‘Can-Am Satellites Digital
Media Group’ and c.o.b. as ‘Can-Am Digital Media Group’
and c.o.b. as ‘Digital Media Group’, Anne Marie Halley
a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex,
Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson,
Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20,
Jane Doe 1 to 20 and any other person or persons
found on the premises or identified as working at the
premises at 22409 McIntosh Avenue, Maple Ridge,
British Columbia, who operate or work for
businesses carrying on business under the name
and style of ‘Can-Am Satellites’, ‘Can Am Satellites’,
‘CanAm Satellites’, ‘Can Am Satellite’, ‘Can Am Sat’,
‘Can-Am Satellites Digital Media Group’, ‘Can-Am Digital
Media Group’, ‘Digital Media Group’, or one or more of them**

Respondents

and

**The Attorney General of Canada, the Canadian Motion
Picture Distributors Association, DIRECTV, Inc., the
Canadian Alliance for Freedom of Information and Ideas,
and the Congres Iberoamericain du Canada**

Intervenors

Indexed as: Bell ExpressVu Limited Partnership v. Rex

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

Present: L’Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and
LeBel JJ.

on appeal from the court of appeal for british columbia

*Communications law -- Radiocommunications -- Direct-to-home
distribution of television programming -- Decoding in Canada of encrypted signals
originating from foreign satellite distributor -- Whether s. 9(1)(c) of
Radiocommunication Act prohibits decoding of all encrypted satellite signals, with
a limited exception, or whether it bars only unauthorized decoding of signals that
emanate from licensed Canadian distributors -- Radiocommunication Act, R.S.C.
1985, c. R-2, s. 9(1)(c).*

*Statutes -- Interpretation -- Principles -- Contextual approach --
Grammatical and ordinary sense -- “Charter values” to be used as an interpretive
principle only in circumstances of genuine ambiguity.*

*Appeals -- Constitutional questions -- Factual record necessary for
constitutional questions to be answered.*

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell U.S. decoding systems to Canadian customers that enable them to receive and watch U.S. DTH programming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(c) and 18(1) of the *Radiocommunication Act*, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the “lawful distributor of the signal or feed”. The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies, and dismissed the appellant’s appeal.

Held: The appeal should be allowed. Section 9(1)(c) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the Act in their entire context and in their grammatical and ordinary sense

harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the “*Charter* values” presumption.

When the entire context of s. 9(1)(c) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents’ decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not “lawful distributors” under the Act. This interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception accords well with the objectives set out in the *Broadcasting Act* and complements the scheme of the *Copyright Act*.

The constitutional questions stated in this appeal are not answered because there is no *Charter* record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial. “*Charter* values” cannot inform the interpretation given to s. 9(1)(c) of the *Radiocommunication Act*, for these values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

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Not followed: *R. v. Love* (1997), 117 Man. R. (2d) 123; *R. v. Ereiser* (1997), 156 Sask. R. 71; *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. v. Thériault*, [2000] R.J.Q. 2736, aff’d Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff’d [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 O.R. (3d) 737;

referred to: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL), aff’d (1995), 106 Man. R. (2d) 37, leave to appeal ref’d (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449

(QL), rev'd (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd [1998] A.J. No. 628 (QL); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. v. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Gayle* (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Baron v. Canada*, [1993] 1

S.C.R. 416; *R. v. Mills*, [1999] 3 S.C.R. 668; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, dismissing an appeal from a decision of the British Columbia Supreme Court, [1999] B.C.J. No. 3092 (QL), refusing to grant an injunction. Appeal allowed.

K. William McKenzie, Eugene Meehan, Q.C., and Jessica Duncan, for the appellant.

Alan D. Gold and *Maureen McGuire*, for all respondents except Michelle Lee.

Graham R. Garton, Q.C., and *Christopher Rupa*, for the intervener the Attorney General of Canada.

Roger T. Hughes, Q.C., for the intervener the Canadian Motion Picture Distributors Association.

Christopher D. Bredt, Jeffrey D. Vallis and *Davit D. Akman*, for the intervener DIRECTV, Inc.

Ian W. M. Angus, for the intervener the Canadian Alliance for Freedom of Information and Ideas.

Alan Riddell, for the intervener the Congres Iberoamerican du Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

- 1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(c) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). In practical terms, the issue is whether s. 9(1)(c) prohibits the decoding of all encrypted satellite signals, with a limited exception, or whether it bars only the unauthorized decoding of signals that emanate from licensed Canadian distributors.
- 2 The respondents facilitate what is generally referred to as “grey marketing” of foreign broadcast signals. Although there is much debate -- indeed rhetoric -- about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(c) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

II. Background

- 3 The appellant is a limited partnership engaged in the distribution of direct-to-home (“DTH”) television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission (“CRTC”) as a DTH distribution undertaking under the *Broadcasting Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a

- CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.
- 4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.
 - 5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada

and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

- 6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The

respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

- 7 In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.
- 8 The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9(1)(c) and 18(1) of the *Radiocommunication Act*. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

III. Relevant Statutory Provisions

10 The *Radiocommunication Act* is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the *Broadcasting Act*, provide context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 *Radiocommunication Act*, R.S.C. 1985, c. R-2

2. In this Act,

“broadcasting” means any radiocommunication in which the transmissions are intended for direct reception by the general public;

...

“encrypted” means treated electronically or otherwise for the purpose of preventing intelligible reception;

“lawful distributor”, in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

...

“radiocommunication” or “radio” means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

“subscription programming signal” means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

9. (1) No person shall

...

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

...

10. (1) Every person who

...

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

- (2.5) No person shall be convicted of an offence under paragraph 9(1)(c), (d) or (e) if the person exercised all due diligence to prevent the commission of the offence.

...

18. (1) Any person who

(a) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

...

(c) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*, or

...

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c), (d) or (e) or 10(1)(b), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

...

- (6) Nothing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*.

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

“broadcasting” means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

...

“broadcasting undertaking” includes a distribution undertaking, a programming undertaking and a network;

...

“distribution undertaking” means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

...

- (2) For the purposes of this Act, “other means of telecommunication” means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.
- (3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

Canada that 3. (1) It is hereby declared as the broadcasting policy for

- (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
- (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

...

- (d) the Canadian broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
 - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
 - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and

multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

...

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

- (2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Copyright Act, R.S.C. 1985, c. C-42

- 21. (1)** Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(a) to fix it,

(b) to reproduce any fixation of it that was made without the broadcaster's consent,

(c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

31. ...

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

IV. Judgments Below

A. *Supreme Court of British Columbia*, [1999] B.C.J. No. 3092 (QL)

12 In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(c). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the *Radiocommunication Act*. He interpreted s. 9(1)(c) as applying only to the

theft of signals from “lawful distributors” in Canada, and not applying to the “paid subscription by Canadians to signals from distributors outside Canada” (para. 20). He reasoned (at paras. 18-19):

The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(c) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.

The interpretation of s. 9(1)(c) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(c) to apply to such conduct, it would have said so in clear language. In my view the quasi criminal provisions in the Radiocommunication Act should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

B. *Court of Appeal for British Columbia* (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(c). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, “[l]egislation which can reasonably be said to bear two

- unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous” (para. 35). For this reason, and the fact that s. 9(1)(c) bears penal consequences, the majority held that the “narrower interpretation adopted by the chambers judge ... must ... prevail” (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.
- 15 Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the “lawful distributor of the signal or feed” (emphasis added). The majority interpreted the legislator’s choice of the definite article “the”, underlined in the above phrase, to mean that the prohibition applies only “to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal” (para. 36). In other words, “[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding” (para. 36). Consequently, according to the majority, there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies.
- 16 The majority characterized s. 9(1)(c) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority’s view, Parliament elected to regulate merely in respect of signals transmitted by parties who are

authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription programming signal", the majority held that "the fact that a subscription program signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(c) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

17 Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the *Canadian Charter of Rights and Freedoms* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

18 Dissenting, Huddart J.A. considered the text of s. 9(1)(c) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted programming signals ... regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most ... provides support for a less inclusive interpretation of s. 9(1)(c) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

19 For one, “the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament” (para. 55). As well, the more restrictive reading of s. 9(1)(c) “ignores the broader policy objective” of the governing regulatory scheme, this being “the maintenance of a distinctively Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger” (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that “[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. ... Yet only Canada can control the reception of foreign signals in Canada” (para. 50).

20 Huddart J.A. declined the respondents’ invitation to read s. 9(1)(c) in a manner that “respect[s] section 2(b) of the *Charter*” (para. 57), relying on *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, in this regard. She then concluded (at para. 58):

In summary, I am not persuaded the line of cases on which the chambers judge relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(c), taken alone, provide a clear basis for the determination of Parliament’s intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the *Act* within that scheme, and with the scheme of the *Act* itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view

explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in *R. v. Love* [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

V. Issues

21 This appeal raises three issues:

1. Does s. 9(1)(c) of the *Radiocommunication Act* create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?
2. Is s. 9(1)(c) of the *Radiocommunication Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
3. If the answer to the above question is “yes”, can the statutory provision be justified pursuant to s. 1 of the *Charter*?

VI. Analysis

A. *Introduction*

22 It is no exaggeration to state that s. 9(1)(c) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an

absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (1995), 106 Man. R. (2d) 37 (Q.B.) (*sub nom. R. v. O'Connor*), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.) (*sub nom. King v. Canada (Attorney General)*); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd [1998] A.J. No. 628 (QL) (Q.B.) (*sub nom. R. v. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at p. 2034.

- 23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001 (*sub nom. R. v. D'Argy*); *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000;

R. v. Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(c). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(c). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s.

9(1)(c) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

- B. *Does Section 9(1)(c) of the Radiocommunication Act Create an Absolute Prohibition Against Decoding, Followed by a Limited Exception, or Does it Allow all Decoding, Except for Those Signals for Which There Is a Lawful Distributor who Has not Granted its Authorization?*

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and*

Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article “Statute Interpretation in a Nutshell” (1938), 16 *Can. Bar Rev.* 1, at p. 6, “words, like people, take their colour from their surroundings”. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger’s principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter”. (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

28 Other principles of interpretation — such as the strict construction of penal statutes and the “*Charter* values” presumption — only receive application

where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the “*Charter* values” principle later in these reasons.)

29 29 What, then, in law is an ambiguity? To answer, an ambiguity must be “real” (*Marcotte, supra*, at p. 115). The words of the provision must be “reasonably capable of more than one meaning” (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the “entire context” of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.’s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: “It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids” (emphasis added), to which I would add, “including other principles of interpretation”.

30 For this reason, ambiguity cannot reside in the mere fact that several courts -
- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of

decisions supporting competing interpretations and then apply that which receives the “higher score”, it is not appropriate to take as one’s starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if “the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning” (Willis, *supra*, at pp. 4-5).

(2) Application to this Case

- 31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (*Chieu, supra*, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters are “encrypted” under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not “lawful distributors” under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay “a subscription fee or other charge” for unscrambled reception. Finally, I note that the “encrypted network feed” portion of s. 9(1)(c) is not relevant on these facts and can be ignored for the purposes of analysis.

(a) *Grammatical and Ordinary Sense*

32 In its basic form, s. 9(1)(c) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

No person shall

...

- (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

Il est interdit :

...

- c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau;
[Emphasis added.]

The provision opens with the announcement of a broad prohibition (“No person shall”), follows by announcing the nature (“decode”) and object (“an encrypted subscription programming signal”) of the prohibition, and then announces an exception to it (“otherwise than under and in accordance with an authorization from the lawful distributor”). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in *Pearlman*, *supra*, at p. 2031).

33 The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(c) is directed towards the reception side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute’s having an extra-territorial reach. In the present

case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

34 The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(c) is the decoding of “an encrypted subscription programming signal” (in French, “un signal d’abonnement”) (emphasis added). The usage of the indefinite article here is telling: it signifies “one, some [or] any” (*Canadian Oxford Dictionary* (1998), at p. 1). Thus, what is prohibited is the decoding of any encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of “subscription programming signal” suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act defines that term as, “radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge” (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in *Branton*, *supra*, at para. 26, “that the wording ‘or elsewhere’ is limited to the type of situation contemplated in s. 3(3)” of the Act. Section 3(3) reads:

3. ...

(3) This Act applies within Canada and on board

(a) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

- (b) any spacecraft that is under the direction or control of
 - (i) Her Majesty in right of Canada or a province,
 - (ii) a citizen or resident of Canada, or
 - (iii) a corporation incorporated or resident in Canada; and
- (c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of “subscription programming signal”. Section 3(3) specifies the geographic scope of the *Radiocommunication Act* and all its constituent provisions, as is confirmed by the marginal note accompanying the subsection, which states “Geographical application”. To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(a) through (c) could potentially be subject to liability for unlawful decoding under s. 9(1)(c); in this way, s. 3(3) addresses the “where” question. On the other hand, the definition of “subscription programming signal” provides meaning to the s. 9(1)(c) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the “what” question. These are two altogether separate issues.

37 Furthermore, it was not necessary for Parliament to include the phrase “or elsewhere” in the s. 2 definition if it merely intended “subscription programming signal” to be interpreted as radiocommunication intended for

direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words “or elsewhere” were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that “[t]he legislator does not speak in vain” (*Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). Parliament has provided express direction to this effect through its enactment of s. 10 of the *Interpretation Act*, which states in part that “[t]he law shall be considered as always speaking”. In any event, “or elsewhere” (“*ou ailleurs*”, in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

- 38 In my opinion, therefore, the definition of “subscription programming signal” encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament did in fact choose language in s. 9(1)(c) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, “otherwise than under and in accordance with an

authorization from the lawful distributor of the signal or feed”. I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(c) (“the signal”), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words “lawful distributor” confirms that the provision “is only intended to operate where there is a lawful distributor”. Finally, the respondents draw to our attention the French language version of the provision, and particularly the word “*leur*” that modifies “*distributeur légitime*”: a number of cases considering the French version of s. 9(1)(c) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in *Thériault*, *supra*, at p. 2739; *Gregory Électronique*, *supra*, at paras. 24-26; and *S.D.S. Satellite*, *supra*, at p. 7. See also *Branton*, *supra*, at para. 25).

40 I do not agree with these opinions. The definite article “the” and the possessive adjective “*leur*” merely identify the party who can authorize the decoding in accordance with the exception (see *Pearlman*, *supra*, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that “[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding”, I cannot see how it necessarily follows that decoding unregulated signals “cannot therefore be in breach of the *Radiocommunication Act*” (par. 36).

Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman, supra*, at p. 2031: [TRANSLATION] “To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author.”

41 In my view, the definite articles are used in the exception portion of s. 9(1)(c) in order to identify from amongst the genus of signals captured by the prohibition (any encrypted subscription programming signal) that species of signals for which the rule is “otherwise”. Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for the (definite) particular signal that is decoded, the person has received authorization from the (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

42 Although I have already stated that the U.S. DTH distributors in the present case are not “lawful distributors” under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a “lawful distributor” of an encrypted subscription programming signal is “a person who has the lawful right in Canada to transmit it and authorize its decoding”. In this connection, the fact that a person is authorized to

transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase “lawful right” (“*légitimement autorisée*”) comprehends factors in addition to licences granted by the CRTC. In defining “lawful distributor”, Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(c)) or a Minister’s licence (s. 5(1)(a)). Instead, it deliberately chose broader language. I therefore agree with the opinion of Létourneau J.A. in the Federal Court of Appeal decision in *Norsat, supra*, at para. 4, that

[t]he concept of “lawful right” refers to the person who possesses the regulatory rights through proper licensing under the *Act*, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of “broadcasting” under the *Broadcasting Act* (i.e., where the transmitted programming is “made solely for performance or display in a public place”) and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a “lawful distributor” for the purposes of the *Radiocommunication Act*.

43 In the end, I conclude that when the words of s. 9(1)(c) are read in their grammatical and ordinary sense, taking into account the definitions

provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

(b) *Broader Context*

44 Although the *Radiocommunication Act* is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorization to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada".

These same authors note at p. 3.17 that:

The *Radiocommunication Act* embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

45 The *Broadcasting Act* came into force in 1991, in an omnibus statute that also brought substantial amendments to the *Radiocommunication Act*, including the addition thereto of s. 9(1)(c). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian

public. Of note for the present appeal is that the definition of “broadcasting” in the *Broadcasting Act* captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The *Broadcasting Act* also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(a) through (t)). The emphasis of the Act, however, is placed on broadcasting and not reception.

46 Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in *Knibb*, *supra*, at paras. 38-39, which was adopted by Gibson J. in the Federal Court, Trial Division decision in *Norsat*, *supra*, at para. 35:

The *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and consideration must be given to each statute’s roll [*sic*] in the overall scheme. [Cite to R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 286.]

The addition of s. 9(1)(c), (d) and (e) and other sections to the *Radiocommunication Act* through the provisions of the *Broadcasting Act*, 1991 are supportive of that approach in my view. Subsections 9(1)(c), (d) and (e) of the *Radiocommunication Act* must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

47 Canada’s broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the

programming offered through the broadcasting system is “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty”. Sections 3(1)(d) and 3(1)(t) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that “the Canadian broadcasting system constitutes a single system” best regulated and supervised “by a single independent public authority”.

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(c). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep all of that aside? What purpose would have been served?

49 On the other hand, the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the *Broadcasting Act*. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single

- system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.
- 50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception. As I have noted above, the concept of “lawful right” in the definition of “lawful distributor” incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorize decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.
- 51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster

DIRECTV has advocated the same interpretation of s. 9(1)(c) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

52 I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(c) and 21(1)(d) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, “Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals” (1993), 3 *M.C.L.R.* 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(a) and 18(6) of the *Radiocommunication Act* both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

(c) *Section 9(1)(c) as a “Quasi-Criminal” Provision*

53 I wish to comment regarding the respondents’ argument regarding the penal effects that the “absolute prohibition” interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who “has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)”) and does not therefore directly engage the penal aspects of the *Radiocommunication Act*, the respondents direct our attention to ss. 10(1)(b) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(c). Respondents’ counsel argued before us that, if s. 9(1)(c) is interpreted in the manner suggested by the appellant, “hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute” and that “the effect of [the appellant’s] submissions is to criminalize subscribers even if they pay every cent to which DIRECTV is entitled”. The thrust of the respondents’ submission is that the presence of ss. 10(1)(b) and 10(2.1) in the *Radiocommunication Act* provides context that is important to the interpretation of s. 9(1)(c), and that this context militates in favour of the respondents’ position.

54 Section 9(1)(c) does have a “dual aspect”, in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances “give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9” (emphasis added), and allows for a “lawful excuse” defence. Section 10(2.5) further provides that “[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence”. Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

(d) *Conclusion*

55 After considering the entire context of s. 9(1)(c), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the

signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

B. *The Constitutional Questions*

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74, mandates that constitutional questions be stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49, *per* L’Heureux-Dubé J.; see also B. A. Crane and H. S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted “wide latitude” by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71; *Corbiere*, *supra*, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 643-44, *per* Cory J.). Like many general rules, however, this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, *supra*; *Idziak*, *supra*; *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 69, leave to appeal refused January 24, 2002, [2002] 1 S.C.R. vii.

59 In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: *Bisaillon*, *supra*; *Crane and Brown*, *supra*, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, “[t]his policy ... is of particular importance in constitutional matters” (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1580; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *R. v. Mills*, [1999] 3 S.C.R. 668, at

para. 38, *per* McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 357: “The procedural requirements of Rule 32 of the *Supreme Court Rules* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record” (emphasis added).

60 Respondents’ counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions.

Rather, he argued that “*Charter* values” must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, *per* McIntyre J.; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86, *per* Iacobucci and Arbour JJ.; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at paras. 18-19. One must keep in

mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role *vis-à-vis* statute law.

62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that “it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not” (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a “*Charter* values” interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

63 This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558, *per* L’Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771, *per* McLachlin J. (as she then was); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *Mossop*, *supra*, at pp. 581-82, *per* Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439, at

para. 66, *per* Cory J.; *Mills, supra*, at paras. 22 and 56; *Sharpe, supra*, at para. 33.

64 These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the “*Charter* values” rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:

[T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute’s constitutional validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80, *per* Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. “The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature

in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)” (*Vriend, supra*, at para. 139).

66 To reiterate what was stated in *Symes, supra*, and *Willick, supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

67 It may well be that, when this matter returns to trial, the respondents’ counsel will make an application to have s. 9(1)(c) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding

whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1.

VII. Disposition

68 In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(c) of the *Radiocommunication Act* creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

Appeal allowed with costs.

Solicitors for the appellant: Crawford, McKenzie, McLean & Wilford, Orillia and Lang Michener, Ottawa.

Solicitors for all the respondents, except Michelle Lee: Gold & Fuerst, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitors for the intervener the Canadian Motion Picture Distributors Association: Sim, Hughes, Ashton & McKay, Toronto.

Solicitors for the intervener DIRECTV, Inc.: Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Canadian Alliance for Freedom of Information and Ideas: Ian W. M. Angus, Port Hope.

Solicitors for the intervener the Congres Iberoamerican du Canada: Soloway, Wright, Ottawa.

TAB 10

**Canadian Human Rights Commission and
Donna Mowat** *Appellants*

v.

Attorney General of Canada *Respondent*

and

**Canadian Bar Association and Council of
Canadians with Disabilities** *Interveners*

**INDEXED AS: CANADA (CANADIAN
HUMAN RIGHTS COMMISSION) v.
CANADA (ATTORNEY GENERAL)**

2011 SCC 53

File No.: 33507.

2010: December 13; 2011: October 28.

Present: McLachlin C.J. and LeBel, Deschamps,
Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE FEDERAL COURT OF
APPEAL**

Administrative law — Judicial review — Standard of review — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether standard of reasonableness applicable to Tribunal's decision to award costs — Whether Tribunal made a reviewable error in awarding costs to complainant — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Administrative law — Boards and tribunals — Jurisdiction — Costs — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether Tribunal having jurisdiction to award costs — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the *Canadian Human Rights Act* (“CHRA”). The Canadian Human Rights Tribunal (“Tribunal”) concluded that M’s complaint of sexual harassment was substantiated in part and she was awarded \$4,000 to compensate for “suffering in respect

**Commission canadienne des droits de la
personne et Donna Mowat** *Appelantes*

c.

Procureur général du Canada *Intimé*

et

**Association du Barreau canadien et Conseil
des Canadiens avec déficiences** *Intervenants*

**RÉPERTORIÉ : CANADA (COMMISSION
CANADIENNE DES DROITS DE LA PERSONNE) c.
CANADA (PROCUREUR GÉNÉRAL)**

2011 CSC 53

Nº du greffe : 33507.

2010 : 13 décembre; 2011 : 28 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Adjudication des dépens à la plaignante par le Tribunal canadien des droits de la personne — La norme du caractère raisonnable s'applique-t-elle à la décision du Tribunal d'adjuger des dépens? — Le Tribunal a-t-il commis une erreur susceptible de contrôle judiciaire en adjugeant les dépens à la plaignante? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 53(2)c, d).

Droit administratif — Organismes et tribunaux administratifs — Compétence — Dépens — Adjudication des dépens à la plaignante par le Tribunal canadien des droits de la personne — Le Tribunal a-t-il le pouvoir d'adjuger des dépens? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 53(2)c, d).

M a saisi la Commission canadienne des droits de la personne d’une plainte selon laquelle les Forces canadiennes avaient fait preuve à son endroit de discrimination fondée sur le sexe et ainsi contrevenu aux dispositions de la *Loi canadienne sur les droits de la personne* (« LCDP »). Le Tribunal canadien des droits de la personne (« Tribunal ») a conclu que M avait établi en partie le bien-fondé de sa plainte de harcèlement

of feelings or self-respect”. M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to s. 53(2)(c) and (d) of the *CHRA* and awarded M \$47,000 in this regard. The Federal Court upheld the Tribunal’s decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal’s decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal’s area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of s. 53(2)(c) and (d), which authorize the Tribunal to “compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice” permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal’s interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words “any expenses incurred by the victim” taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected

sexuel et il lui a accordé la somme de 4 000 \$ pour préjudice moral. M a demandé le remboursement de ses frais de justice. Estimant que les al. 53(2)(c) et (d) de la *LCDP* lui conféraient le pouvoir d’adjuger des dépens, le Tribunal a fait droit à la demande de M en lui accordant 47 000 \$ à ce titre. La Cour fédérale a confirmé que le Tribunal avait le pouvoir d’adjuger des dépens, mais la Cour d’appel fédérale a accueilli le pourvoi formé contre cette décision, statuant que le Tribunal n’avait pas ce pouvoir.

Arrêt : Le pourvoi est rejeté.

Un tribunal administratif a droit en principe à la déférence en ce qui concerne l’interprétation de sa loi constitutive et des règles de droit qui s’y rattachent de près. Toutefois, les questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d’expertise de l’organisme juridictionnel sont assujetties à la norme de la décision correcte. La norme applicable à la décision du Tribunal d’adjuger des dépens à la plaignante après que celle-ci eut obtenu gain de cause est celle de la décision raisonnable. La question de savoir si le Tribunal peut adjuger des dépens constitue une question de droit qui relève essentiellement du mandat et de l’expertise du Tribunal liés à l’interprétation et à l’application de sa loi constitutive. Elle ne représente ni une question de compétence ni une question de droit d’une importance capitale pour le système juridique dans son ensemble, étrangère au domaine d’expertise du Tribunal au sens de l’arrêt *Dunsmuir*.

La question d’interprétation précise dont était saisi le Tribunal était celle de savoir si les mots employés aux al. 53(2)(c) et (d) pour l’autoriser à « indemniser la victime [...] des dépenses entraînées par l’acte [discriminatoire] » confèrent le pouvoir d’adjuger des dépens. L’examen du texte des dispositions, de leur contexte et de leur objet révèle que l’interprétation du Tribunal n’était pas raisonnable. Une loi relative aux droits de la personne exprime des valeurs essentielles et vise la réalisation d’objectifs fondamentaux. Il convient de l’interpréter libéralement et téléologiquement de manière à reconnaître sans réserve les droits qui y sont énoncés et à leur donner pleinement effet. Il faut néanmoins respecter l’intention du législateur qui se dégage des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s’harmonise avec l’esprit de la Loi et son objet. Considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l’acte » sont suffisamment larges pour englober les dépens. Or, lorsque ces mots sont considérés dans le contexte de la loi, on ne peut pas raisonnablement les

to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the *CHRA*, the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in s. 53(3).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration)*

interpréter de manière à créer une catégorie distincte d'indemnité susceptible de viser tout type de débours ayant un lien de causalité avec l'acte discriminatoire. L'interprétation retenue par le Tribunal va à l'encontre de la présomption d'absence de tautologie qu'établissent les règles d'interprétation législative, rend superflue la répétition du mot « dépenses » et n'explique pas le rattachement de ce terme à l'indemnité visée à ces alinéas. Qui plus est, le terme « dépens » possède un sens bien défini qui diffère de celui d'indemnité ou de dépenses. Si le législateur a entendu conférer le pouvoir d'adjudger des dépens, on comprend mal pourquoi il n'a pas employé ce terme juridique consacré et largement répandu pour le faire. L'historique de la *LCDP*, l'opinion de la Commission concernant son pouvoir d'adjudger des dépens et l'examen des lois comparables adoptées par les provinces donnent aussi sérieusement à penser que le Tribunal n'est pas habilité à adjudger des dépens. Enfin, l'interprétation que retient le Tribunal l'autorise à indemniser le préjudice moral de manière distincte, d'une part, et à adjudger des dépens dont le montant peut être illimité, d'autre part. Il est difficile de concilier cette interprétation avec la limitation de l'indemnité pour préjudice moral ou le fait que le par. 53(3) ne prévoit pas expressément le pouvoir d'accorder le remboursement des frais.

Nulle interprétation raisonnable des dispositions pertinentes n'appuie la conclusion selon laquelle le Tribunal peut adjudger des dépens au plaignant qui a gain de cause. Aux prises avec une question difficile d'interprétation législative et une jurisprudence contradictoire, le Tribunal a retenu la définition de « dépense » figurant au dictionnaire et il a formulé ce qu'il tenait pour une solution bénéfique sur le plan des principes au lieu d'entreprendre une démarche d'interprétation fondée sur le texte, le contexte et l'objet des dispositions en cause. On ne saurait substituer à l'analyse textuelle et contextuelle une interprétation libérale et téléologique dans le seul but de donner effet à une autre décision de principe que celle prise par le législateur.

Jurisprudence

Arrêt appliqué : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **arrêts critiqués :** *Canada (Procureur général) c. Thwaites*, [1994] 3 C.F. 38; *Canada (Procureur général) c. Stevenson*, 2003 CFPI 341 (CanLII); *Canada (Procureur général) c. Brooks*, 2006 CF 500 (CanLII); **arrêts mentionnés :** *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*,

v. *Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *M. v. H.*, [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

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An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals, Bill C-72, 1st Sess., 30th Parl., 1975, s. 37(4).

[1987] 1 R.C.S. 1114; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Gould c. Yukon Order of Pioneers*, [1996] 1 R.C.S. 571; *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61; *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831; *Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *Hilewitz c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 57, [2005] 2 R.C.S. 706; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; *M. c. H.*, [1999] 2 R.C.S. 3; *Will-Kare Paving & Contracting Ltd. c. Canada*, 2000 CSC 36, [2000] 1 R.C.S. 915; *Harel c. Sous-ministre du Revenu du Québec*, [1978] 1 R.C.S. 851; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614; *Morguard Properties Ltd. c. Ville de Winnipeg*, [1983] 2 R.C.S. 493; *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764.

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Admin. L.R. (4th) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Philippe Dufresne and Daniel Poulin, for the appellant the Canadian Human Rights Commission.

Andrew Raven, Andrew Astritis and Bijon Roy, for the appellant Donna Mowat.

Peter Southey and Sean Gaudet, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and Paul Champ, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LEBEL AND CROMWELL JJ. —

I. Overview

[1] The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“CHRA” or “Act”), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and “for any expenses incurred by the victim as a result of the discriminatory practice” (s. 53(2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for “any expenses incurred by the victim as a result of the discriminatory practice” permits it to order payment of all or a portion of the victim’s legal costs.

[2] The Tribunal’s decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal’s decision was incorrect (2009 FCA

Admin. L.R. (4th) 127, [2008] A.C.F. n° 143 (QL), 2008 CarswellNat 200. Pourvoi rejeté.

Philippe Dufresne et Daniel Poulin, pour l’appelante la Commission canadienne des droits de la personne.

Andrew Raven, Andrew Astritis et Bijon Roy, pour l’appelante Donna Mowat.

Peter Southey et Sean Gaudet, pour l’intimé.

Reidar M. Mogerman, pour l’intervenante l’Association du Barreau canadien.

David Baker et Paul Champ, pour l’intervenant le Conseil des Canadiens avec déficiences.

Version française du jugement de la Cour rendu par

LES JUGES LEBEL ET CROMWELL —

I. Vue d’ensemble

[1] Le Tribunal canadien des droits de la personne peut ordonner à l’auteur d’un acte discriminatoire contraire à la *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6 (« LCDP » ou « Loi ») d’indemniser la victime des pertes de salaire et des frais supplémentaires occasionnés par le recours à d’autres biens, services, installations ou moyens d’hébergement, ainsi que « des dépenses entraînées par l’acte » (par. 53(2)). La principale question à trancher en l’espèce est celle de savoir si, en décidant que ce pouvoir d’ordonner l’indemnisation de la victime « des dépenses entraînées par l’acte [discriminatoire] » lui permettait également d’ordonner le paiement total ou partiel des dépens de la victime, le Tribunal a commis une erreur susceptible de contrôle judiciaire.

[2] Saisie d’une demande de contrôle judiciaire, la Cour fédérale a appliqué la norme de la décision raisonnable et a confirmé la décision du Tribunal selon laquelle il possédait ce pouvoir (2008 CF 118, 322 F.T.R. 222). La Cour d’appel fédérale a toutefois annulé la décision au motif que la norme de contrôle applicable était celle de la décision

309, [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal's decision should be reviewed on the reasonableness standard, its decision was unreasonable.

[3] Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal's award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

[4] The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal's decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal's decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

[5] The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54 C.H.R.R. D/21 (the "merits decision"), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant's co-workers which she alleged were sexually

correcte et que la décision du Tribunal était incorrecte (2009 CAF 309, [2010] 4 R.C.F. 579). Elle a également estimé que même au regard de la norme de la décision raisonnable, la décision du Tribunal était déraisonnable.

[3] M^{me} Mowat n'a pas pris part à l'instance en Cour d'appel fédérale, mais elle demande aujourd'hui à notre Cour de rétablir la décision du Tribunal. La Commission canadienne des droits de la personne, qui n'a pas été partie aux instances devant le Tribunal et la Cour fédérale, mais qui est intervenue en Cour d'appel fédérale, se constitue aujourd'hui partie appelante aux côtés de M^{me} Mowat. (Dans les présents motifs, « appelante » s'entend de M^{me} Mowat, et « Commission », de la Commission canadienne des droits de la personne.)

[4] Le pourvoi formé devant notre Cour soulève la question préliminaire de la norme de contrôle judiciaire qu'il convient d'appliquer à la décision du Tribunal, ainsi que la question principale de savoir si le Tribunal a commis une erreur susceptible de contrôle judiciaire lorsqu'il a conclu qu'il avait le pouvoir d'adjuger des dépens. Nous sommes d'avis que la norme applicable est celle de la décision raisonnable et que le Tribunal a interprété de manière déraisonnable cette facette de son pouvoir d'accorder réparation. Nous sommes par conséquent d'avis de rejeter le pourvoi.

II. Faits à l'origine de l'instance

[5] En 1995, après avoir exercé pendant 14 ans la fonction de technicienne des mouvements, M^{me} Mowat a fait l'objet d'une libération obligatoire des Forces canadiennes. Au cours de sa carrière militaire, l'appelante a présenté un grand nombre de plaintes et de griefs en bonne et due forme, notamment contre des membres de sa chaîne de commandement. Bon nombre de ces plaintes et de ces griefs ont été soumis à l'état-major de la Défense — le palier le plus élevé de règlement des griefs au sein des Forces canadiennes —, mais aucun n'a été jugé fondé (2005 TCDP 31, 54 C.H.R.R. D/21 (la « décision sur le fond », par. 20, 81-82, 94, 143, 193, 207-208, 216, 218, 231, 236, 286, 294, 297 et 299). Les Forces canadiennes ont ouvert une

harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant's Commanding Officer and the employee responsible was disciplined (paras. 83-87).

[6] However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to ss. 7 and 14 of the *CHRA*. The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

[7] The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was “marked by a fundamental lack of precision in identifying the theory of the . . . case” and referred to the allegations as a “conspiracy theory” and a “scatter-shot complaint with the allegations all over the place” (merits decision, at paras. 4, 357 and 408).

[8] However, the presiding Tribunal member concluded that the appellant's complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military's response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

enquête interne au sujet des propos d'un collègue de travail qui, de l'avis de l'appelante, constituaient du harcèlement sexuel à son endroit. Il a été conclu qu'il s'agissait effectivement de harcèlement sexuel (par. 303). Les recommandations formulées dans les quelques rapports établis à la suite des incidents ont été suivies par le commandant de l'appelante, et des mesures disciplinaires ont été prises contre le collègue visé par la plainte (par. 83-87).

[6] Cependant, en 1998, trois ans après son départ des Forces armées, l'appelante a saisi la Commission, sur le fondement des art. 7 et 14 de la *LCDP*, d'une plainte alléguant le harcèlement sexuel, la distinction défavorable en cours d'emploi et le refus de continuer de l'employer en raison de son sexe. L'affaire a finalement été portée devant le Tribunal canadien des droits de la personne.

III. Historique judiciaire

A. *Tribunal canadien des droits de la personne, 2005 TCDP 31, 54 C.H.R.R. D/21*

[7] Le Tribunal a consacré six semaines à l'audition de l'affaire, et son dossier comptait au moins 4 000 pages de transcription de témoignages et plus de 200 pièces. Son président et membre instructeur, J. Grant Sinclair, critique sévèrement la conduite de l'appelante pendant le déroulement de l'instance. Il fait observer que la plainte est « marquée par un manque fondamental de précision de la part de la plaignante quant à sa thèse », ses allégations relevant de la « théorie de la conspiration », et il déplore qu'il s'agisse d'une « plainte diffuse qui comporte des allégations décousues » (décision sur le fond, par. 4, 357 et 408).

[8] Il conclut toutefois que l'appelante a établi en partie le bien-fondé de sa plainte. À son avis, l'allégation de harcèlement sexuel, consécutive aux propos tenus par son collègue de travail à trois reprises, est prouvée, et il ajoute que les Forces armées n'ont pas pris de mesures adéquates ou conformes à leurs politiques (par. 42, 47, 49 et 312-322). Les autres allégations sont rejetées.

[9] The Tribunal awarded \$4,000 (plus interest, taking the award to the maximum of \$5,000, the statutory limit at the time), to compensate the appellant for “suffering in respect of feelings or self-respect” (para. 7). It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than \$196,000. At issue was whether the Tribunal’s authority to award a complainant “any expenses incurred by the victim as a result of the discriminatory practice” under s. 53(2)(c) and (d) of the *CHRA* includes the authority to award legal costs.

[10] In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs (2006 CHRT 49 (CanLII) (the “costs decision”)). Without recovery of legal costs, he found, any victory would be “pyrrhic” (para. 29). He then awarded \$47,000 in partial satisfaction of Ms. Mowat’s legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review — Federal Court of Canada, 2008 FC 118, 322 F.T.R. 222*

[11] The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the “core” of its expertise

[9] Le Tribunal accorde à l’appelante la somme de 4 000 \$ qui, majorée de l’intérêt, atteint 5 000 \$, soit le maximum alors prévu par la loi pour le préjudice moral (par. 7). Il conclut à l’application des dispositions de la Loi qui étaient en vigueur au moment où M^{me} Mowat a déposé sa plainte et à la non-rétroactivité des modifications substantielles apportées en 1998 (par. 399-401). Il demande ensuite à l’appelante de lui présenter des observations complémentaires au sujet des dépens réclamés s’élevant au total à plus de 196 000 \$. Il lui fallait décider si le pouvoir du Tribunal d’indemniser la victime « des dépenses entraînées par l’acte [discriminatoire] » conféré aux al. 53(2)c) et d) de la *LCDP* comprenait celui d’adjuger des dépens.

[10] Dans une décision distincte, après examen de la jurisprudence contradictoire de la Cour fédérale et des considérations de principe favorables au paiement des frais de justice, le membre instructeur Sinclair s’estime investi du pouvoir d’adjuger des dépens (2006 TCDP 49 (CanLII) (la « décision relative aux dépens »)). Il conclut que le plaignant qui aurait gain de cause sans pouvoir recouvrer ses dépens remporterait une victoire fort « coûteuse » (par. 29). Il accorde alors à M^{me} Mowat 47 000 \$ pour ses frais juridiques, un montant qu’il établit en fonction du nombre d’éléments de preuve présentés à l’appui de l’allégation de harcèlement sexuel — dont le bien-fondé est reconnu — par rapport au reste de la preuve offerte à l’appui des allégations rejetées.

B. *Contrôle judiciaire — Cour fédérale du Canada, 2008 CF 118 (CanLII)*

[11] Le procureur général du Canada a demandé le contrôle judiciaire de la décision relative aux dépens, mais l’appelante n’a pas pris part à l’instance. Examinant en premier lieu la question de la norme de contrôle, le juge Mandamin applique les quatre facteurs formulés dans l’arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1998] 1 R.C.S. 982, puis il se livre à une analyse pragmatique et fonctionnelle pour retenir la norme de la décision raisonnable *simpliciter*. Il considère qu’une

(para. 24). He also relied upon the “human rights policy approach to statutory interpretation” (para. 41), purportedly arising from this Court’s decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal’s decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the \$47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. Federal Court of Appeal, 2009 FCA 309, [2010] 4 F.C.R. 579

[12] The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal’s expertise and of central importance to the legal system (para. 42). The Tribunal’s human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

[13] The Federal Court of Appeal went on to conclude that the Tribunal’s decision to award legal

question de droit est en litige, mais il fait observer que le Tribunal s’est livré à une interprétation de sa loi constitutive sur un sujet qui « touche au cœur même » de son expertise (par. 24). Il invoque également « [l]’approche stratégique en matière de droits de la personne à l’interprétation [des lois] » (par. 41) censée découler de l’arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, pour étayer son analyse et justifier l’existence d’un régime partial d’adjudication des dépens. Dès lors s’impose une interprétation à la fois large et téléologique de la *LCDP*, adaptée à ses objectifs réparateurs et à sa nature particulière. Le juge Mandamin conclut ensuite que la décision du Tribunal sur son pouvoir d’adjuger des dépens est raisonnable (par. 40). Il estime toutefois que le membre instructeur n’a pas bien expliqué sa démarche pour arriver au montant de 47 000 \$, ce qui constitue un manquement à l’obligation d’équité procédurale. Il annule donc la décision et renvoie le dossier au Tribunal pour ce motif. Ce volet de l’affaire n’a pas été porté en appel, de sorte qu’il ne fait pas l’objet du présent pourvoi.

C. Cour d’appel fédérale, 2009 CAF 309, [2010] 4 R.C.F. 579

[12] Le procureur général du Canada s’est tourné vers la Cour d’appel fédérale, qui a accueilli son appel à l’unanimité, statuant que le Tribunal n’avait pas le pouvoir d’adjuger des dépens. La juge Layden-Stevenson applique les principes relatifs à la norme de contrôle énoncés par notre Cour dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, un arrêt rendu après l’audience en Cour fédérale. Elle arrête son choix sur la norme de la décision correcte pour la raison principale que le litige porte sur une question de droit à la fois étrangère au domaine d’expertise du Tribunal et d’une importance capitale pour le système juridique dans son ensemble (par. 42). La question, qui commande une réponse certaine et cohérente, ne fait pas intervenir l’expertise du Tribunal en matière de droits de la personne (par. 47).

[13] La Cour d’appel fédérale conclut ensuite que la décision du Tribunal d’adjuger des dépens est

costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the *CHRA* did not allow for costs recovery (paras. 68 and 90). Further, “costs” is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal’s award of legal costs should be set aside (para. 96).

IV. Analysis

A. *The Issues*

[14] As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under s. 53(2)(c) and (d) of the Act?
2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

incorrecte. Après un examen approfondi de la jurisprudence contradictoire du Tribunal et de la Cour fédérale sur ce point, la juge Layden-Stevenson se penche sur l’historique de la disposition en cause et conclut qu’il témoigne de l’intention manifeste du législateur d’écarter l’adjudication des dépens et de conférer un rôle plus actif à la Commission (par. 65-67 et 88). La juge fait observer que dans un rapport spécial au Parlement, la Commission reconnaît elle-même que la *LCDP* ne permet pas à une partie de recouvrer ses dépens (par. 68 et 90). Elle ajoute que le mot « dépens » est un terme technique propre au domaine juridique (par. 76) et que le pouvoir d’accorder des dépens doit être conféré par la loi (par. 78). Elle se fonde également sur l’analyse comparative de lois équivalentes sur les droits de la personne applicables dans d’autres ressorts canadiens. Bon nombre de ces lois mentionnent expressément le pouvoir d’adjudger des dépens en plus de celui d’ordonner le remboursement des dépenses (par. 70-74 et 84-87). En conclusion, la juge Layden-Stevenson estime qu’aucune considération de politique générale, non plus que l’usage d’une méthode d’interprétation libérale et téléologique, ne justifierait la neutralisation de l’intention manifeste du législateur (par. 99-100). Elle explique qu’il vaut mieux laisser au législateur le soin de décider de conférer ou non au Tribunal le pouvoir d’adjudger des dépens (par. 101). Elle fait observer que même au regard de la norme de la décision raisonnable, il y a lieu d’annuler la décision du Tribunal relative à l’adjudication des dépens (par. 96).

IV. Analyse

A. *Questions en litige*

[14] Comme nous le signalons précédemment, le présent pourvoi soulève deux questions :

1. Quelle norme de contrôle judiciaire s’applique à la décision du Tribunal concernant son pouvoir d’adjudger des dépens sur le fondement des al. 53(2)c) et d) de la Loi?
2. Le Tribunal a-t-il commis une erreur susceptible de contrôle judiciaire lorsqu’il a conclu qu’il pouvait accorder une indemnité pour les dépens?

B. *The Dunsmuir Analysis*

[15] In *Dunsmuir and Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

[16] *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review” (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

B. *Analyse au regard de l'arrêt Dunsmuir*

[15] Dans les arrêts *Dunsmuir* et *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, la Cour simplifie une démarche analytique jugée ardue par les tribunaux. Estimant que la distinction entre la norme de la décision manifestement déraisonnable et celle de la décision raisonnable *simpliciter* est illusoire, les juges majoritaires suppriment la norme de la décision manifestement déraisonnable et concluent qu'il ne doit y avoir désormais que deux normes de contrôle : celles de la décision correcte et de la décision raisonnable.

[16] Dans *Dunsmuir*, la Cour consacre la démarche en deux étapes qui permet d'arrêter la norme de contrôle applicable : l'analyse relative à la norme de contrôle. Premièrement, la cour saisie « vérifie si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, elle entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle » (par. 62). L'analyse doit demeurer axée sur la nature de la question soumise au tribunal administratif en cause (*Khosa*, par. 4, le juge Binnie). Les facteurs dont il doit être tenu compte pour déterminer si, dans un cas donné, la déférence s'impose à l'endroit du tribunal administratif sont les suivants : l'existence d'une disposition d'inattaquabilité (ou « *clause privative* » dans le vocabulaire juridique traditionnel), l'existence d'un régime administratif distinct et particulier dans le cadre duquel le décideur possède une expertise spéciale et la nature de la question de droit (*Dunsmuir*, par. 55). La Cour reconnaît que la déférence est généralement de mise lorsque le tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie. La déférence peut également s'imposer lorsque le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé (*Dunsmuir*, par. 54; *Khosa*, par. 25).

[17] *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

[18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

[19] Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and

[17] Dans l'arrêt *Dunsmuir*, notre Cour nuance la jurisprudence antérieure sur les dispositions d'inattaquabilité en reconnaissant que celles-ci, qui ont longtemps permis de soustraire les décisions administratives au contrôle judiciaire, peuvent donner lieu à l'application d'une norme déférente. Mais leur présence ou leur absence ne sont plus déterminantes quant à savoir si la déférence s'impose ou non à l'endroit du tribunal administratif (*Dunsmuir*, par. 52). Dans l'arrêt *Khosa*, les juges majoritaires de notre Cour confirment qu'indépendamment de l'existence d'une disposition d'inattaquabilité, une certaine déférence s'impose à l'égard du tribunal administratif dans une affaire ayant trait au rôle, à la fonction et à l'expertise propres à ce décideur (par. 25-26).

[18] L'arrêt *Dunsmuir* reconnaît que la norme de la décision correcte continue de s'appliquer aux questions constitutionnelles, aux questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur, ainsi qu'aux questions portant sur la « délimitation des compétences respectives de tribunaux spécialisés concurrents » (par. 58, 60-61; voir également l'arrêt *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 26, le juge Fish). La norme de la décision correcte vaut aussi pour les questions touchant véritablement à la compétence. À cet égard, la Cour se distancie expressément des définitions larges de la compétence de façon qu'une question se rapportant à celle-ci se pose uniquement lorsque le tribunal administratif « doit déterminer expressément si les pouvoirs dont le législateur l'a investi l'autorisent à trancher une question » (par. 59; voir également l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, par. 5).

[19] Après l'énoncé des principes applicables à l'analyse que commande le contrôle judiciaire, notre examen doit maintenant porter sur la façon dont ces principes doivent être appliqués à la décision du Tribunal. Ainsi que le recommande la Cour dans l'arrêt *Dunsmuir*, il faut d'abord s'intéresser à

of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed. Generally speaking, the reviewing courts have shown deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif* (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

[20] Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554), or what constituted a "service customarily available to the public" or "public service" under the provincial

la jurisprudence relative aux décisions du Tribunal et à celles d'organismes apparentés auxquels il incombe de statuer sur des plaintes en matière de droits de la personne. Au fil des ans, une abondante jurisprudence s'est constituée sur la question des normes de contrôle applicables à ces décisions. En règle générale, les juridictions de révision défèrent aux conclusions de fait des tribunaux des droits de la personne (P. Garant, *Droit administratif* (6^e éd. 2010), p. 553). Par contre, elles font preuve de peu de déférence envers ces mêmes tribunaux lorsqu'ils interprètent la loi, y compris leur propre loi habilitante. Il est bien connu que les cours de justice font traditionnellement preuve de respect vis-à-vis des organismes administratifs chargés de l'application de régimes administratifs complexes dans certains domaines comme les relations de travail, les télécommunications, la réglementation des marchés financiers et les relations économiques internationales (*National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1339 et 1341, la juge Wilson, et p. 1369-1370, le juge Gonthier). En revanche, les juridictions de révision ne se montrent pas déférentes envers les tribunaux des droits de la personne appelés à trancher des questions de droit. À leur avis, l'expertise relative de ces tribunaux administratifs demeure minime, et les régimes qu'ils administrent ne sont pas particulièrement complexes (voir A. Macklin, « Standard of Review: The Pragmatic and Functional Test », dans C. M. Flood et L. Sossin, dir., *Administrative Law in Context* (2008), 197, p. 216).

[20] La jurisprudence de la Cour recèle plusieurs exemples. Dans l'arrêt *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103, la Cour statue qu'en l'absence d'une disposition d'inattaquabilité, la commission ou le tribunal des droits de la personne qui n'a pas de connaissances spécialisées doit interpréter la loi correctement (p. 1125-1126). Dans des décisions subséquentes, elle juge que la question de savoir si le terme « situation de famille » — un motif de distinction illicite prévu par la loi fédérale — englobe le couple homosexuel (*Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554), et celle de savoir ce

human rights legislation (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

[21] But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

[22] The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the

qu'il faut entendre par les expressions « services habituellement offerts au public » ou « services publics » employées dans les lois provinciales sur les droits de la personne (*Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Gould c. Yukon Order of Pioneers*, [1996] 1 R.C.S. 571) constituent des questions de droit à l'égard desquelles tribunaux et organismes des droits de la personne ne possèdent pas d'expertise particulière par rapport aux cours de justice et qu'elles emportent l'application de la norme de la décision correcte.

[21] Mais en raison de l'évolution récente du droit en matière de contrôle judiciaire depuis l'arrêt *Dunsmuir*, et de l'accent mis sur la déférence qui s'impose à l'endroit d'un tribunal administratif, même en ce qui concerne bon nombre de questions de droit, il nous faut déterminer si toute décision du Tribunal ou d'un organisme apparenté sur une question de droit est assujettie à la norme de la décision correcte. Nous devons ici reconnaître l'existence d'une tension entre certains des principes qui sous-tendent l'actuel régime de contrôle judiciaire lorsqu'il s'applique aux décisions d'un tribunal des droits de la personne.

[22] Cette difficulté s'explique par la nature d'un tel tribunal. D'une part, faisant fond sur la jurisprudence antérieure, les arrêts *Dunsmuir* et *Khosa* reconnaissent qu'un tribunal administratif a droit en principe à la déférence d'une cour de justice en ce qui concerne l'interprétation de sa loi constitutive et des règles de droit qui s'y rattachent de près. D'autre part, la Cour réaffirme que les questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise de l'organisme juridictionnel demeurent assujetties à la norme de la décision correcte, et ce, dans un souci de cohérence de l'ordre juridique fondamental du pays. La nature de la « loi constitutive » qu'administre un tribunal des droits de la personne rend très délicat le maintien de l'équilibre entre ces deux énoncés contradictoires. Au Canada, un volet essentiel de toute loi sur les droits de la personne énonce les principes et les règles visant à contrer la discrimination. Or, cette loi

remedial authority of human rights tribunals or commissions.

[23] There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

[24] In this case, there is no doubt that the Tribunal has the power to award compensation for "any expenses incurred by the victim as a result of the discriminatory practice" pursuant to s. 53(2)(c) and (d) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, e.g., *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

renferme aussi un grand nombre de dispositions qui ont trait, par exemple, à la preuve et à la procédure ou au pouvoir de réparation du tribunal ou de la commission des droits de la personne.

[23] Nul doute qu'un tribunal des droits de la personne est souvent appelé à se prononcer sur des questions de très large portée. Or, les mêmes questions peuvent être soulevées devant d'autres organismes juridictionnels, en particulier des cours de justice. À l'issue de l'analyse relative à la norme de contrôle proposée dans l'arrêt *Dunsmuir*, la norme applicable aux décisions sur certaines de ces questions pourrait bien être celle de la décision correcte. Mais les questions de droit générales que le Tribunal est appelé à trancher n'équivalent pas toutes à des questions d'une importance capitale pour le système juridique et elles ne sont pas toutes étrangères au domaine d'expertise de l'organisme décisionnel. Il convient d'établir les distinctions qui s'imposent, surtout en ce qui concerne le litige qu'il nous faut aujourd'hui trancher.

[24] Dans le cas qui nous occupe, le Tribunal possède sans aucun doute le pouvoir d'indemniser la victime « des dépenses entraînées par l'acte [discriminatoire] » suivant les al. 53(2)c) et d) de la Loi. Il faut alors se demander s'il pouvait adjuger des dépens à titre d'indemnité. Même si, dans *Dunsmuir*, elle ne supprime pas la catégorie des questions de compétence, la Cour juge que celles-ci appellent une interprétation stricte. Ainsi, depuis cet arrêt, des questions que certains auraient pu auparavant considérer comme des questions de compétence doivent désormais faire l'objet de l'analyse relative à la norme de contrôle afin que l'on détermine si elles sont assujetties à la norme de la décision correcte ou à celle de la décision raisonnable (voir, p. ex., *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3, par. 33-34; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, par. 28-34). En somme, lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement, et le Tribunal a droit à la déférence.

[25] The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed “a jurisdiction-limiting label, such as ‘statutory interpretation’ or ‘human rights’, to what is in reality a function assigned and properly exercised under the enabling legislation” by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal’s mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

[26] Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and

[25] La question des dépens constitue une question de droit qui relève essentiellement du mandat et de l’expertise du Tribunal liés à l’interprétation et à l’application de sa loi constitutive (*Dunsmuir*, par. 54). L’intimé prétend qu’un tribunal des droits de la personne ne possède pas d’expertise particulière en la matière. Toutefois, il faut se garder de retomber dans le formalisme antérieur qui accolait une « étiquette limitative de compétence, comme celle d’“interprétation législative” ou de “droits de la personne”, à ce qui est en réalité une fonction confiée [à un tribunal administratif] et exercée correctement [par lui] en vertu de la loi habilitante » (*Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 96, la juge Abella). La détermination des dépenses engagées par la plaignante à cause de l’acte discriminatoire dont elle a été victime demeure inextricablement liée au mandat du Tribunal et à sa compétence spécialisée qui lui permettent de tirer des conclusions de fait au chapitre de la discrimination (voir *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 112, la juge Abella; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 76, le juge LeBel). En tant qu’organisme administratif couramment appelé à tirer de telles conclusions de fait, le Tribunal se trouve bien placé pour examiner des questions se rapportant à l’indemnité dont il convient d’ordonner le versement en application du par. 53(2). De plus, on ne saurait affirmer que la décision d’un tribunal d’accorder ou non un type particulier d’indemnité, en l’occurrence des dépens, revêt une importance capitale pour le système juridique canadien dans son ensemble ni qu’elle est étrangère au domaine d’expertise du décideur. L’indemnisation intervient souvent dans des circonstances variées et en application de régimes multiples. On ne saurait dire non plus de la décision d’accorder ou non des dépens dans le cadre de cette indemnisation, ni de la détermination de leur montant, qu’elles mettraient en péril le système juridique, et ce, même si une juridiction de révision concluait que la décision est erronée.

[26] Assujettir l’octroi de dépens à la norme de la décision correcte irait à l’encontre de *Dunsmuir* et de

from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

[27] In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

C. Reasonableness of the Decision

[28] In *Dunsmuir*, the majority of this Court described reasonableness as

notre récent arrêt *Smith*. Il convient de faire observer que le contexte factuel de cette dernière affaire était à la fois complexe et considérable. La Cour devait en effet décider si le tribunal administratif investi du pouvoir de trancher tout litige consécutif à l'expropriation forcée d'un terrain et d'indemniser l'exproprié de « tous les frais, notamment de procédure et d'évaluation » entraînés par l'exercice du recours, pouvait accorder les frais et dépens afférents aux instances connexes qui, à son avis, avaient été nécessaires à l'obtention de l'indemnité d'expropriation. Au nom des juges majoritaires de la Cour, le juge Fish conclut que la décision relative aux frais et dépens est assujettie à la norme de la décision raisonnable étant donné que le tribunal interprète une disposition de sa loi constitutive portant sur l'adjudication des dépens et que « [l]es décisions à cet égard sont invariablement tributaires des faits et ont en règle générale un caractère discrétionnaire » (par. 30). À son avis, le texte de la loi traduit la volonté du législateur de confier à ce seul tribunal le soin de déterminer la nature et le montant des frais qu'il convient d'accorder, un processus qui soulève par ailleurs des questions qui ne se prêtent pas aisément à la dissociation du droit et des faits (par. 30-32). Tout comme ce décideur administratif, le tribunal fédéral en cause dans la présente affaire a interprété une disposition de sa loi constitutive qui requerrait un examen approfondi des faits et qui lui laissait une certaine marge d'appréciation.

[27] En résumé, la question de savoir si le Tribunal peut adjuger des dépens dans le cadre de l'indemnisation qu'il ordonne ne représente ni une question de compétence ni une question de droit d'une importance capitale pour le système juridique dans son ensemble, étrangère au domaine d'expertise du Tribunal au sens de l'arrêt *Dunsmuir*. La décision du Tribunal d'adjuger des dépens à la plaignante, après que celle-ci eut obtenu gain de cause, est par conséquent susceptible de contrôle judiciaire au regard de la norme de la décision raisonnable.

C. Caractère raisonnable de la décision

[28] Dans l'arrêt *Dunsmuir*, les juges majoritaires définissent comme suit la norme du caractère raisonnable :

a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[29] Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

[30] The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

La norme déferente du caractère raisonnable procède du principe à l'origine des deux normes antérieures de raisonnabilité : certaines questions soumises aux tribunaux administratifs n'appellent pas une seule solution précise, mais peuvent plutôt donner lieu à un certain nombre de conclusions raisonnables. Il est loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables. La cour de révision se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. [par. 47]

[29] La norme du caractère raisonnable constitue donc une norme déferente qui se veut respectueuse de l'expérience et de l'expertise du décideur administratif. La notion de déférence joue un rôle fondamental en matière de contrôle judiciaire, comme le conclut la Cour dans l'arrêt charnière *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227. La déférence envers un tribunal administratif tient compte de la possibilité de plusieurs interprétations concurrentes. Cette prise en compte permet de se demander qui du tribunal administratif ou de la cour de justice est le mieux placé pour faire ce choix (Macklin, p. 205).

[30] La notion de déférence permet également de distinguer le contrôle judiciaire de l'appel. Bien que les deux tiennent compte du principe de déférence, il faut se garder de les confondre. Dans le cas du contrôle judiciaire, la déférence peut protéger le décideur administratif d'une immixtion judiciaire trop poussée, même à l'égard de certaines questions de droit dès lors que celles-ci touchent au cœur même du mandat et du domaine d'expertise du décideur. En pareil cas, la déférence a pour effet de protéger toute une gamme d'interprétations raisonnables possibles de sa loi constitutive par le tribunal (voir R. E. Hawkins, « Whither Judicial Review? » (2010), 88 *R. du B. can.* 603).

[31] By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. Application — Reasonableness of Tribunal's Interpretation

[32] The Tribunal held that any authority to award legal costs must come from either s. 53(2)(c) or (d) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of s. 53(2)(c) and (d), which authorize the Tribunal to “compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice”, permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

[33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g.,

[31] En revanche, suivant les principes régissant l'appel qu'a posés l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, la juridiction d'appel n'est tenue à aucune déférence envers la juridiction inférieure sur une question de droit qui rend la décision automatiquement susceptible de contrôle selon la norme de la décision correcte. Dans l'arrêt *Khosa*, la Cour confirme à la majorité qu'on ne doit pas appliquer au contrôle judiciaire ces principes propres à l'appel.

D. Application — Caractère raisonnable de l'interprétation du Tribunal

[32] Le Tribunal a estimé que tout pouvoir d'adjudger des dépens devait se fonder sur l'al. 53(2)c) ou d) de la Loi (décision relative aux dépens, par. 11). L'appelante et la Commission n'ont pas invoqué d'autres dispositions susceptibles de justifier le résultat recherché, et elles ont reconnu en plaidoirie se fonder à la fois sur l'une et l'autre dispositions. La question d'interprétation précise dont était saisi le Tribunal était donc celle de savoir si les mots employés aux al. 53(2)c) et d) pour l'autoriser à « indemniser la victime [. . .] des dépenses entraînées par l'acte [discriminatoire] » confèrent le pouvoir d'adjudger des dépens. Le Tribunal a décidé que tel était le cas. Or, nous croyons que son interprétation n'est pas raisonnable, ce que révèle l'examen attentif du texte des dispositions, de leur contexte et de leur objet.

[33] Il nous faut interpréter le texte législatif et discerner l'intention du législateur à partir des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s'harmonise avec l'esprit de la Loi, son objet et l'intention du législateur (E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87, cité dans l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21). Dans le cas d'une loi relative aux droits de la personne, il faut se rappeler qu'elle exprime des valeurs essentielles et vise la réalisation d'objectifs fondamentaux. Il convient donc de l'interpréter libéralement et téléologiquement de manière à reconnaître sans réserve les droits qui y sont énoncés et à leur donner pleinement effet (voir,

R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[34] The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term “expenses incurred” in s. 53(2)(c) and (d) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

[35] Turning to the text of the provisions in issue, the words “any expenses incurred by the victim”, taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words “any expenses incurred by the victim” appear.

p. ex., R. Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 497-500). On doit tout de même retenir une interprétation de la loi qui respecte le libellé choisi par le législateur.

[34] La conclusion du Tribunal selon laquelle il possède le pouvoir d'accorder des dépens s'appuie sur deux éléments. Premièrement, il invoque trois décisions de la Cour fédérale pour conclure que le syntagme « dépenses entraînées » employé aux al. 53(2)c) et d) est suffisamment large pour englober les dépens : *Canada (Procureur général) c. Thwaites*, [1994] 3 C.F. 38, p. 71; *Canada (Procureur général) c. Stevenson*, 2003 CFPI 341 (CanLII), par. 23-26; *Canada (Procureur général) c. Brooks*, 2006 CF 500 (CanLII), par. 10-16. Deuxièmement, le Tribunal fait fond sur ce qu'il tient pour d'importantes considérations de politique juridique liées à l'accès à la justice en matière de droits de la personne. Pour les motifs exposés ci-après, nous estimons que ces facteurs n'étaient pas raisonnablement la conclusion selon laquelle le Tribunal peut adjuger des dépens. Il appert d'une analyse exhaustive de nature contextuelle et téléologique qu'aucune interprétation raisonnable des dispositions n'appuie cette conclusion.

(1) Le texte

[35] En ce qui concerne le texte des dispositions en cause, considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l'acte » sont suffisamment larges pour englober les dépens. Tel est le point de vue du Tribunal ainsi que celui de la Cour fédérale dans les décisions qu'il invoque à l'appui. Or, lorsque ces mots sont dûment considérés dans le contexte de la loi, il devient manifeste qu'on ne peut pas raisonnablement les interpréter de manière à créer une catégorie distincte d'indemnité susceptible de viser tout type de débours ayant un lien de causalité avec l'acte discriminatoire. La prétention contraire fait selon nous abstraction de la structure des dispositions dans lesquelles figurent les mots « des dépenses entraînées par l'acte ».

[36] For ease of reference, we reproduce s. 53(2) and (3) as they read at the time the appellant's complaint was filed:

53. . . .

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

- (i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
- (ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

[36] Pour en faciliter la consultation, nous reproduisons les par. 53(2) et (3) dans leur version en vigueur au moment où l'appelante a déposé sa plainte :

53. . . .

(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut [. . .] ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures destinées à prévenir des actes semblables, notamment :

- (i) d'adopter un programme, plan ou arrangement visé au paragraphe 16(1),
- (ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le tribunal peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de cinq mille dollars, s'il en vient à la conclusion, selon le cas :

a) que l'acte a été délibéré ou inconsidéré;

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

[37] It is significant, in our view, that the phrase “that the person compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice” appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(c), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(d), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term “expenses” had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term “expenses” is intended to mean something different in each of paragraphs (c) and (d).

[38] The interpretation adopted by the Tribunal makes the repetition of the term “expenses” redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, “It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every

b) que la victime en a souffert un préjudice moral.

[37] Il nous paraît significatif que l’expression « indemniser la victime [. . .] des dépenses entraînées par l’acte » figure dans deux alinéas successifs. Le texte est identique, mais chaque fois, le renvoi aux dépenses est précédé d’un libellé particulier et différent. La répétition du mot « dépenses » et le contexte dans lequel celui-ci est employé donnent franchement à penser que la nature des dépenses visées dépend du type d’indemnité prévu par le libellé particulier de chacun de ces alinéas. Ainsi, à l’al. 53(2)c), l’auteur de l’acte discriminatoire est tenu d’indemniser la victime des pertes de salaire et des dépenses entraînées par l’acte. À l’alinéa 53(2)d), l’indemnité vise les frais supplémentaires occasionnés par le recours à d’autres biens, services, installations ou moyens d’hébergement, en plus des dépenses entraînées par l’acte discriminatoire. Si l’emploi du mot « dépenses » vise à conférer le pouvoir distinct d’accorder des dépens pour tous les types de plaintes, on conçoit difficilement que ce pouvoir soit attribué non seulement dans le contexte de la perte de salaire, mais aussi dans celui de la fourniture de services et que le pouvoir d’adjudger des dépens ne fasse pas l’objet d’un alinéa distinct au lieu d’être prévu dans le contexte précis de deux alinéas. On peut en conclure que l’intention du législateur était de faire en sorte que le mot « dépenses » ait un sens différent à chacun des al. c) et d).

[38] L’interprétation retenue par le Tribunal rend superflue la répétition du mot « dépenses » et n’explique pas le rattachement de ce terme à l’indemnité visée par chacun des alinéas. Elle va à l’encontre de la présomption d’absence de tautologie qu’établissent les règles d’interprétation législative. La professeure Sullivan signale d’ailleurs à la p. 210 de son ouvrage que [TRADUCTION] « [l]e législateur est présumé ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement

word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.” As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, “It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.” See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[39] The appellant received an award for pain and suffering under s. 53(3) of the *CHRA*. The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike s. 53(2)(c) and (d), there is in subs. (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (c) and for additional costs of obtaining goods and services in paragraph (d).

[40] Moreover, the term “costs”, in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of “words or expressions that have through usage by legal professionals acquired a distinct legal meaning”: Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament’s intent.

[41] Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the

ni s’exprimer en vain. Chaque mot d’une loi est présumé avoir un sens et jouer un rôle précis dans la réalisation de l’objectif du législateur. » Comme l’explique l’ancien juge en chef Lamer dans l’arrêt *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, au par. 28, « [s]uivant un principe d’interprétation législative reconnu, une disposition législative ne devrait jamais être interprétée de façon telle qu’elle devienne superfétatoire. » Voir également l’arrêt *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[39] L’appelante a obtenu une indemnité pour préjudice moral en application du par. 53(3) de la *LCDP*. Le Tribunal a par ailleurs refusé expressément le remboursement de ses frais médicaux (décision sur le fond, par. 404-406). À la différence des al. 53(2)c) et d), le par. (3) ne fait aucune mention du remboursement de dépenses. Là encore, si le législateur a voulu conférer un pouvoir distinct d’adjudger des dépens, on s’explique mal son omission de le faire explicitement dans la mesure où l’indemnisation des dépenses est expressément prévue pour la perte de salaire, à l’al. c), puis pour les frais supplémentaires occasionnés par le recours à d’autres biens et services, à l’al. d).

[40] Qui plus est, dans le vocabulaire juridique, le terme « dépens » possède un sens bien défini qui diffère de celui d’« indemnité » ou de « dépenses ». Il s’agit d’un terme technique propre à la langue du droit en ce qu’il correspond à [TRADUCTION] « un mot ou une expression qui, du fait de son emploi par les professionnels du droit, a acquis un sens juridique distinct » (Sullivan, p. 57). Les « dépens » s’entendent habituellement d’une indemnité accordée pour les frais de justice engagés et les services juridiques retenus dans le cadre d’une instance. Si le législateur a entendu conférer le pouvoir d’adjudger des dépens, on comprend mal pourquoi il n’a pas employé ce terme juridique consacré et largement répandu pour le faire. Nous verrons plus loin que l’historique de la loi donne aussi sérieusement à penser que telle n’était pas l’intention du législateur.

[41] Enfin, pour ce qui est du texte de la Loi, il vaut la peine de signaler qu’il plafonne très

amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was \$5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in s. 53(3).

(2) Context

[42] Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(a) *Legislative History*

[43] The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and

strictement le dédommagement que le Tribunal peut accorder pour le préjudice moral infligé par l'acte discriminatoire. Rappelons aussi qu'il ne prévoit pas explicitement le remboursement des frais engagés pour l'obtention de ce dédommagement. Au moment d'engager l'instance, la somme maximale susceptible d'être accordée s'élevait à 5 000 \$. L'interprétation que retient le Tribunal l'autorise à indemniser le préjudice moral de manière distincte, d'une part, et à adjuger des dépens dont le montant peut être illimité, d'autre part. Il est difficile de concilier cette interprétation avec la limitation de l'indemnité ou le fait que le par. 53(3) ne prévoit pas expressément le pouvoir d'accorder le remboursement des frais.

(2) Le contexte

[42] À propos du contexte, trois éléments doivent être pris en compte : l'historique législatif, l'opinion constante de la Commission concernant le pouvoir du Tribunal d'adjuger des dépens et les dispositions législatives comparables adoptées par les provinces et les territoires. Lorsque ces éléments sont considérés de pair avec le texte des dispositions et leur objet, l'interprétation retenue par le Tribunal ne fait pas partie de celles qui sont raisonnables.

a) *Historique législatif*

[43] Souvent, l'évolution et l'historique législatifs d'une disposition peuvent constituer des aspects importants du contexte dont il doit être tenu compte dans une démarche moderne d'interprétation des lois (*Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425, par. 28, le juge Binnie; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, p. 528, la juge L'Heureux-Dubé; *Hilewitz c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 57, [2005] 2 R.C.S. 706, par. 41-53, la juge Abella). L'évolution législative s'entend de la formulation initiale, puis subséquente, d'une disposition, et l'historique législatif, des éléments touchant à la conception, à l'élaboration et à l'adoption du texte de loi : Sullivan, p. 587-593;

M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8.

P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), p. 496 et 501-508.

[44] We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

[44] Nous croyons que rien ne justifie d'oublier les dispositions envisagées mais non retenues dans la mesure où elles peuvent contribuer à la détermination de l'objet de la loi. Une grande prudence s'impose quant à l'importance éventuelle qu'il convient de leur accorder. Cependant, elles peuvent renseigner utilement sur l'historique et l'objet de la loi et, dans certains cas, offrir un élément de preuve direct de l'intention du législateur (Sullivan, p. 609; Côté, p. 507; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, par. 37). Dans l'arrêt *M. c. H.*, [1999] 2 R.C.S. 3, notre Cour a statué qu'un projet de modification législative rejeté pouvait servir à établir l'intention du législateur : par. 348-349, le juge Bastarache.

[45] The legislative evolution and history of the *CHRA* shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art “costs” was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament’s intent.

[45] L'évolution et l'historique de la *LCDP* nous éclairent sur deux points importants. Premièrement, ils donnent fortement à penser que le législateur aurait eu recours au terme juridique consacré s'il avait voulu conférer le pouvoir d'adjudger des dépens. Le législateur est présumé connaître la loi, et l'omission d'employer un terme technique usité en droit permet d'inférer que le terme utilisé a une autre signification. L'historique de l'adoption des dispositions en cause étaye cette inférence raisonnable, car le terme juridique « dépens » a été employé dans l'ébauche de certaines dispositions, mais pas dans d'autres. En second lieu, le rôle qu'il projetait de confier à la Commission explique que le législateur n'a pas voulu lui attribuer le pouvoir d'adjudger des dépens.

[46] Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows:

[46] L'adoption en 1977 de la *Loi canadienne sur les droits de la personne* a été précédée par le dépôt, en 1975, du projet de loi C-72 intitulé *Loi visant à compléter la législation canadienne actuelle en matière de discrimination et de protection de la vie privée*, 1^{re} sess., 30^e lég., qui a franchi l'étape de la première lecture. Le projet conférait expressément au Tribunal le pouvoir d'adjudger des dépens *en plus* de celui d'accorder une indemnité pour les frais. Le libellé des dispositions en cause était pour ainsi dire identique à celui de l'actuel par. 53(2). Le paragraphe 37(4) du projet de loi C-72 disposait :

37. . . .

(4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

[47] Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in 1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

[48] This piece of the legislative history of the provision before us strongly suggests that “costs” was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

24. . . .

(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:

. . . .

(6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to

(a) a complainant, if the complaint is substantiated and

(i) the Commission did not appear before the Tribunal, or

(ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complaint; or

(b) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

37. . . .

(4) Les dépens de l'enquête et les frais qui en découlent sont laissés à la discrétion du tribunal.

[47] Le projet de loi C-72 est mort au Feuilleton. Lors du dépôt du projet de loi C-25, devenu la *LCDP* en 1977, le pouvoir exprès d'adjuger des dépens que prévoyait le par. 37(4) du projet de loi C-72 a été omis, alors que celui d'indemniser des frais occasionnés a été retenu. De plus, une disposition portant sur le rôle de la Commission a été ajoutée. Nous y reviendrons.

[48] Ce volet de l'historique des dispositions qui nous intéressent permet de conclure que le terme technique « dépens » est employé lorsqu'il s'agit de conférer le pouvoir d'indemniser une partie de ses frais de justice. Cette interprétation se voit confirmée par les modifications proposées en 1992, mais non adoptées par la suite. En effet, le par. 24(3) du projet de loi C-108 — *Loi modifiant la Loi canadienne sur les droits de la personne et d'autres lois en conséquence*, 3^e sess., 34^e lég., 1991-92 — prévoyait que le Tribunal pouvait condamner la Commission aux dépens. En voici le libellé :

24. . . .

(3) Les paragraphes 53(3) et (4) de la même loi sont abrogés et remplacés par ce qui suit :

. . . .

(6) Le tribunal peut accorder, aux dépens de la Commission, les frais et dépens qu'il détermine suivant les barèmes fixés dans les règles visées à l'article 48.9 :

a) au plaignant qui a gain de cause, soit lorsque la Commission n'a pas comparu devant lui, soit lorsque le plaignant a un représentant distinct à cause de la divergence de ses intérêts et de ceux de la Commission, ou des circonstances de la plainte;

b) au défendeur qui a gain de cause, lorsqu'il estime que la plainte est sans objet, dénuée de tout intérêt, faite de mauvaise foi ou a causé une contrainte financière excessive à celui-ci.

Clause 21 (adding s. 48.9(1)(h)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

[49] These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word “costs” was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

[50] Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament’s view.

[51] We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award “costs of and incidental to any hearing” before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the *CHRA*. However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

[52] The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be

De plus, l’art. 21 (qui ajoutait l’al. 48.9(1)(h)) aurait permis au Comité du tribunal des droits de la personne d’établir, avec l’approbation du gouverneur en conseil, des règles de procédure régissant l’adjudication des frais, des dépens et des intérêts.

[49] Ces dispositions ont franchi l’étape de la première lecture en décembre 1992, mais elles n’ont connu aucune suite, de sorte qu’elles n’ont pas été adoptées. Cependant, elles montrent encore une fois que le mot « dépens » était perçu comme un terme technique propre au droit et que son emploi visait à conférer le pouvoir de condamner au paiement des frais de justice.

[50] Un autre aspect de l’historique législatif permet de conclure que, dans l’esprit du législateur, pouvoir d’adjudger des dépens et rôle projeté de la Commission étaient liés.

[51] Rappelons que le projet de loi de 1975, qui n’a pas connu de suite, autorisait expressément le Tribunal à accorder les « dépens de l’enquête et les frais qui en découlent ». Or, ce pouvoir exprès n’a pas été repris dans le projet de loi de 1977 dont est issue la *LCDP*. Toutefois, même si le législateur a écarté le pouvoir d’adjudger des dépens, il a ajouté une disposition relative au rôle de la Commission qui, dans sa version actuelle, prévoit ce qui suit :

51. En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l’attitude la plus proche, à son avis, de l’intérêt public, compte tenu de la nature de la plainte.

Nous convenons avec l’intimé qu’il appert nettement de cette succession de mesures que le législateur a choisi de confier un rôle actif à la Commission, dont celui d’agir au nom d’un plaignant, au lieu d’investir le Tribunal d’un vaste pouvoir d’adjudication des dépens.

[52] Les modifications proposées en 1992 et dont nous faisons précédemment état s’accordent avec cette interprétation. Il convient également de signaler que le pouvoir d’adjudger des dépens que

awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

[53] A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "Administrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851, at p. 859, *per de Grandpré J.*, and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37, *per Dickson J.* (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements.

[54] In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

prévoient ces dispositions ne pouvait être exercé que si la Commission n'assurait pas la conduite de l'instance, ce qui tend à appuyer la thèse, défendue par l'intimé, de l'abandon du pouvoir d'adjuger des dépens au profit de l'octroi à la Commission d'un rôle actif dans la présentation des plaintes au Tribunal.

b) *Opinion de la Commission concernant son pouvoir d'adjuger des dépens*

[53] S'inscrit également dans le contexte le fait que la Commission elle-même a toujours considéré que la *LCDP* ne conférait pas le pouvoir d'adjuger des dépens et qu'elle a maintes fois exhorté le législateur à corriger la situation en modifiant la Loi. Dans l'arrêt *Will-Kare Paving & Contracting Ltd. c. Canada*, 2000 CSC 36, [2000] 1 R.C.S. 915, par exemple, notre Cour a permis la prise en compte de l'interprétation de sa loi habilitante par un organisme administratif, malgré l'importance relative de cet élément. Dissident, le juge Binnie s'y fonde sur des extraits d'allocutions prononcées devant l'Association canadienne d'études fiscales par le ministre des Finances et un employé de Revenu Canada relativement à l'interprétation d'une disposition de la loi de l'impôt sur le revenu. Il écrit : « La politique et l'interprétation de l'administration ne sont pas des sources concluantes, mais elles ont un certain poids en cas de doute sur la signification d'un texte législatif » (par. 66), citant à l'appui les arrêts *Harel c. Sous-ministre du Revenu du Québec*, [1978] 1 R.C.S. 851, p. 859, le juge de Grandpré, et *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, p. 37, le juge Dickson, plus tard Juge en chef. L'opinion de ce type sur la juste interprétation de la disposition en cause n'est évidemment pas concluante, mais le tribunal peut en tenir compte si elle satisfait au critère minimal de la pertinence et de la fiabilité (Sullivan, p. 575; Côté, p. 633-638). À notre avis, l'opinion réfléchie et constante de la Commission quant à la portée de sa loi constitutive satisfait à cette exigence.

[54] Dans son rapport annuel de 1985, la Commission demandait la modification de la Loi afin de doter le Tribunal du pouvoir d'adjuger des dépens :

The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.

The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989 and 1990 annual reports to Parliament.

[55] Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that “[t]he CHRA does not allow for the awarding of costs” (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

[56] While, as noted, the Commission’s views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

[57] The respondent also urges us to consider parallel legislation in the provinces and territories

La Commission recommande au Parlement de modifier la Loi canadienne sur les droits de la personne de façon à y inclure une disposition conférant au tribunal des droits de la personne un pouvoir discrétionnaire l’habilitant à condamner aux dépens les parties aux plaintes qu’il instruit.

Cette recommandation vise à laisser aux tribunaux une plus grande discrétion dans la suite à donner aux plaintes dans les cas où des contraintes excessives peuvent entrer en compte.

(*Rapport annuel 1985* (1986), p. 12 (en italique dans l’original))

La Commission a formulé des recommandations au même effet dans chacun de ses rapports annuels au Parlement en 1986, 1987, 1988, 1989 et 1990.

[55] Plus récemment, dans son *Rapport spécial au Parlement : Liberté d’expression et droit à la protection contre la haine à l’ère d’Internet* (2009), la Commission relève que « [l]a LCDP ne permet pas d’allouer des dépens » (p. 37). À ce propos, elle renvoie à la procédure simplifiée que suit le plaignant pour déposer une plainte, de même qu’à l’assistance sur laquelle il peut compter de sa part et de celle du Tribunal tant à l’étape de l’enquête qu’à celle de l’instruction, pour expliquer que le plaignant n’a pas besoin d’un avocat pour exercer son recours. La Commission recommande la modification de la Loi afin que le Tribunal ait le pouvoir discrétionnaire d’allouer des dépens, mais seulement lorsqu’il juge qu’une partie a abusé de sa procédure.

[56] Comme nous le signalons précédemment, même si elle n’est pas liée par la conception que la Commission se fait de l’étendue de son pouvoir légal, une cour de justice peut en tenir compte. La Commission administre et applique la *LCDP* au quotidien, si bien qu’elle en a une connaissance approfondie. Le fait qu’elle estime depuis longtemps et avec constance que la Loi ne permet pas d’adjudication des dépens revêt une certaine importance dans les circonstances de l’espèce même s’il n’est pas décisif.

c) *Dispositions législatives comparables des provinces et des territoires*

[57] L’intimé nous incite par ailleurs à tenir compte des dispositions législatives parallèles des

and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).

[58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

[59] In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.

[60] For example, British Columbia allows costs to be awarded if there is "improper conduct" during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). In Manitoba and the Northwest Territories, the conduct must be "frivolous or vexatious" (*Human Rights Code*, S.M. 1987-88, c. 45, s. 45(2); *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 63). In Alberta, Prince Edward Island, and Newfoundland (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1, s. 39(2)), tribunals can make any

provinces et des territoires et nous convenons qu'il s'agit d'une entreprise utile en l'espèce. Évidemment, nous ne laissons pas entendre que la consultation des lois provinciales et territoriales s'avère toujours pertinente pour discerner l'intention du législateur fédéral. La professeure Sullivan confirme toutefois que la comparaison des lois fédérales, provinciales et territoriales portant sur un même sujet peut se révéler instructive (p. 419-420).

[58] La Cour a déjà examiné en parallèle les dispositions législatives de différents ressorts. Ainsi, dans l'arrêt *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614, le juge Sopinka étudie quelques lois provinciales comparables afin de déterminer si la loi fédérale considérée permet à la Commission des relations de travail dans la Fonction publique de décider qui est un employé en application de sa loi habilitante (p. 631-632). De même, dans l'arrêt *Morguard Properties Ltd. c. Ville de Winnipeg*, [1983] 2 R.C.S. 493, le juge Estey recourt à une analyse comparative de la loi manitobaine et de celles d'autres provinces pour décider si la ville de Winnipeg entendait geler des évaluations foncières (p. 504-505).

[59] Dans le cas qui nous occupe, le recours aux dispositions législatives équivalentes des provinces et des territoires n'est indiqué qu'à une fin bien précise. La démarche tend à confirmer que le législateur emploie toujours le mot « dépens » lorsqu'il veut conférer le pouvoir d'adjudger des dépens.

[60] Par exemple, la Colombie-Britannique permet d'adjudger des dépens en cas de [TRA-DUCTION] « comportement répréhensible » pendant l'examen de la plainte (*Human Rights Code*, R.S.B.C. 1996, ch. 210, par. 37(4)). Au Manitoba et dans les Territoires du Nord-Ouest, la conduite reprochée doit être « futile ou vexatoire » (*Code des droits de la personne*, L.M. 1987-88, ch. 45, par. 45(2); *Loi sur les droits de la personne*, L.T.N.-O. 2002, ch. 18, art. 63). En Alberta, à l'Île-du-Prince-Édouard et à Terre-Neuve (*Alberta Human Rights Act*, R.S.A. 2000, ch. A-25.5, par. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, ch. H-12, par. 28.4(6);

“appropriate” cost order, in Québec a tribunal may award costs “as it determines”, *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 126; and in Saskatchewan it is any “appropriate” cost order but not against the Commission (*Saskatchewan Human Rights Code Regulations*, R.R.S., c. S-24.1, Reg. 1, s. 21(1)). In Ontario, the offending party’s conduct must be “unreasonable, frivolous or vexatious or . . . in bad faith” and the Tribunal can make its own rules pertaining to costs awards (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.1(2)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of s. 53(2) of the *CHRA*.

(3) Purpose

[61] The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

[62] As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*, at para. 50, *per* La Forest J., concurring.

Human Rights Act, 2010, S.N.L. 2010, ch. H-13.1, par. 39(2)), le tribunal peut rendre l’ordonnance qui [TRADUCTION] « convient » quant aux dépens. Au Québec, il peut rendre l’ordonnance « qu’il détermine » en la matière (*Charte des droits et libertés de la personne*, L.R.Q., ch. C-12, art. 126). En Saskatchewan, il peut aussi rendre l’ordonnance qui [TRADUCTION] « convient » à ce chapitre, mais il ne peut condamner la Commission aux dépens (*Saskatchewan Human Rights Code Regulations*, R.R.S., ch. S-24.1, règl. 1, par. 21(1)). En Ontario, la partie en cause doit avoir une conduite « déraisonnable, frivole ou vexatoire » ou « agi[r] de mauvaise foi », et le Tribunal peut établir ses propres règles pour l’adjudication des dépens (*Loi sur l’exercice des compétences légales*, L.R.O. 1990, ch. S.22, par. 17.1(2)). Dans tous ces ressorts, le pouvoir d’adjudication des dépens *s’ajoute au* pouvoir général d’indemniser une partie des dépenses engagées. Le libellé des dispositions prévoyant le remboursement des dépenses est très semblable à celui du par. 53(2) de la *LCDP*.

(3) L’objet

[61] L’appelante demande à la Cour d’interpréter de manière large et téléologique les dispositions qui autorisent le Tribunal à indemniser de ses dépenses la victime de l’acte discriminatoire, pour garantir le caractère intégral de l’indemnisation. Cet argument reprend le deuxième motif invoqué par le Tribunal pour étayer sa conclusion qu’il peut adjuger des dépens.

[62] Certes, la *LCDP* demeure considérée comme une loi quasi constitutionnelle qui appelle une interprétation large, libérale et téléologique en rapport avec cette nature particulière. Toutefois, on ne saurait substituer à l’analyse textuelle et contextuelle une interprétation libérale et téléologique dans le seul but de donner effet à une autre décision de principe que celle prise par le législateur (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 49-50, la juge Abella; *Gould*, par. 50, le juge La Forest, motifs concordants).

[63] The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy change may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* (2000)). Interestingly, this report also acknowledged that the CHRA does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

[64] In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of “expenses” and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

[65] We would dismiss the appeal without costs.

[63] Le présent litige paraît découler de la décision de la Commission, datant de 2003, de restreindre le nombre de cas dans lesquels elle épaula le plaignant (m.i., par. 47-48). Ce changement d'orientation a pu donner suite au rapport du Comité de révision de la Loi canadienne sur les droits de la personne présidé par l'honorable Gérard La Forest. En effet, ce rapport recommandait que la Commission ne compare que dans les dossiers soulevant des questions sérieuses de discrimination systémique ou des points de droit nouveaux (*La promotion de l'égalité : Une nouvelle vision* (2000)). Il reconnaissait en outre que la LCDP n'accordait pas le pouvoir d'adjudger des dépens et il recommandait la création d'une clinique juridique appelée à offrir son aide aux éventuels plaignants (p. 77-79 et 81-85). Contrairement à la première recommandation, cette dernière n'a pas été suivie, de sorte que le rôle de la Commission dans la présentation des plaintes au Tribunal s'est restreint bien qu'aucune autre mesure n'ait été prise pour aider les plaignants. Il est toutefois révélateur que ces changements soient intervenus sans modification de la loi au sujet du pouvoir d'adjudger des dépens.

[64] À notre avis, il appert nettement du texte de la loi, de son contexte et de son objet que le Tribunal ne possède pas le pouvoir d'adjudger des dépens, et les dispositions applicables ne se prêtent à aucune autre interprétation raisonnable. Aux prises avec une question difficile d'interprétation législative et une jurisprudence contradictoire, le Tribunal a retenu la définition de « dépense » figurant au dictionnaire et il a formulé ce qu'il tenait pour une solution bénéfique sur le plan des principes au lieu d'entreprendre une démarche d'interprétation fondée sur le texte, le contexte et l'objet des dispositions en cause. Avec respect pour l'opinion contraire, cette démarche a amené le Tribunal à opter pour une interprétation déraisonnable des dispositions. La Cour d'appel était justifiée de contrôler puis d'annuler l'ordonnance du Tribunal.

V. Dispositif

[65] Nous sommes d'avis de rejeter le pourvoi sans dépens.

Appeal dismissed.

Solicitor for the appellant the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitors for the appellant Donna Mowat: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Champ & Associates, Ottawa.

Pourvoi rejeté.

Procureur de l'appelante la Commission canadienne des droits de la personne : Commission canadienne des droits de la personne, Ottawa.

Procureurs de l'appelante Donna Mowat : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Camp Fiorante Matthews, Vancouver.

Procureurs de l'intervenant le Conseil des Canadiens avec déficiences : Champ & Avocats, Ottawa.

TAB 11

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MR. JUSTICE RITTER

BETWEEN:

THE OWNERS: CONDOMINIUM PLAN NO. 8222909

Appellant
(Defendant)

- and -

BRENT FRANCIS, STAN GEORGE WONG and CYNTHIA EWANUS
and REGAL PACIFIC MORTGAGE CORPORATION

Respondents
(Plaintiffs)

AND BETWEEN:

THE OWNERS: CONDOMINIUM PLAN NO. 8222909

Appellant
(Plaintiff by Counterclaim/Defendant)

- and -

STAN GEORGE WONG and CYNTHIA EWANUS

Respondents
(Defendants by Counterclaim/Plaintiffs)

Appeal from the Whole of the Judgment of
THE HONOURABLE MR. JUSTICE J.S. MOORE
Dated the 1st day of November, 2001

REASONS FOR JUDGMENT

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE RITTER

CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD

COUNSEL:

L.M.H. BELZIL

For the Appellant

C.L. PLANTE

For the Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE RITTER

[1] This appeal involves an issue of statutory interpretation, specifically, whether s. 31 of the **Condominium Property Act**, R.S.A 1980, c. C-22 (the “Act”) prevents the appellant condominium corporation from collecting condominium fees for ten townhouse units on a basis other than the unit factors attached to each unit. It is my conclusion that the scheme of collection based on unit factors, with an automatic rebate, breaches this provision and is therefore *ultra vires* the appellant. I also conclude that damages awarded to the respondents must be set aside, as a basis for them does not exist. Finally, the award of solicitor-client costs to the respondents is set aside.

Background

[2] The appellant was incorporated in 1982. It is a mixed use condominium with 209 residential high-rise units, two ground floor commercial units, and ten townhouse units. Until 1994, the complex operated as a rental apartment building with all units being owned by Waters Edge Ltd. In 1994, all units were sold by Waters Edge Ltd. to an intervening purchaser, 496454 Alberta Ltd. (the “Developer”), who sold them to the public. All of the public sales closed simultaneously on September 27, 1994.

[3] Part of the sale documentation provided to each purchaser was a proposed amendment to the condominium by-laws which contemplated a 65% rebate of condominium fees to the townhouse unit purchasers, payable on the basis of unit factors. On September 1, 1994, an agent for the Developer, Darren Latoski (“Latoski”), was appointed to form the board of the appellant. At this time, there was a blanket mortgage registered against the title of all the units of the appellant. Latoski was never registered as a board member at the Land Titles office.

[4] On September 28, 1994, Latoski signed ten rebate agreements with the purchasers of the ten townhouse units, entitling them to a 65% rebate of condominium fees for each of the units. The by-law amendment which provided for the rebate agreements was dated September 1, 1994 and was signed by an unknown person believed to be from Waters Edge Ltd. The by-law amendment had already been filed at the Land Titles Office.

[5] The first meeting of the new owners took place in February 1995 and a board of directors was elected and registered at the Land Titles office. The board did not receive a minute book or other corporate documents from the Developer until just before the trial of this matter. This board considered the fee rebates granted to the townhouse owners and found them to be fair. While the townhouse units had a greater unit factor allotted to them, they were metered and charged separately for utilities, which were common expenses for the high-rise units. Also, the townhouse units had separate garages which were not common property, while the parkade that provided parking to the high-rise unit owners was common property, the upkeep and repair of which was to be paid from

money collected as condominium fees. It was due to these factors that the Developer entered into the rebate agreements with the townhouse owners.

[6] At the second general meeting of the appellant, held in February 1996, a new board was elected. In October 1996, a new property manager was retained who shortly thereafter advised the board that the rebate question should be considered. The board considered the rebate by-law in December 1996 and determined it to be invalid, as it was executed other than in the prescribed manner, and it was contrary to the spirit of fee collection by unit factor.

[7] The board then notified the townhouse owners of an increase in their fees reflecting the amount payable on the basis of their unit factors. A series of meetings among the board, its legal counsel, the townhouse owners and their legal counsel followed. Options were explored including the board offering to assume the payment of utilities owing by the townhouse owners. But all of these failed and the matter ultimately came to trial in the Court of Queen's Bench commencing December 11, 2000.

[8] Eight of the townhouse units were purchased by the respondent Brent Francis ("Francis") in September 1994. On April 20, 2000, he assigned himself into bankruptcy. His trustee declined to assume conduct of these proceedings, but the respondent Regal Pacific Mortgage Corporation ("Regal Pacific") ultimately took conduct of his part in the litigation on the basis that it held a general security agreement over Francis' assets, and his interest in the litigation comprised a chose in action which was caught by the agreement.

[9] Just before trial, Regal Pacific purported to assign its interest in this chose in action to a numbered British Columbia corporation but then "changed its mind" and by letter from its counsel informed the appellant that it was retaining control of Francis' interest. While this series of dealings is referenced in the trial decision, it is not resolved. However, it is implicit in the result that the trial judge accepted that the transfer to the British Columbia corporation was never concluded.

The Trial Decision

[10] The trial decision is reported at (2001), 304 A.R. 294, 49 R.P.R. (3d) 123, 2001 ABQB 921. In that decision, the trial judge concluded that all purchasers of the condominiums were aware of the rebate agreements when they purchased their respective units. Therefore, it would be unfair to permit the owners of the high-rise apartment units to receive a benefit at the expense of the townhouse unit owners. Further, the scheme complied with the Act, as full fees based on unit factors were initially assessed and then 65% of those fees were rebated back to the townhouse owners. The appellant enjoyed the ability to rebate fees by virtue of its general powers to manage its business. In addition, it was not *ultra vires* of the appellant to deviate from collection of fees based on unit factors, as the appellant was entitled to do what was necessary to ensure that equity was achieved and that each owner was only responsible for his or her fair share of common expenses.

[11] Finally, by way of remedy, the trial judge declared that the appellant had to continue to rebate 65% of the fees in accordance with the rebate agreements. He added Regal Pacific as a plaintiff in the action, awarding damages for the difference between the value of the eight units based on an entitlement to a 65% fee rebate and their value based on no such entitlement. This respondent was singled out, as the units originally owned by Francis had been sold, allegedly at the loss for which they were compensated. The units belonging to the other respondents, Stan George Wong (“Wong”) and Cynthia Ewanus (“Ewanus”), had not been sold so that the declaration that the by-law and agreements were valid restored their value. The appellant’s counterclaim for condominium fee arrears from September 1994 to the date of judgment was dismissed. The respondents were awarded costs on a solicitor and client basis.

Legislation

[12] This appeal engages a number of provisions of the *Condominium Property Act*, *supra*. In particular, it is the position of the appellant that a condominium corporation does not enjoy natural person powers, as does a business corporation under the *Business Corporations Act*, R.S.A. 2000, c. B-9, and that it must therefore look to the Act to see if it has the requisite authority to make certain decisions or take particular actions.

[13] Section 23 of the Act concerns the establishment of a board of management. It provides:

23(1) A corporation shall have a board of managers that shall be constituted as provided by the by-laws of the corporation.

(2) A corporation shall, within 15 days of a person becoming or ceasing to be a member of the board, file at the land titles office a notice in the prescribed form stating the name and address of that person and the day that the person became or ceased to be, as the case may be, a member of the board.

(3) The powers and duties of the corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the board of the corporation.

(4) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

[14] Section 26 of the Act deals with the by-laws of the corporation. It provides:

26(1) The by-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.

(2) Any by-law may be amended, repealed or replaced by a special resolution.

(3) An amendment, repeal or replacement of a by-law does not take effect until

(a) the corporation files a copy of it with the Registrar, and

(b) the Registrar has made a memorandum of the filing on the condominium plan.

(4) No by-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage of other dealing with them or to destroy or modify any easement implied or created by this Act.

(5) The by-laws bind the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the by-laws.

[15] Section 30(1) of the Act deals with the corporation's management power. It provides:

30(1) A corporation is responsible for the enforcement of its by-laws and the control, management and administration of its real and personal property and the common property.

[16] Section 31(1) of the Act deals with raising funds for the purposes of the corporation. It provides:

31(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;

(b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

(c) to raise amounts so determined by levying contributions on the owners in proportion to the unit factors of their respective units;

(d) to recover from an owner by an action in debt any sum of money spent by the corporation

(i) pursuant to a by-law, or

(ii) as required by a local authority or other public authority,

in respect of the unit or common property that is leased to that owner under section 41.

[17] In 1996, the Legislature of the Province of Alberta passed legislation amending s. 31(1) of the Act so as to permit the assessment of fees on a basis other than unit factors: **Condominium Property Amendment Act, 1996**, S.A. 1996, c. 12, s. 32. The provision is now s. 39 of the **Condominium Property Act**, R.S.A. 2000, c. C-22. However, this provision was not proclaimed until September 1, 2000: **Condominium Property Amendment Act, 2000**, S.A. 2000, c. 11, s. 13. After it came into effect, the board met and proposed that the townhouse owners receive a rebate of 40% of their fees. This proposal was rejected by the respondents Wong and Ewanus but was accepted by HSBC, the first mortgagee of the Francis units, which by then were subject to foreclosure proceedings such that HSBC became the owner of the Francis units on December 21, 2000.

[18] The resolutions which were passed by the corporation to give effect to the 40% rebate arrangement with HSBC also extend to the respondents Wong and Ewanus so that in future they will receive a rebate of 40% of their fees. Further, the appellant is not pursuing an appeal respecting its counterclaim for condominium fee arrears. Therefore, none of the respondents will have to repay any part of the 65% rebated to them between the time of their purchases and the trial judgment.

Standard of Review

[19] The question of whether the by-law and rebate agreements are *ultra vires* is a question of law and the correctness standard applies. Likewise, the question of whether delay may be considered when dealing with otherwise *ultra vires* acts and the issue of whether the “indoor management rule” applies to condominium corporations are matters of law for which the correctness standard applies.

[20] The issue of whether the trial judge should have added Regal Pacific as a party during the trial deals with a procedural question to which the reasonableness standard applies. All issues relating to fact findings call for a standard based on palpable or overriding error. Finally, the

question relating to the award of damages on a basis unknown in law is one of law and the correctness standard applies to it.

Analysis

1. Validity of the By-law and Rebate Agreements

[21] The main issue in this appeal is whether it was *ultra vires* of the condominium corporation to invoke a scheme which resulted in condominium fees being collected on a basis other than unit factors. Part of the analysis of this question involves a determination of whether the rebate scheme, by which fees are purported to be collected and rebated back, complies with s. 31 or is otherwise authorized by the Act. This issue will be dealt with first because if the scheme does not breach s. 31, or is otherwise valid, that conclusion will dispose of the appeal.

[22] The scheme of rebates relating to the townhouse units consists of two elements. First, the Developer purported to pass the rebate by-law, and second, when the Developer sold the townhouse units, it entered into rebate agreements with each purchaser. Both the by-law and the rebate agreements provide for a rebate of 65% of fees collected on the basis of unit factors to the townhouse owners. Both state that the rebate lasts for 50 years, renewable for subsequent periods of 50 years. The rebate agreement provides that the entitlement to the rebate runs with the title to each townhouse unit. The rebate agreement also provides that if the condominium corporation fails to comply with the agreement, the townhouse owner holding the interest in the agreement at the relevant time will receive damages in a sum equivalent to the 65% rebate.

[23] In practice, the townhouse owners did not make full payment of the fees based on their unit factors and then receive back a rebate of 65%. They simply paid 35% of the fees otherwise payable.

[24] This scheme can only be perceived as a thinly-veiled attempt to have the townhouse unit owners pay fees on a basis other than unit holdings. The by-law makes it clear that the whole purpose was to address the perceived inequality created by unit factor assessment of fees relating to the utility and garage issues. The duration of the rebate agreement is, for all practical purposes, for the useful life of the project. The manner of payment reflects payment of fees on a basis other than unit factors. I therefore conclude that the scheme does not comply with s. 31 of the Act.

[25] The second step in the analysis of the *ultra vires* issue involves an interpretation of s. 31 of the Act read with other provisions of the Act and the Act as a whole. In this respect, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature: ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27, 36 O.R. (3d) 418; ***Bell ExpressVu Limited Partnership v. Rex*** (2002), 212 D.L.R. (4th) 1, 2002 SCC 42; ***Love v. Flagstaff (County of) Subdivision and Development Appeal Board***, 2002 ABCA 292.

[26] A contextual analysis of the Act reveals that a condominium corporation does not enjoy the same powers of a natural person, as do most business corporations. The Act does not provide for such powers; rather s. 20(4) of the Act states that the **Business Corporations Act**, *supra*, which attributes natural person powers to corporations created under it, does not apply to a condominium corporation.

[27] Also, as a condominium corporation is created by statute, it owes its existence to the statute and can only undertake actions its creating statute specifically authorizes: **Ashbury Railway Carriage & Iron Co. v. Riche**, (1875) L.R. 7 H.L. 653; **Cowe v. Strata Plan VR1349** (1994), 92 B.C.L.R. (2d) 327 at paras. 10-12; **453048 British Columbia v. Strata Plan KAS 1079** (1994), 43 R.P.R. (2d) 293 at 296-97, at paras. 10-11.

[28] The interpretation of the powers of other statutorily created corporations supports this conclusion. In **Guaranty Properties v. Edmonton (City)** (1998), 220 A.R. 223, 61 Alta. L.R. (3d) 266, 1998 ABQB 68 at para. 46, Costigan J. (as he then was), considered the issue of powers granted to a municipal corporation created by the **Municipal Government Act**, R.S.A. 1980, c. M-26.1 and stated:

The defendant municipality was created by statute. Its power to contract also arose from and was limited by statute. Therefore, if the defendant purported to enter into an agreement which was beyond its statutory capacity, the doctrine of *ultra vires* would render the contract void.

[29] Under the **Companies Act**, R.S.A. 1980, c. C-20, which preceded the **Business Corporations Act**, *supra*, and did not attribute natural person powers to companies incorporated under it, the issue of *ultra vires* was treated in the same way. That is, an activity that was contrary to either the articles of association of the corporation or the **Companies Act** was *ultra vires* of the corporation. Thus, contracts entered into by a company which were not authorized by the articles or were in contravention of the **Companies Act** were *ultra vires* of the company. In **Angus v. R Angus Alberta Ltd.** (1988), 85 A.R. 266 at para. 42, 58 Alta. L.R. (2d) 76 at 87, 50 D.L.R. (4th) 439 at 449 (C.A.), this Court stated:

Acts of a company carried out in contravention of the **Companies Act** are illegal and *ipso facto ultra vires* because they are incapable of being ratified by the shareholders. The shareholders cannot approve a breach of statute.

[30] The respondents also argue that the provisions of the Act are to be given a liberal and remedial interpretation. However, broad, liberal and remedial interpretations do not permit courts to ignore words that are part of an enactment. The only provision in the Act dealing with the issue of how fees are to be collected is s. 31. That provision enables a condominium corporation to collect fees on a unit factor basis. It does not empower condominium corporations to collect fees based on other considerations. It is not the role of the courts to enlarge what the legislature has chosen to

provide for whenever a possible inequity may occur as a result of the enforcement of the plain meaning of the legislative provision. The appropriate remedy is either to avoid the problem by correctly allocating unit factors in the first place, or by an amendment to the legislation. With respect to s. 31 the legislature has chosen to do exactly that. I conclude it did so because it perceived situations, perhaps such as the one presented here, where other considerations aside from unit factors formed the appropriate basis for the attribution of a condominium fees.

[31] The respondents argue that resort may be had to s. 30 relating to the management powers of the corporation. However, this section does not support the respondents' position. The responsibility for enforcement of by-laws does not provide a corporation with natural person powers. It only enables it to enforce otherwise valid by-laws. Further, the control, management, and administration of the corporation's property says nothing about how money is to be raised for the care of the common property and the payment of utilities.

[32] The scheme of the Act does not permit a court to impose what it considers to be fair on a case-by-case basis. Rather, the scheme is designed to provide certainty to owners and corporations alike. It thereby achieves fairness, as a reading of relevant provisions reveals that the legislature has chosen to limit the power of condominium corporation to impose fees. The extent of that limitation is apparent on any reading of s. 31 of the Act. All owners should be able to rely on the knowledge that fees will always be collected as a readily calculable amount based on unit factors. This form of assessment provides owners with certainty that their portion of fees will never exceed the proportion of unit factors they hold in relation to the entire number of unit factors issued. This certainty remains regardless of the whims of a board or its views regarding other aspects of fairness. It must be remembered that every departure from collection of fees on a basis other than unit holdings will result in someone paying proportionately more. Here, it is the owners of the high-rise units who are asked to do so.

[33] The trial judge relied on several decisions from other jurisdictions in concluding that the scheme was not *ultra vires*: **Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No. 441** (1998), 42 O.R. (3d) 62, 114 O.A.C. 370; **Winnipeg Condominium Corp. No. 12 v. Edwardian Estates** (1995), 100 Man. R. (2d) 234, 123 D.L.R. (4th) 16 (C.A.); **York Region Condominium Corp. No. 771 v. Year Full Investment (Canada)** (1992), 10 O.R. (3d) 670, 95 D.L.R. (4th) 327 (Gen. Div.), aff'd (1993), 12 O.R. (3d) 641, 100 D.L.R. (4th) 449 (C.A.). However, a review of each of these decisions reveals that they either did not go as far as the trial judge determined, or were based on legislation which authorized the court to achieve "equitable" results. Similar provisions are not found in the Act.

[34] I conclude that the rebate by-law and agreements are contrary to the Act and are therefore *ultra vires* and unenforceable.

2. Delay and Estoppel

[35] The short answer to the question of whether laches or estoppel can legitimize an otherwise *ultra vires* act is that they cannot. An *ultra vires* act is an illegal act and it remains such even if it is acted on over the course of time or on separate consecutive occasions: **Halsbury's Laws of England**, 4th ed., vol. 16 (London: Butterworths, 1992) at 907; **Maritime Electric Co. v. General Dairies**, [1937] 1 All E.R. 748, [1937] 1 D.L.R. 609 (P.C.) ("**Maritime Electric**"); **York Condominium Corporation No. 288 v. Harbour Square Commercial** (1988), 49 R.P.R. 264 at 271-72, at paras. 43-47 (QL) (D.C.) ("**York Condominium v. Harbour Square**"); **Northern Alberta Agribusiness v. Falher (Town)** (1980), 14 Alta. L.R. (2d) 97 at 102, at para. 11 (QL) (Q.B.); **United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)** (2002), 303 A.R. 249 at 289, 3 Alta. L.R. (4th) 211 at 259, 2002 ABCA 131 at para. 163, leave to appeal to the S.C.C. requested [2002] S.C.C.A. No. 318 (QL).

[36] In **Maritime Electric**, *supra*, an electrical utility company erroneously undercharged a customer when it was, by statute, required to charge all customers equally. Although the customer relied to his detriment on the low bills and therefore had grounds for an argument of estoppel, this defense was denied by the Judicial Committee of the Privy Council which noted "the duty of each party is to obey the law" (at All E.R. 753, D.L.R. 613).

[37] This same principle applies to condominium corporations. In **York Corporation v. Harbour Square**, *supra*, a condominium corporation wrongly permitted the unauthorized use of common property over four years, and then retracted its authorization. The court rejected the estoppel defense on the grounds that it is not effective against a statutory duty or obligation. Similarly, in **Strata Plan 1261 v. 360204 B.C. Ltd.** (1995), 50 R.P.R. (2d) 62, an agreement between a condominium corporation and a company allowing the company to rent out spaces in a parking garage was declared invalid because there had been no resolution of the owners in relation to this common property, notwithstanding that the agreement had been in place without complaint for four years.

3. The Indoor Management Rule

[38] The trial judge applied the indoor management rule to correct an irregularity in the passage of the rebate by-law. The problem arose because when the rebate by-law was passed, the board had only one member and the general by-laws of the corporation state that when there is a mortgage on title, the board is to consist of at least three people. At the time of the passage of the rebate by-law, a mortgage was in place.

[39] The indoor management rule states that persons dealing in good faith with a corporation are entitled to assume that prescribed formalities have been met. However, this rule does not apply to bodies formed by statute: **Hollenberg v. British Columbia Optometric Association** (1967), 61 D.L.R. (2d) 295 at 307, at para. 3 (S.C.). Further, the Act does not contain any saving provision such as that found in s. 19 of the **Business Corporations Act**, *supra*. Finally, if the decision in **York Condominium Corporation No. 162 v. Noldon Investments Ltd.** (1977), 1 R.P.R. 236, (Ont. H.C.J.) applies to irregularities respecting condominium corporation contracts, I decline to follow it. However, that decision nonetheless emphasizes the importance of formalities when the developer is in control, as was the case when the rebate by-law was passed.

[40] I agree that there is an added importance to ensuring that formalities are met while the developer is in control. Compliance with formalities serves as an additional protection to purchasers of units in the development, as it serves to avoid secret by-laws and agreements that may only surface when the corporation is turned over to the purchaser board, or some time later when the developer turns over the corporate documents to the owner board.

[41] I conclude that the indoor management rule has no role to play in the analysis of the enforceability of contracts entered into by condominium corporations.

4. The Addition of Regal Pacific as a Party and Findings of Fact

[42] A decision to add a plaintiff to the action is entitled to deference from an appellate court: **Alberta Treasury Branches v. Ghermezian** (2000), 266 A.R. 170 at 173, 84 Alta. L.R. (3d) 229 at 232, 2000 ABCA 228 at para. 12. I do not propose to interfere with the trial judge's exercise of that discretion in adding Regal Pacific as a party.

[43] Issues relating to findings of fact engage a standard of review where such findings are not to be reversed unless it can be established that the trial judge made a palpable and overriding error: **Housen v. Nikolaisen** (2002), 286 N.R. 1 at 12, 211 D.L.R. (4th) 577 at 584-85, 2002 SCC 33 at para. 10. The appellant is unable to demonstrate such error. With respect to the one issue which was argued at the appeal, being whether or not there was a "standstill agreement", there was support for the finding of the trial judge. In any event, that finding must be considered in context. If, contrary to what the trial judge found, there was a standstill agreement, that agreement only covered a short

period of time between the passage of the rebate by-law and the litigation. Regardless, I have determined that delay cannot make an illegal act legal.

5. The Basis for the Damages Awarded

[44] The appellant argues that the trial judge awarded damages for a cause of action unknown to law. This issue does not need to be addressed, as damages cannot have been awarded given the conclusion that the by-law and contracts were *ultra vires* of the appellant.

6. Costs at Trial

[45] The trial judge awarded solicitor-client costs to the respondents. In view of the decision I have reached, those costs are set aside. I do not propose to deal with whether that award would have been an unreasonable exercise of discretion had the trial judge correctly found in favour of the respondents.

[46] However, the respondents retain a degree of the success they achieved at the trial as the appellants abandoned its appeal with respect to fees rebated to the date of the trial decision. The appellants are therefore entitled to costs based on this degree of success.

Conclusion

[47] I would allow the appeal and dismiss the respondents' claims.

APPEAL HEARD on May 6, 2003

REASONS FILED at EDMONTON, Alberta,
this 28th day of July, 2003

I concur: _____
Authorized to sign for McFADYEN J.A.

I concur: _____
Authorized to sign for: PICARD J.A.

RITTER J.A.

TAB 12

In the Court of Appeal of Alberta

Citation: Kubota Canada Ltd. v. Case Credit Ltd., 2005 ABCA 139

Date: 20050405

Docket: 0303-0405-AC

Registry: Edmonton

Between:

Kubota Canada Ltd.

Appellant
(Respondent)

- and -

Case Credit Ltd.

Respondent
(Applicant)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Madam Justice Myra Bielby**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice W.E. Wilson
Dated the 25th day of November, 2002
(Docket: (88845) 88979)

Memorandum of Judgment

The Court:

[1] An unperfected purchase-money security interest (PMSI) will have priority over a perfected security interest where the agreement creating the latter contains subordination provisions to that effect. Those provisions need not be express, but before subordination will be implied, the wording used in the perfected security agreement must acknowledge a priority for the PMSI. Here, there is no such implication in the wording, but merely a warranty as to ownership of the collateral, and a covenant to maintain it free from encumbrances other than PMSIs.

Facts

[2] The Canadian Western Bank, which advanced a separate claim disposed of in the judgment below, has not appealed from that judgment. This decision, therefore, deals only with the contest between the Appellant Kubota Canada Ltd. and the Respondent Case Credit Ltd.

[3] The learned chambers judge concluded that the Appellant did not have priority, as against the Respondent's competing claim, so as to enable it to claim entitlement to inventory it supplied to an insolvent debtor pursuant to the provisions of an agreement creating a PMSI ("the Kubota collateral"). The Appellant had allowed its registration of the PMSI at the Personal Property Registry to lapse. Prior to that situation being discovered and remedied, the Respondent had obtained and registered a general security agreement in which the debtor pledged all its present and after-acquired property to the Respondent.

[4] The Appellant argues that it should have been granted priority because the Respondent's security agreement contains an implied subordination clause pursuant to which its PMSI retained priority notwithstanding the lapse in registration. The chambers judge found no such subordination on the wording of the Respondent's security agreement, the relevant portions of which read:

2. DEBTOR'S WARRANTIES

Debtor warrants that while any of the Obligations are unpaid:

- (a) ... Debtor is the owner of the Collateral free of all encumbrances and security interests except Secured Party's security interest and *Permitted Liens* . . .

4. DEBTOR'S COVENANTS

Debtor agrees:

- (a) . . . Debtor shall: maintain the Collateral . . . keep it free from all liens, encumbrances and security interests (*other than Permitted Liens . . .*)

[5] The term “Permitted Liens” was defined in the Respondent’s security agreement as including:

- (iii) *purchase money liens on property acquired in the ordinary course of business to finance or secure a portion of the purchase price thereof;*
 . . . [emphasis added]

Standard of Review

[6] The parties agree that the standard of review for this appeal is correctness.

Methods of Establishing Priority

[7] The ***Personal Property Security Act***, R.S.A. 2000, c. P-7 (the ***Act***) establishes a scheme to allow lenders to obtain and enforce security against a debtor’s personal property in connection with loans to the debtor. The ***Act*** allows debtors to grant security over both property owned at the time the debt arises and property acquired in the future. Generally, debtors grant such security by way of a written agreement, which typically provides that the lender has a first claim to all present and after-acquired property upon default (a “general security agreement”); see s. 10(1) of the ***Act***.

[8] The ***Act*** allows for debtors to continue acquiring inventory and equipment needed to operate their businesses. This continued acquisition may be financed by others, typically vendors, notwithstanding the debtor’s previous grant of security in all after-acquired property to its lender. Section 1(11) provides that a PMSI arises when a debtor gives a security interest in collateral to secure payment of part or all of the purchase price of the collateral. Section 34 provides that a PMSI has priority over any other security if the PMSI is perfected within a specified time period. Part 3 of the ***Act*** sets out various ways to perfect a security. One of these is registration; see s. 25. Registration is made at the Personal Property Registry; see s. 42(1).

[9] Accordingly, vendors remain prepared to sell inventory and equipment to a business which has granted a general security agreement, because the business is nonetheless able to grant priority to those vendors in relation to the goods which are the subject of the sale. The lender holding the general security agreement is not able to assert priority over the vendor, even though the wording of that agreement purports to grant priority to the lender over all after-acquired property.

[10] In addition to the above, there are other means by which priority to after-acquired goods may be established. This case involves one of those means. Where the lender agrees in its general security agreement that the debtor may grant priority to other parties, such a grant will take priority even if the agreement with the other parties is not perfected by registration or otherwise. This is

because, through a term of the contract (often called a “term of subordination”), the lender has agreed to give the debtor that ability. Section 40 of the **Act** preserves the lender’s right to give such a subordination, that a third party can then enforce, if that third party is one of the persons for whose benefit the subordination exists.

[11] Applying these provisions to the case at bar, the Appellant’s claim of priority to the Kubota security, given its lapsed registration at the Personal Property Registry, depends on the terms of the general security agreement between the Respondent and the debtor. The Appellant argues that the agreement contains the requisite subordination, while conceding that it does not do so expressly.

Clauses Implying Subordination

[12] While there is no term in the Respondent’s general security agreement expressly stating that a PMSI shall have priority over the Respondent’s security, the Appellant nonetheless argues that such priority is implicit in the relevant clauses.

[13] The Respondent argues that these clauses merely permit the debtor to grant PMSIs to secure financing for future acquisitions, but fall short of also granting such PMSIs priority in the absence of registration or other perfection under the **Act**.

[14] Subordination has been found to arise by way of implication; see **Chiips Inc. v. Skyview Hotels Ltd.** (1994), 155 A.R. 281 (C.A.) (para. 5). The majority of the Court there considered a spectrum of reported decisions, in similar fact-situations, to ultimately arrive at its decision that such an implied subordination existed in that case.

[15] At one end of that spectrum was the decision of the Ontario Court of Appeal in **Euroclean Canada Inc. v. Forest Glade Investments Ltd.** (1985), 16 D.L.R. (4th) 289 (leave to appeal to the Supreme Court of Canada dismissed, 3 June, 1985) which contained an express subordination clause as follows:

- (e) Not Encumber -- The Corporation shall not, . . . , create any mortgage, hypothec, charge, lien or other encumbrance upon the mortgaged property . . . ranking or purporting to rank in priority to or pari passu with the charge created by this Debenture, except that the Corporation *may give mortgages or liens in connection with the acquisition of property after the date hereof* . . . and any such mortgage, lien or other encumbrance *shall rank in priority* to the charge hereby created. [emphasis added]

[16] At the other end of the spectrum is **Sperry Inc. v. Canadian Imperial Bank of Commerce** (1985), 50 O.R. (2d) 267 (C.A.), in which the Ontario Court of Appeal found that the clauses in the lender’s general security agreement fell far short of creating a subordination agreement, although finding for the equipment supplier on other grounds. The clauses in question read:

1. . . . the undersigned hereby charges in favour of and grants to the Bank a security interest in the undertaking of the undersigned and all property. . . of which the undersigned is now or may hereafter become the owner . . .

4. Ownership of Collateral

The undersigned represents and warrants that, except for the security interest created hereby and *except for purchase money obligations*, the undersigned is, or with respect to Collateral acquired after the date hereof will be, the owner of the Collateral free from any. . . encumbrance. “Purchase money obligations” means any . . . encumbrance upon property assumed or given back as part of the purchase price of such property . . . (emphasis added)

[17] Midway between the two positions is ***Canadian Imperial Bank of Commerce v. International Harvester Credit Corporation of Canada***, [1986] O.J. No. 1315, where the following clauses were found to create an implicit subordination agreement in relation to a floating charge given by a lender:

- 2.1 As security for the due payment of all moneys payable hereunder, the Corporation as beneficial owner hereby:
 - (a) grants, assigns, conveys, mortgages and charges as and by way of a first fixed and specific mortgage and charge to and in favour of the Bank . . . all machinery, equipment, plant, vehicles, goods and chattels now owned by the Corporation . . . and all other machinery, equipment, plant, vehicles, goods and chattels, hereafter acquired by the Corporation; and
 - (b) charges as and by way of a first floating charge to and in favour of the Bank, . . . all its undertaking, property and assets, both present and future, of every nature and kind . . .

In this Debenture, the mortgages and charges hereby constituted are called the “Security” and the subject matter of the Security is called the “Charged Premises”.

- 2.2 Until the Security becomes enforceable, the Corporation may dispose of or deal with the subject matter of the floating charge in the ordinary course of its business and for the purpose of carrying on the same provided that the Corporation will not . . . create, assume or have outstanding, except to the Bank, any mortgage, charge or other encumbrance on any part of the

Charged Premises *ranking or purporting to rank or capable of being enforced in priority to or pari passu with the Security*, other than any . . . encumbrance . . . created . . . to secure all or any part of the funds required for the purchase of such property . . .

[18] Similarly in ***Transamerica Commercial Finance Corporation Canada v. Imperial T.V. & Stereo Centre Ltd.***, [1993] A.J. No.740 (Q.B.), the following was found adequate to form the basis of an implicit subordination agreement (although the PMSI-holder lost on other grounds):

Imperial, by the terms of the Debenture, agreed not to assume any other charges against the assets of the company, without the prior written consent of the Credit Union, *that would have priority over the Credit Union's debenture unless, inter alia;*

The same be given to or in favour of the bankers of [Imperial] on the security of the accounts receivable or the inventory of [Imperial] to secure current loans required for the usual purposes of the business of [Imperial] and whether given pursuant to the provisions of the Bank Act or otherwise. [emphasis added]

[19] After considering the above authorities, this Court in ***Chiips*** found that a subordination agreement was implicit in the following clauses:

4.05 Possession, Use and Release of Mortgaged Property

Until the Security becomes enforceable, the Company may dispose of or deal with the subject matter of the floating charge . . . provided that the Company shall not . . . create . . . or other encumbrance on any part of the Mortgaged Property *ranking or purporting to rank or capable of being enforced in priority to or pari passu with the Security*, other than,

- (a) any mortgage, lien or other encumbrance upon property, created or assumed to secure all or any part of the funds required for the purchase of such property . . .

6.01 The Company covenants and agrees with the Holder that, so long as this Debenture is outstanding, the Company shall not:

. . .

- (c) create . . . any . . . other encumbrance on any part or all of the Mortgaged Property ranking or purporting to rank in priority to or pari passu with the Security . . . provided, however, that this covenant

shall not apply to, nor operate to prevent, and there shall be permitted:

- (i) the . . . giving of purchase money mortgages or other purchase money liens on property acquired by the Company . . . in connection with the acquisition or purchase of such property . . . [emphasis added].

[20] In reviewing these authorities, it is important to keep in mind that an agreement permitting the debtor merely to grant a PMSI is different from one permitting the debtor to grant a PMSI which will rank ahead of other security. This difference between a merely “permissive” clause, and a clause intended to affect priorities, is recognized by Professors Cuming and Wood in the *Alberta Personal Property Security Handbook* (Carswell: Scarborough, Ont., 1998), at p. 384, as follows:

. . . a distinction should properly be drawn between a subordination clause and a negative covenant with a permissive provision . . . the fact that the security agreement permits the debtor to create the interest should not be taken to imply that the secured party intends to subordinate his claim to that interest.

[21] The Appellant argued against this statement, maintaining that commercial reality dictates that whenever a PMSI is granted, that PMSI should, perfected or not, have an implied priority over any general security. Counsel for the Appellant observed that businesses with operating or other loans from their bankers secured by general security agreements must be allowed to acquire inventory or equipment on an ongoing basis through vendor financing secured by PMSIs. If these PMSIs did not have priority over the general security vendors would not sell on credit, no such further acquisitions could be made, businesses would struggle, and general loans would then go into default. Counsel also noted that bankers would not be prejudiced by priority being given to PMSIs because such security would cover only after-acquired goods, whereas the bankers had advanced funding based on the assets and income of the business as it existed prior to the purchases which gave rise to the PMSIs.

[22] This reasoning explains why lenders, such as the Respondent, are prepared to allow PMSIs to be created subsequent to the creation of a general security agreement. However, commercial reality stops short of requiring that these PMSIs should have priority in all circumstances. There is no commercial reality which would dictate against requiring the subsequent PMSIs to be registered or otherwise perfected for the priority to arise or continue.

Words Implying Ranking or Priority

[23] As the general security agreement granted to the Respondent does not contain an express subordination in favour of the Appellant’s PMSI, one must analyze the wording of that general security agreement to determine whether it supports a finding of implicit subordination. In s. 2 the debtor warrants that, subject to permitted liens, it is the owner of the collateral. In s. 4 the debtor

agrees to keep the collateral free of encumbrances except for permitted liens, which are defined to include PMSIs.

[24] Nowhere in these clauses is there any suggestion of the granting of priority to PMSIs. The Appellant argues that such a grant should be implicit in the use of the phrase “purchase money lien” because those liens are considered to have priority under the *Act*. However, that is not so; under the *Act*, priority exists only when a PMSI is perfected, which is not the situation here.

[25] In *Chiips* the clauses found to create an implied subordination included the following:
 4.05 . . . the Company shall not . . . create . . . or other encumbrance . . . ranking or purporting to rank or capable of being enforced in priority . . . to the Security [agreement] other than . . . [any PMSI].

[26] The Court of Appeal found this to imply that any such PMSI would rank in priority to the general security agreement.

[27] Similar wording can be found in *CIBC v. International Harvester* :

. . . the Corporation will not . . . create . . . any . . . encumbrance . . . ranking or purporting to rank or capable of being enforced in priority to or pari passu with the Security, other than . . . [a PMSI].

[28] Also, in *Transamerica*, the debtor agreed not to assume any other charges against the assets of the Company that would have priority over the Credit Union’s debenture other than those given on inventory or accounts receivable to secure current loans required for the usual purposes of the business. While not dealing with a PMSI as such, the clause forbade the granting of any security in priority to the Credit Union “other than” the specified types of security.

[29] In each of these authorities, the prohibition against granting security with priority, “other than” a PMSI or equivalent, set the basis for the implication of subordination. Permitting an exception in a prohibition against granting priority implicitly grants priority to the exception. In this way, the wording of these clauses implicitly creates a grant of priority to PMSIs.

[30] It is interesting to note that while the Court did not expressly make this observation in *Chiips*, the clause under consideration there amounted to an exception from the debtor’s general grant of security. Article 4 of that agreement, entitled “Mortgage and Charge” contained the charging provisions, under which the debtor granted general security over all its property. Article 4.05 contained an exception to that grant, allowing the debtor to use and dispose of the charged property in the ordinary course of its business, subject to the prohibition against granting priority other than to PMSIs. A mere covenant or promise not to encumber does nothing to benefit a non-party, unless it also sets up a priority in favor of that non-party. In *Chiips*, the general security agreement implicitly did so, by the arrangement and use of “priority” wording.

[31] In the present case, no similar words are to be found. There is no prohibition against the granting of security with priority over the security agreement, and therefore no exception from such a prohibition for PMSIs. There is simply a warranty that the debtor owns the contemplated collateral free of any encumbrances except for PMSIs (and other “permitted liens”) at the time of execution of the agreement, and there is a promise that the debtor will maintain the collateral in this condition. Further, these provisions relating to PMSIs are not found in the part of the security agreement where the debtor gives the Respondent a charge over its property which might have better supported a finding of implied subordination.

[32] The wording in question is akin to that in *Sperry*. The clause in that case was also a mere warranty as to ownership, with no reference to any exception to the general creditor’s priority.

[33] The Appellant finally attempted to rely on the principles of statutory construction in arguing that the debtor and Respondent must have intended PMSIs to have priority over the Respondent’s security in all situations, because the definition of “permitted liens” in their security agreement groups PMSIs with other types of liens which would have priority without registration by statute or otherwise. These included tax liens, construction liens, easement restrictions, minor title irregularities and workers’ compensation liens. However, the Appellant offered no authority to support the suggestion that each of these charges would create priority without the need for any type of registration.

Conclusion

[34] The learned chambers judge was correct that the wording of the security agreement in this case did not subordinate the Respondent’s rights to the rights of PMSI-holders. Express wording is not needed to create a subordination, but subordination will be implied only where the wording acknowledges a priority for PMSIs. Here, as Harradance, J.A. observed of *Sperry*, at para. 48 in *Chiips*:

It is understandable that the court found that this clause “falls far short” of an agreement to subordinate the bank’s interest. This clause is very vague and does not at any point mention the terms “rank” or “priority”.

[35] The appeal is therefore dismissed.

Appeal heard on March 3, 2005

Memorandum filed at Edmonton, Alberta
this 5th day of April, 2005

Côté J.A.

Authorized to sign for: Picard J.A.

Bielby J.

Appearances:

F.H. Belzil
for the Appellant (Respondent)

D.A. Bodner
for the Respondent (Applicant)

TAB 13

In the Court of Appeal of Alberta

Citation: R v HB, 2022 ABCA 240

Date: 20220707
Docket: 2203-0119A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

H.B.

Applicant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the complainants must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

**Reasons for Decision of
The Honourable Justice Jack Watson**

Application for Judicial Interim Release

**Reasons for Decision of
The Honourable Justice Jack Watson**

[1] The appellant seeks judicial interim release pending his appeal from conviction on five counts of sexual offences against three complainants, his children, over a period of 15 years. Guilty verdicts in relation to those counts were rendered by a jury. He testified and denied the offences. His oldest son also testified that he did not suffer or see the conduct complained of by his younger siblings. Plainly, the jury accepted the evidence of the complainants. On June 9, 2022, the appellant was sentenced to imprisonment for a total of 14 years. The appellant's counsel advises that the appellant has also launched an appeal against the sentence.

[2] The appellant's affidavit in support of his application sets out that he was born in 1949 and is presently 73 years of age. Having been admitted to the Bar of Alberta in 1979, he largely was engaged in a civil litigation practice until he and his wife retired in 2018. He and she no longer reside in Alberta. He was arrested on the charges on December 18, 2018. He was granted judicial interim release pending trial and was compliant with the terms of release until the jury's verdict which was on April 14, 2022, following a 10-day trial. The Crown did not seek his detention pending sentence, and he resided outside of Alberta until he returned for sentencing and surrendered to the Court.

[3] The appellant's affidavit does not suggest any health conditions or other factors which would indicate that the appellant would suffer any "unnecessary hardship" pending appeal within the meaning of s 679(4)(a) of the *Criminal Code*, were this a situation of a sentence appeal only. The case before me, of course, is not limited to sentence, so the governing test is in s 679(3) of the *Criminal Code* which provides that an applicant may be released "pending the determination of his appeal if the appellant establishes that (a) the appeal or application for leave to appeal is not frivolous; (b) he will surrender himself into custody in accordance with the terms of the order; and (c) his detention is not necessary in the public interest."

[4] There is no serious issue as to the appellant's willingness to surrender so the issues in the motion concern whether the appellant has established an appeal which is not frivolous, a low bar, and that his continued detention is not necessary in the public interest, which in this case is assessed principally on balancing the reviewability and enforceability considerations of the conviction.

[5] The decision of **R v Oland** 2017 SCC 17 at paras 23-25, [2017] 1 SCR 250 explained that there are two main features of the public interest, namely public safety and public confidence. Public safety is assessed not only by the level of risk of re-offence but also by the effect of re-offence if it occurs: compare **R v Proulx** 2000 SCC 5 at paras 66-69, [2000] 1 SCR 61. The magnitude of effect can offset the level of risk in favor of detention.

[6] As also pointed out in *Oland*, at para 27, there may be residual public safety concerns that “remain relevant and should be considered in the public confidence analysis” even if public safety can be addressed by release conditions. All that said, I am not persuaded that the appellant’s release pending appeal would endanger the safety of the public in a manner that could not be addressed by appropriate release conditions. Crown counsel did propose reasonable conditions at the hearing of the within application.

[7] Since *Oland*, giving proper weight to the public interest criterion would involve weighing the *strength* of the grounds of appeal even if they meet the ‘not frivolous’ test. At paras 45-48 of *Oland*, Moldaver J stated that “the strength of the grounds of appeal, the seriousness of the offence” inform the public interest. Moldaver J also referred, at para 44, to the court looking at whether the grounds of appeal “clearly surpass” the “minimal standard required to meet the “not frivolous” criterion”.

[8] Drawing those threads of *Oland* together seems to me to involve recognizing the principle of statutory construction that the court does not “lightly assume” that the legislature would enact two provisions in the same law to perform the same work: compare *United States v Taylor*, 596 U.S. (2022), citing *Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825/839, n. 14 (1988); see also *Duncan v Walker*, 533 US 167/174 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”).

[9] It is similarly established in Canadian law that the courts assume every word in a statute of Parliament is intended to have a meaning and is not merely surplusage: see *eg Alberta (Education) v The Canadian Copyright Licensing Agency*, 2012 SCC 37 at para 47, [2012] 2 SCR 345; *CHRC v Canada (sub nom Mowat)*, 2011 SCC 53 at para 38, [2011] 3 SCR 471 (“[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain”).

[10] The courts should likewise assume that Parliament is aware of common law interpretations of its wording of “public interest”. With that in mind, it strikes me that ss 679(3)(a) and (c), when read as in *Oland*, set the “not frivolous” criterion under s 679(3)(a) to screen cases with such a plain lack of merit that it is not necessary to address the public interest and that, for s 679(3)(c) as to public interest, the court is still expected to place the strength of the grounds into the scales at the stage of balancing reviewability and enforceability.

[11] The appellant proposes two grounds of appeal as to impugned evidence which he submits are arguable and rest on points of principle. In response, the Crown submits that the grounds are either frivolous in the legal sense or weak, contending that the impugned evidence came into the record to respond to defence positions made at trial and was not at the time the subject of complaint or motion for directions in the charge to the jury.

[12] The first ground of appeal contends that the trial judge altered an initial ruling that witness CS would not be allowed to testify as to what CS allegedly said about the matters in question around the year 2000. In that ruling, the trial judge expressed concern that such evidence would risk oath-helping to bolster CS's trial evidence: compare **R v Stirling**, 2008 SCC 10 at paras 5-11, [2008] 1 SCR 272.

[13] Later in the trial, however, defence counsel cross-examined witness JF on portions of JF's statement to the police on October 12, 2018. JF had included in the statement comments during the discussion of memory issues and a "bad path" JF's life had taken. One of those comments was that if "maybe most of it" was what happened to CS and LP, JF "would be for them 110 percent". It was also put to JF that JF said to the police officer that "I would also go through with this 100 percent just for [CS and LP] case, to be quite honest". Before the trial judge, defence counsel suggested this was valid cross-examination to show present bias or collusion on the part of JF to bolster the evidence of CS and LP.

[14] Crown counsel sought permission to re-examine JF on *the time frame* when JF first heard of CS's and LP's allegations. The trial judge restricted the permission to the "when" and not to any content. The specific question of Crown counsel was "When did you – when did they first alert you to their allegations against [the appellant]?" JF's answer was "I would have been 18 years old. The year 2000. Some time in the summertime. I was living on my own . . .".

[15] The appellant submits that this evidence coming from the mouth of JF and not CS, whose evidence was completed, or LP, who had not yet testified, was hearsay and exceeded the 'narrative' exception discussed by a member of the panel in **R v Staath**, 2021 ABCA 88 at paras 35-37, 22 Alta LR (7th) 78 (the other members of the panel did not cover the same territory). The Crown submits that more to the point is **R v Fast**, 2022 ABCA 33 at para 7, paras 69-79, [2022] AJ No 127 (QL) which distinguished evidence of the content of prior statements and the circumstances surrounding those prior statements. Crown counsel said the trial judge rightly allowed this evidence to address the implicit inference that JF was in 2018 signing on to support CS and LP.

[16] In the appellant's memorandum on the motion, counsel writes that "[t]he correct remedy would have been a prior consistent statement from [JF] to rebut the impression that it was only after this bias arose that the allegations were made by [JF] for the first time. No such statement was ever tendered": (AM para [15]). Crown counsel goes on to say that this submission effectively concedes that the "when" of JF's awareness was a material consideration.

[17] The Crown then adds that the defence at trial did not seek an addition to the jury charge to overcome the alleged prejudice from this evidence, citing **R v M(SK)**, 2021 ABCA 246 at para 46, [2021] AJ No 930 (QL). **M(SK)** is distinguishable because the misuse of prior statement evidence in that case was well past what occurred here (notably repetition to numerous persons coupled with indications of content), but it is illuminating that the panel in **M(SK)** said at para 32:

32 In our view, had the trial judge provided a similarly worded limiting instruction it would have been clear to the jury that repetition does not prove the truth of something oft-repeated; here, the alleged sexual assault. We are also confident that such an instruction would not have confused the jury about why the defence used the complainant's statements to raise both inconsistencies in the complainant's evidence, and to support the defence theory that the complainant's memories were falsely constructed, therefore unreliable. Rather, we are satisfied that if the jury had been given an adequate limiting instruction, it would have gained a full appreciation of the legal dangers of relying on evidence merely because it has been repeated.

[18] In other words, the alleged prejudice here could readily have been overcome. Since the issue of this responding evidence of JF was debated by counsel, I am unable to infer that counsel forgot about the matter or otherwise acted ineffectively as counsel. Rather, counsel left the issue as it had emerged, with a generalized consciousness of JF dating back 18 years with no content confirmatory of CS or LP. Leaving the situation that way and not requesting instructions does not look like error let alone ineffectiveness to me; rather, it seems to me to be a reasonable tactic: see **R v Calnen**, 2019 SCC 6 at para 37, [2019] 1 SCR 301; **R v Samaniego**, 2022 SCC 9, at paras 41-47, 412 CCC (3d) 7.

[19] The effect of all this is that the first ground of appeal is, in my view, devoid of merit to the point of meeting the test in s 679(3)(a) of the *Code*. If the argument could be said to get past "not frivolous" it does not do so "clearly" – compare **R v Hamad**, 2018 ABCA 87, [2018] AJ No 253 (QL) – or at the least it is not strong enough to overcome enforceability for the purposes of a judicial interim release application.

[20] The second ground of appeal is that during the cross-examination of the appellant, the appellant asserted that he was unaware of an investigation in 2001 into sexual abuse in the household by Child and Family Services. The Child and Family Services investigator had not spoken to the appellant personally nor did she ask anyone to pass on information to the appellant. But the investigator had spoken to the appellant's wife (who on the affidavit before me also worked with the appellant in his office). The Crown contended that it was implausible that the appellant's wife would not mention this to the appellant.

[21] It is not argued that the responsive evidence would have been inadmissible if there were direct evidence that the appellant was told about the Child and Family Services investigation. The main complaint is that the Crown did not call the appellant's wife to prove she passed along the information. If an adverse inference is hinted at in this submission, it would seem under the circumstances to more realistically land on the defence.

[22] In any event, Crown counsel points out that the trial judge instructed the jury that the only use of that evidence was for the purposes explained by counsel in their final addresses, and Crown counsel's argument was not improper. The trial judge also instructed the jury that the investigator's

evidence was not to be used as proof that the appellant was sexually abusing any of his children, nor to help support or confirm the testimony of the complainants. The appellant's memorandum before me does not propose alternative directions. It is settled law that a jury will be taken to act on the instructions they get from the trial judge: see **R v Corbett**, [1988] 1 SCR 670 at p 692; **R v Morningchild**, 2011 ABCA 215 at para 13, 510 AR 369; **R v A(N)**, 2015 NWTCA 8 at para 32, 331 CCC (3d) 33; **R v Barton**, 2019 SCC 33 at para 247, [2019] 2 SCR 579.

[23] As with the first ground of appeal, I am not persuaded that the second ground of appeal is arguable.

[24] This returns me to the crucial question of the balancing involved in the public interest. Despite the able submissions for the appellant, I am not persuaded that the significant public interest in enforceability of a decision of jurors on the serious offences that was visited by the sentence imposed is overcome by a need to review it. The decision was, when all is said and done, a decision on credibility and reliability of evidence.

[25] The application for judicial interim release is dismissed.

Application heard on June 30, 2022

Reasons filed at Edmonton, Alberta
this 7th day of July, 2022

Watson J.A.

Appearances:

R.A. Fata
for the Respondent

B.A. Beresh, Q.C.
for the Applicant

TAB 14

Editor's Note: Corrigendum released September 2, 2004. Original judgment has been corrected, with text of corrigendum appended.

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Mr. Justice Robert M. Hall
Date of Document:	2004 09 01
Statement of purpose in filing:	Reasons for Judgment on Application issued January 22, 2004 by GMAC Leaseco Ltd. for recovery from Receiver of cost allocations for units sold by Leaseco (as opposed to being sold by the Receiver) in the amount of \$53,909.08.
Court Sub-File Number:	9:10 (Ref. Sub-File 7:60)

CITATION: *In Re Hickman Equipment (1985) Ltd.*
 (In Receivership), 2004 NLSCTD 164

DATE: 2004 09 01

DOCKET: 2002 01T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

IN THE MATTER OF a Court ordered Receivership of Hickman Equipment (1985) Limited (“Hickman Equipment”) pursuant to Rule 25 of the **Rules of the Supreme Court, 1986**, under the **Judicature Act**, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the **Bankruptcy and Insolvency Act**, c. B-3 of the Revised Statutes of Canada, 1985, as amended (the “BIA”)

Before: The Honourable Mr. Justice Robert M. Hall

Place of Hearing: St. John’s, Newfoundland and Labrador

Date of Hearing: June 8, 2004

Appearances: Thomas R. Kendell, Q.C. for the Applicant, GMAC Leaseco Ltd.
 Frederick J. Constantine for the Receiver, PricewaterhouseCoopers Inc.
 Geoffrey Spencer for CIBC.
 Bruce Grant for John Deere Ltd. and John Deere Credit Inc.
 Griffith Roberts for Hickman Motors Ltd. and Group Holdings Ltd.

Authorities Cited:

STATUTES CONSIDERED: Personal Property Security Act, SNL 1998, c. P-71

REASONS FOR JUDGMENT

Hall, J.

Background

1. On February 7, 2002, this Court issued an Order (filed on February 8, 2002) whereby Hickman Equipment (1985) Limited (“HEL”) was afforded protection under the provisions of the **Companies Creditors Arrangement Act** (the “**CCAA Order**”). The **CCAA Order** essentially dealt with all assets of HEL regardless of whether those assets were in the possession of HEL as owner, or as agent for others, and whether secured or otherwise.

2. On March 14, 2002 this Court issued a Receivership Order (“the Receivership Order”) which Receivership Order ordered that PricewaterhouseCoopers Inc. (“PWC”) be appointed Receiver of HEL. The Receivership Order covered all of the property in the possession of HEL in the same manner and to the same extent as the **CCAA Order**. An earlier Receiving Order adjudged HEL bankrupt and also appointed PWC Trustee of the bankrupt estate. By virtue of paragraphs 10(c) and 10(e) of the Receivership Order, PWC was directed to develop a plan and procedure to govern the orderly liquidation of the assets of HEL. PWC was also directed to formulate a plan for a determination of the legal and equitable rights of creditors of and claimants against the bankrupt estate, there being many competing creditors claiming the same security. In particular, paragraphs 10(c) and (e) required the development by PWC of a Realization Plan and a Cost Allocation Plan. These

paragraphs in the Receivership Order stated:

1. "THIS COURT ORDERS that, in respect of the Assets, the Receiver is hereby empowered from time to time until further order of this Court generally to do all things which may be reasonably necessary in order to facilitate the development of a plan and procedural structure for the liquidating of the Assets or any part thereof and for the determination of the legal and equitable rights of all creditors and claimants including, without limitation:
 2. ...
 3. (c) to develop and recommend the optimal method for disposition of the Assets and the distribution of property or proceeds to those claimants or creditors entitled thereto and to report to the Court as soon as possible, but in any event within 45 days after this Order, with a recommended procedure to dispose of all realizable Assets, including the allocation of the costs of the entire process (the "Realization Plan"), provided that the Receiver shall only sell Assets upon further order of the Court.
 4. (e) to conduct such investigations and analyses of the Assets as may in its judgement be necessary or advisable to enable it to develop a plan for the determination of the rights and entitlement of creditors to the Assets or parts thereof, and present such plan and to apply to this Court for any direction or directions with respect to the preparation, development or implementation of such plan, including the allocation of costs of the entire process (the "Claims Plan")."
3. On May 14, 2002 this Court approved the Realization Plan and Cost Allocation Plan developed by PWC and the formal Order to that effect was filed on May 17, 2002.
4. After the approval of the Realization Plan and Cost Allocation Plan PWC proceeded with and completed the liquidation of substantially all of the assets of HEL. The majority of assets were sold by public auction, although some were sold by tender and others by way of negotiated sale agreement or pursuant to Court Order. As sales were completed and assets disposed of, many of the secured creditors of HEL, including the Applicant GMAC Leasco Ltd. in this current matter, brought Interlocutory Applications seeking payment to them of proceeds arising from the sale of assets over which these creditors claimed security. As these applications were arising prior to the completion of all elements of the receivership, it was necessary for the Receiver to develop a procedure whereby it could retain a holdback from the sale of the assets as a contribution towards costs incurred in the

receivership and to be attributed to the various creditors pursuant to the Cost Allocation Plan. As a result PWC sought, and this Court granted approval to PWC to retain a holdback of 15% of the proceeds of each sale as a contribution to the Cost Allocation Plan on the understanding that the matter of the allocation of cost would be revisited upon the completion of the realization process. Paragraph 5 of the Cost Allocation Plan dealt specifically with this intended revisit by providing:

1. “Costs of the Receiver or the Trustee in implementing the Realization Plan shall be apportioned as approved by the Court on the recommendation of the Receiver, with notice to all Interested Parties after completion of the realization process. In making its recommendation, the Receiver will adjust the allocation of costs to more equitably match assigned costs to actual realization proceeds. There may be indirect costs that are not allocable, except over all Assets.”

5. PWC has not as yet sought nor been granted a final Order making a final allocation of costs pursuant to paragraph 5 of the Cost Allocation Plan.

1. The Present Application.

6. GMAC Leaseco Ltd. brings this present application on the basis that no costs ought to be allotted against it with respect to the sale of 18 listed motor vehicles and that the amount of \$53,909.08 held back by the Receiver from the proceeds of the sale of those vehicles ought to be paid out to GMAC Leaseco Ltd. It asserts that these 18 motor vehicles (the “Applicant’s Units”) were sold solely through the effort and expense of the Applicant’s agent, Hickman Motors Limited, and not through any effort or expense of the Receiver. This is not largely disputed by PWC.

7. The 18 units in question were held by HEL as “equipment” as defined under the **Personal Property Security Act**, SNL 1998, c. P-71, (“**PPSA**”) as opposed to “inventory” as defined in the **PPSA**. They were essentially motor vehicles used in the operation of the business of HEL. HEL was a related company to Hickman Motors Limited, a substantial General Motors dealership and the units in question were General Motors’ products normally sold and serviced by Hickman Motors Limited in the course of its usual business. The Receiver agreed that having the units consigned for sale on behalf of the Receiver to Hickman Motors Limited was likely to achieve the best sale price for the individual units. This was the procedure which was followed and the units were refurbished by Hickman Motors Limited with the consent of the Receiver and ultimately sold. Unfortunately the sale prices which were generated were not sufficient to produce any equity for the receivership. Nonetheless, under the provisions of the Cost Allocation Plan, the sale proceeds were subject to the holdback for cost allocation in the amount of \$53,909.08.

8. GMAC Leaseco Ltd. takes the position that, for a variety of reasons, these particular units should not be subject to any holdback at all or any Cost Allocation Plan liability. In the alternative, counsel for GMAC Leaseco Ltd, at the hearing of this application, consented to a token cost allocation in the amount of \$7,500.

9. Principally GMAC Leaseco's objection to paying the 15% holdback with respect to these units was based upon:

- (1) that its right to security over these vehicles as first secured creditor was clear, easily determined and unchallenged by other creditors, and therefore the receiver simply ought to have turned over the vehicles to GMAC Leaseco to be realized upon in accordance with their securities without any charge for receivership costs being asserted;
- (2) the Receiver did not expend any effort on its own behalf in the refurbishing of or realization upon these units; and
- (3) it is fundamentally unfair in this situation that the units should be subject to cost allocation holdback in the amount of \$53,909.08 or any amount.

1. Receiver's Position.

10. The Receiver takes the position that, excepting some limited cases, there has been little or no distinction made by the Receiver in its securing, possessing and maintaining any of the assets of HEL that HEL had in its possession at the commencement of the receivership. The Receiver contends that the costs incurred by it in the management of the receivership have generally been incurred in relation to all the property of HEL without any distinction as to the category of property either by its possession by other parties or any other characteristic. In addition, it contends that all sales of the property have been by asset class and not by legal interest.

11. PWC contends that a principal role of PWC as a Court appointed Receiver is to assist the creditors and the Court in designing and executing a process that provides a fair opportunity to all creditors to adjudicate issues related to the receivership and that its role in this regard is defined in the Receivership Order and its mandate emanates from that Order and subsequent Orders of the Court. The duties of the Court appointed Receiver have included:

- (a) the design and implementation of Investigation and Claims Plans;

- (b) administrative tasks including development of a website where creditors could post and share documentation related to the receivership;
- (c) seizure and cataloging of the records of HEL;
- (d) regulate and required Court reporting;
- (e) completion of various statutory duties;
- (f) investigative and legal work associated with a potential Court action against the auditors of HEL as mandated by an Order of the Court;
- (g) meetings with creditors and responding to requests for information; and
- (h) working on defined tasks of the Receiver's mandate as ordered by the Court.

12. PWC therefore argues that Cost Allocation Plan issues apply to many more issues than simply the cost of realizing on any particular asset or group of assets. It contends that it alone is able to provide a neutral position with respect to costs allocation that is independent of the particular interest of any one creditor or group of creditors and that this independent approach provides a consistent, evenhanded approach to cost allocations. It contends that a consistent approach to cost allocation issues should be adopted so that all secured creditor claimants are treated fairly and equally. Nonetheless, PWC does acknowledge that the circumstances of some creditors' claims may warrant some special consideration. There have already been two applications where special consideration was given in terms of cost allocation. However, both of these related to circumstances where the goods in question, even though some came into the possession of the Receiver, were found by the Court not to be assets of HEL in that one group of assets were found to be "consigned goods" which were in fact located in the United States and had never come into the possession of HEL; and the second of which was "30 day goods" under the **Bankruptcy and Insolvency Act**, RSC, 1985, c. B-3. These two exceptions are qualitatively different from the group of assets to which the present application applies. The Applicant's units were clearly the property of HEL and in its possession and used by it.

13. The Receiver takes the position that it is irrelevant whether or not the units in question were secured as “equipment” or as “inventory”. Counsel for the Receiver states that “a loan is a loan” and that the business affairs of HEL were a mess that needed to be straightened in an orderly manner under a process whereby all creditors had an opportunity to argue before an independent party, i.e. the Receiver, as to their entitlement to the various assets.

14. James A. Kirby, C.A., CIRP, Senior Vice-President of PWC, testified at the hearing of this matter. He is unable to say, without reviewing each and every individual fee invoice of PWC, what costs and fees are directly attributable to the Receiver’s involvement with these particular units. His best guess with respect to these direct costs would be in the range of \$5,000 – \$10,000. That of course does not deal with the other indirect costs of the receivership. The Receiver takes the position that it would be reasonable to reduce the 15% holdback by 15% of that amount (i.e. a reduction of 17.25%) to reflect the reduced sales effort by the Receiver with respect to these particular assets. This would reduce the holdback amount by \$9,299.32 to a holdback amount of \$44,609.76.

1. Applicable Principles.

15. Paragraph 5 of the Cost Allocation Plan envisages the Court, on the recommendation of the Receiver, apportioning the costs of the receivership to the various creditors. No guidance is provided in the Cost Allocation Plan to aid the Court in deciding on what would be a fair allocation of the receivership costs. Nothing in the Cost Allocation Plan prevents a partial allocation of costs at a point in time earlier than the completion of the receivership and bankruptcy. I am therefore satisfied that it is appropriate at this time to deal with this application rather than waiting for the completion of the receivership.

16. Counsel have been unable to provide to the Court any jurisprudential guidance in this regard, nor did counsel provide much discussion of the principles they felt would be applicable to assigning costs on a different basis than a uniform percentage relative to sale proceeds received.

17. In my view the following principles apply in this matter:

- (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
- (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;

- (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
- (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
- (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

1. Reasons for Variation.

18. There was one clearly articulable reason for varying the allocation of the receivership cost from a uniform amount in this particular case. The reason is that the receiver had no significant involvement in the actual sale of the Applicant's units. How then do we determine what the sales costs might have been if the Receiver had conducted the sale? There is only one piece of evidence available from the Receiver to demonstrate what sales costs might have been in this regard. That information is the amount of auction commissions paid by the Receiver to the auctioneer for the sale of the bulk of the assets and equipment of HEL. That amount was \$1,193,473 and was deducted from the sale proceeds. From Consent Exhibit No. 1 it would appear that the costs of the receivership including the auction commissions would be as follows:

Costs to date	\$3,162,446
Forecasted costs to conclusion of receivership	\$315,000

Auction commissions	<u>\$1,193,473</u>
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Total	<u>\$4,670,919</u>
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19. Of these total costs of \$4,670,919 the auction commissions constitute 25.5%. Reduction of the cost allocation holdback by a rounded percentage of 25% is a reasonable reduction for the fact that the Receiver did not have to expend its efforts in the sale of this equipment.

1. Order.

20. The Receiver is therefore directed to refund to the Applicant the sum of \$13,477.27 being 25% of the 15% holdback for cost allocation in the amount of \$53,909.08. The Applicant shall additionally be entitled to its costs of the application.

Justice

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Mr. Justice Robert M. Hall
Date of Document:	2004 09 02
Statement of purpose in filing:	Corrigendum to Reasons for Judgment (filed September 1, 2004) on Application issued January 22, 2004 by GMAC Leaseco Ltd. for recovery from Receiver of cost allocations for units sold by Leaseco (as opposed to being sold by the Receiver) in the amount of \$53,909.08.
Court Sub-File Number:	9:10 (Ref. Sub-File 7:60)

CITATION: *In Re Hickman Equipment (1985) Ltd.*
(In Receivership), 2004 NLSCTD 164

DATE: 2004 09 02
DOCKET: 2002 01T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

IN THE MATTER OF a Court ordered Receivership of Hickman Equipment (1985) Limited (“Hickman Equipment”) pursuant to Rule 25 of the **Rules of the Supreme Court, 1986**, under the **Judicature Act**, RSNL 1990, c. J-4, as amended

AND IN THE MATTER OF the **Bankruptcy and Insolvency Act**, c. B-3 of the Revised Statutes of Canada, 1985, as amended (the “BIA”)

Before: The Honourable Mr. Justice Robert M. Hall

Appearances: Thomas R. Kendell, Q.C. for the Applicant, GMAC Leaseco Ltd.
Frederick J. Constantine for the Receiver, PricewaterhouseCoopers Inc.
Geoffrey Spencer for CIBC.
Bruce Grant for John Deere Ltd. and John Deere Credit Inc.
Griffith Roberts for Hickman Motors Ltd. and Group Holdings Ltd.

C O R R I G E N D U M

Hall, J.

[1] The text box on page 1 of the decision filed in this matter on September 1, 2004 is amended by substituting “9:10” for “7:10” in the Court Sub-File Number section.

Justice

TAB 15

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

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

- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

REASONS FOR DECISION
of the
HONOURABLE CHIEF JUSTICE ALLAN H. WACHOWICH

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

Terrence M. Warner
Miller Thomson LLP
for CIT Financial Ltd.

Douglas H. Shell
Lucas Bowker & White
for Deutsche Financial Services

R. Craig Steele
Bordner Ladner Gervais LLP
for Bank of America Canada Specialty Group Ltd.

Juliana E. Topolniski, Q.C.
Bishop & McKenzie
for Mr. Blair Bondar

Darcy G. Readman and Darren R. Bieganek
Duncan & Craig LLP
for UMC Financial Management Inc.

Jeremy H. Hockin & Deborah J. Polyn
Parlee McLaws
for Deloitte Touche Inc.

THE APPLICATION TO DETERMINE COST ALLOCATION

[1] The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the *Companies' Creditors Arrangement Act* proceedings (CCAA costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

[2] Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the CCAA proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc.

(UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the **CCAA** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of **CCAA** costs.

THE ARGUMENTS OF THE PARTIES

[3] DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all **CCAA** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the **CCAA** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the **CCAA** proceedings to one class of creditors.

[4] CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the **CCAA** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

[5] UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the **CCAA** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

[6] The Interim Receiver recommends something of a middle ground. While acknowledging that the **Bankruptcy and Insolvency Act** does not apply to **CCAA** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

[7] The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the

remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and \$500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

[8] UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE CCAA COSTS

[9] The **CCAA** does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

[10] The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in **Canadian Asbestos Services Ltd. v. Bank of Montreal** (1993), 11 O.R. (3d) 353 at 359 (Gen. Div.):

The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

[11] Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the

CCAA proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

[12] Like the argument raised by UMC in the present case, the secured creditors in **United Used Auto & Truck Parts Ltd.** (2000), 16 C.B.R. (4th) 141 (B.C.C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

The object of the **CCAA** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In **Chef Ready [Hongkong Bank v. Chef Ready Foods]** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants **CCAA** relief.

[13] The Monitor acts on behalf of the Court for the benefit of all parties (**Re Starcom International Optics Corp.** (1988), 3 C.B.R. (4th) 177 (B.C.S.C.); **Canadian Asbestos Services Ltd. v. Bank of Montreal**, *supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

[14] All creditors may be affected by a stay imposed in the **CCAA** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the **CCAA**. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

[15] Equity informs the decisions made by courts in the exercise of their jurisdiction under the **CCAA**. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the **CCAA** costs. That is not to say that equity calls for an equal allocation of costs.

[16] The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The

Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of **CCAA** costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

[17] Six classes of creditors voted on a reorganization plan in *Re Keddy Motor Inns Ltd.* (1992), 90 D.L.R. (4th) 175 (N.S.S.C.A.D.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.)). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment – as opposed to equitable treatment – is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

[18] Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in **CCAA** proceedings.

[19] In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in *Kowal [Robert F. Kowal Investments Limited v. Deeder Electric Limited]* (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

[20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from **CCAA** proceedings. The **CCAA** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

[21] Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of **CCAA** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and \$500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

[22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

[23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

[24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

[25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered **CCAA** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the **CCAA** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the **CCAA** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of **CCAA** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

[26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting

on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

[27] UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of **CCAA** costs and the principles that should be applied in such a determination. There is no need, as there was in *Canadian Imperial Bank of Commerce (CIBC) v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

[28] UMC is allocated 15 percent of the Monitor's fees, \$500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the **CCAA** costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

HEARD on the 26th day of November, 2001.

DATED at Edmonton, Alberta this 14th day of December, 2001.

J.C.Q.B.A.

TAB 16

Date: 20090619
Docket: CI 08-01-56696
(Winnipeg Centre)
Indexed as: Winnipeg Motor Express Inc. et al.
Cited as: 2009 MBQB 204

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF THE *COMPANIES'*) Counsel:
CREDITORS ARRANGEMENT ACT, R.S.C.)
1985, C. c-36, AS AMENDED) DAVID R. M. JACKSON
) for Ernst & Young Inc. (the
) "monitor")
AND IN THE MATTER OF A PROPOSED PLAN)
OF COMPROMISE OR ARRANGEMENT OF)
WINNIPEG MOTOR EXPRESS INC., 4975813) G. BRUCE TAYLOR and
MANITOBA LTD. and 5273634 MANITOBA) JENNIFER J. BURNELL
LTD. ("the applicants")) for Winnipeg Motor Express
) ("WME")
)
) HARVEY G. CHAITON
) for Heller Financial Canada
) Holding Company ("Heller") and
) GE Canada Leasing Services
) Company ("GE")
)
)
) DONALD G. DOUGLAS
) for Paccar Financial Services
) Ltd. ("Paccar")
)
) DOUGLAS G. WARD, Q.C.
) for Alterinvest Fund L.P. (BDC)
)
) ROBERT A. DEWAR, Q.C.
) for Ramwinn Diesel, Inc.
) ("Ramwinn")
)
) WILLIAM G. HAIGHT
) for Key Equipment Finance
) Canada Ltd.
)

) E. PETER AUVINEN
) for CIT Financial Ltd., Wells
) Fargo Equipment Finance
) Company, Capital Underwriters
) Inc. and Stoughton Trailers
) Canada Corp. ("Stoughton")
)
) DONALD R. KNIGHT, Q.C.
) for Maxim Transportation
) Services Inc. ("Maxim")
)
) Oral Reasons for Judgment
) Delivered: June 19, 2009

SUCHE J.

[1] The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the **CCAA**. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the \$1.8525 million in issue.

[2] The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease

payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

[3] In the result, certain secured creditors will be excluded, namely:

- (i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;
- (ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

[4] In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

[5] In making its recommendations, the monitor indicates it relied on the following principles:

- (i) all secured creditors should contribute to the cost of restructuring;
- (ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;
- (iii) security arrangements and priorities should not be readjusted as part of this process;
- (iv) the proportion each creditor should be allocated need not be equal;
and
- (v) the allocation should be equitable, rather than equal.

[6] The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

THE PARTIES AND THEIR POSITIONS

Heller

[7] Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at \$5,643,297, which was secured by accounts receivable of \$5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately \$8,750,000 (Cdn.) and \$2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately \$55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately \$394,000 to financing lessors.

[8] Heller supports the monitor's recommendation.

GE

[9] GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately,

GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately \$250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

[10] In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

[11] GE supports the monitor's proposed allocation.

Paccar

[12] as at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received \$279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

[13] Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors,

particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

[14] Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately \$2.7 million, compared to Heller's loss of \$55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

[15] It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

[16] These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

[17] Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

[18] These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

[19] When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

[20] Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered \$4,738.12 out of the proceeds of sale of WME's redundant assets.

[21] Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all

other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

[22] Finally, Ramwinn has a claim against WME in the amount of \$18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

[23] Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease. It was paid its lease payments of \$5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

[24] BDC was owed approximately \$2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered \$78,998.79 plus interest from the redundant asset

sale and will recover \$260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

[25] I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

[26] Both Stoughton and Maxim claim to be "true" lessors. The significance of this issue is twofold; s. 11.3(a) of the **CCAA** provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

[27] Section 11.3(a) was added to the **CCAA** in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in **Quintette Coal Ltd. v. Nippon Steel Corp.** (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2497 (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the **CCAA** into line with the **Bankruptcy and Insolvency Act**, R.S.C.

1985, c. B-3, as amended (the "**BIA**"), which has a similar provision concerning proposals.

[28] The leading authority on the proper interpretation of s. 11.3(a) is **Smith Brothers Contracting Ltd., Re** (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (QL) (B.C.S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). The distinction between a true lease – that is, a contract of bailment also known as an operating lease – and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.

[29] It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.

[30] At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so

it is very difficult to generalize about how any particular type of relationship will be structured.

[31] All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

[32] In ***Smith Brothers***, Bauman J. concluded that s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the ***CCAA***. He says:

56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

[33] And further, at para. 61:

61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

[34] ***Smith Brothers*** has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow

construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

[35] I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

[36] I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment – it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

[37] It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

[38] The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on ***Western Express Air Lines Inc., Re***, 2005 BCSC 53, (2005), 10 C.B.R. (5th) 154, over that in ***Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.***, (2005), 18 C.B.R. (5th) 125 (Ont. Superior Court of Justice).

[39] The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

[40] The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

THE LAW

[41] I turn, then, to the question of principles of allocation of Court Ordered Charges under the **CCAA**. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in ***Hunters Trailer & Marine Ltd., Re***, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the **CCAA** make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

[42] In ***Re Hickman Equipment (1985) Ltd. (In Receivership)***, 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

- (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
- (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
- (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
- (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that

certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

- (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

[43] I also agree with the decision in *Sulphur Corp. of Canada Ltd. (Re)*, 2002 ABQB 682, (2002), 5 Alta. L.R. (4th) 251, where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

ANALYSIS AND DECISION

[44] I begin with the observation that the s. 11 stay in this case has accomplished exactly what the **CCAA** intends that it do – it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

[45] Having said that, good news under the **CCAA** is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have

been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the **CCAA** is that the collective good and the benefit to all stakeholders governs.

[46] The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

[47] In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

[48] I agree with the view expressed in ***Hunjan International Inc., Re*** (2006), 21 C.B.R. (5th) 276 (Ont. Superior Court of Justice), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

[49] So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted,

and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

[50] As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[51] My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful

benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

[52] Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the **CCAA**.

[53] I am also of the view that the relative loss – the issue raised by Paccar – results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and Alterinvest's loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

[54] At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

[55] I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

[56] As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

[57] There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

EQUIPMENT LEASES

[58] Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

[59] It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is

clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

[60] It is difficult to know how this situation can be remedied, given that the whole point of the **CCAA** is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

[61] On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

[62] I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice

suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

[63] The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the **CCAA**, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

[64] I do this, recognizing that the only authority on point that was provided to me, ***Western Express Air Lines***, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...

. . .

22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

[65] Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

[66] However, just as GE's assumed lease was discounted for the risk of non-performance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

CONCLUSION

[67] At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

[68] I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

[69] I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

_____. J.

TAB 17

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor
Resources Inc., 2019 ONCA 508

DATE: 20190619

DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent
Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty (“GOR”) be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (“CJA”) govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (“First Reasons”). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. (“the Receiver”) as receiver of the assets, undertakings and properties of Dianor Resources Inc. (“Dianor”), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor’s secured lender, the respondent Third Eye Capital Corporation (“Third Eye”) who was owed approximately \$5.5 million.

[5] Dianor’s main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. (“381 Co.”) to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor’s properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. (“235 Co.”), another company controlled by John Leadbetter.¹ The

¹ The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least \$32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.²

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a \$2 million credit bid, the assumption of certain liabilities, and \$400,000 payable in cash, \$250,000 of which was to be distributed to 235 Co. for its GORs and the remaining \$150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

² The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic ... why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land”: at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of \$250,000 and \$150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of \$250,000 was based on an expert valuation report and 235 Co.’s acknowledgement that this represented fair market value.³

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge’s decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

³ Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye’s counsel confirmed that this was the position taken by 235 Co.’s counsel before the motion judge, and 235 Co.’s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the \$250,000 and \$150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The \$250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

- (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

- (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
- (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order “effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction” (emphasis in original): David Bish & Lee Cassey, “Vesting Orders Part 1: The Origins and Development” (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement ...

Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, “Vesting Orders Part 2: The Scope of Vesting Orders” (2015) 32:5 Nat’l Insolv. Rev. 53, at p. 56 (“Vesting Orders Part 2”). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)⁴ which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: “a more transparent and conscientious

⁴ To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants.”

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.’s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court’s inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency

Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that “statutory interpretation cannot be founded on the wording of the legislation alone”: *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.⁵ In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

⁵ Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA “does not provide a free standing right to property simply because the court considers that result equitable”: at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article “Vesting Orders Part 1”, Bish and Cassey write at p. 49:

Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is “just or convenient” to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. “Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver”: *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

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

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
- (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, **receiver** means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
- (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh, Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver ... to ... take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)⁶.

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

⁶ This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").⁷

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.⁸ The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

⁷ This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

⁸ *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 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

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

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

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

(c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording “take such other action that the court considers advisable” in s. 47(2)(c) as permitting the court to do what “justice dictates” and “practicality demands”. As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: “It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law”. Thus, Parliament’s deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion “[l]ike the other presumptions relied on in textual analysis ... is merely a presumption and can be rebutted.” The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* “no doubt ... has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context.” In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

However, the implied exclusion argument is misplaced where it relies exclusively on the text of the ... provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance “regarding minimum requirements to be met during the sale process”: Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide “the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse”: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what “justice dictates” but also what “practicality demands”. Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors”: *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor’s assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, “the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bclMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), *aff'd* (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc.*, 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in “Vesting Orders Part 2”, at p. 58, “[a] vesting order is a vital legal ‘bridge’ that facilitates the receiver’s giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective.” As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List’s Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property “free and clear of any liens or encumbrances”: see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court’s advertence to the authority for such a term. As Bish and Cassey note in “Vesting Orders Part 1”, at p. 42, the vesting order is the “holy grail” sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is “a near daily occurrence on the Commercial List”: at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor’s assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word “encumbrance” is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

The word “encumbrance” is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as “every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee”.

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of “jurisdiction” but rather one of “appropriateness” as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.⁹

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

⁹ This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian, Romspen, and Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

... [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

- (1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;
- (2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and
- (3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are “invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by” the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value \$10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed \$5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed “within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.”

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of “order or decision” (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.¹⁰ Accordingly, the “[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered”: *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the *BIA* appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, “where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal.” Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

¹⁰ *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of \$1 million to \$2 million, with 235 Co.'s GORs having a value of between \$150,000 and \$300,000, and Algoma's royalties having a value of \$70,000 to \$140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of \$150,000 but 235 Co. wanted more than the \$250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of \$250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic ... why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that “[t]hese matters ought not to be determined on the basis that ‘the race is to the swiftest’”. However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge’s decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver’s conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver’s report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the \$150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time ...

In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

- (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
- (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
- (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
- (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed...;
- (5) The respondent will not be prejudiced by extending the time;
- (6) There is an arguable ground or grounds of appeal;
- (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted.
[Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.
2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.
3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between \$150,000 and \$300,000. Before the motion judge, 235 Co. acknowledged that the payment of \$250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the \$250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of \$30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: "SEP" JUN 19, 2019

"S.E. Pepall J.A."
"I agree. P. Lauwers J.A."
"I agree. Grant Huscroft J.A."

TAB 18

Court of Queen's Bench of Alberta

Citation: Westpoint Capital Corporation v Solomon Spruce Ridge Inc, 2017 ABQB 497

Date: 20170809
Docket: 1503 04033
Registry: Edmonton

Between:

Westpoint Capital Corporation

Appellant

- and -

Solomon Spruce Ridge Inc. and Martin Gunderson

Respondents

**Supplemental Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser**

Introduction

[1] I issued a written decision in this matter on April 6, 2017, *Westpoint Capital Corporation v Solomon Spruce Ridge Inc*, 2017 ABQB 254. The parties have not yet completed a formal order arising from that decision. Instead, Mr. Chapotelle on behalf of Westpoint Capital Corporation, applied to me to correct errors he alleges were made in my written decision:

- (a) I failed to apply s. 104 of the *Land Titles Act*, RSA 2000, c L-4; and
- (b) I concluded that there was incomplete information in regards to a GIC in Westpoint's name.

[2] Mr. Chapotelle advised he had filed an appeal of my decision because of the 28 days' limitation period from the date of pronouncement. Counsel for Berry Homes Ltd. urges me to leave the decision as it is because of the appeal and because he argues there is limited jurisdiction to reargue a case, even though the formal order has not been taken out.

[3] Counsel for Performance Paving Services Inc. takes no position with respect to s 104 of the *Land Titles Act* and argues that there is no clear error in my decision concerning the advances under the mortgage by way of purchasing term deposits in the mortgagee's name.

Jurisdiction to correct errors

[4] Westpoint submits that I made two significant errors. Firstly, I erred in not applying s. 104 of the *Land Titles Act* and considered that the dates and circumstances of advances under Westpoint's mortgage may be relevant to the situation of Berry Homes, which filed its purchaser's caveat against title to the lands after Westpoint's mortgage was registered, but before some of the monies secured by the mortgage were actually advanced.

[5] Secondly, Westpoint argues that I erred by concluding that there was incomplete information relating to the \$600,000 GIC with the Alberta Treasury Branches, also in Westpoint's name. That GIC was held as security by the ATB for the letter of credit issued on behalf of Solomon in favour of the City of Spruce Grove to secure Solomon's obligations under the project development agreement.

[6] I considered the Court's jurisdiction to correct errors before filing a formal order in *Evans v The Sports Corporation*, 2011 ABQB 478, referencing rr 9.12 and 9.13 and noting that the correction power under the 2010 Rules of Court (*Alberta Rules of Court*, Alta Reg 124/2010) expanded those under the former rules, *Alberta Rules of Court*, Alta Reg 390/1968. I concluded there that I had "extremely broad authority to do what I think is correct in the circumstances" (at para 15).

[7] In *Paniccia Estate v Toal*, 2012 ABQB 11, aff'd 2012 ABCA 397 at para 69, Shelley J reviewed Queen's Bench authorities on the correction power (including *Evans*) and also concluded that these Rules provide a broad discretion. She also referenced the Foundational Rules, emphasizing that the correction power may be appropriate in the context of a timely and cost-effective remedy.

[8] Shelley J considered various factors at para 39:

In light of the general framework of the Rules and the explicit authority provided by Rule 9.13(a), I conclude that a judge may investigate whether an error exists in an order or judgment and, when an error is identified, then consider whether that defect warrants correction. The potential benefits to that kind of judicial intervention are obvious:

1. an otherwise unnecessary and costly appeal may be averted;
2. if a party does conclude an appeal is warranted after an order or judgment has been changed per Rule 9.13(a), then the appeal court has the benefit of a more fully developed

trial consideration of the facts and law, where the trial court has revisited an issue due to:

- a) incomplete argument and analysis of an issue,
- b) incomplete or incorrect review of facts,
- c) an incorrect statement of law, or
- d) an issue with ‘emergent’ implications or effects that may have not been fully apprehended during preparation of the order or judgment; and

- 3. an incorrect statement of law can be corrected that might otherwise confuse future judicial analysis and inappropriately bind lower courts.

[9] I recognize that Shelley J was considering Rule 9.13(a), in which the Court is acting on its own motion. I do not see that Rule 9.12 and 9.13 stand in isolation. Under Rule 9.12, a party may apply to have the judge vary the decision. Under 9.13(a) the judge may correct errors on his or her own motion, subject to giving proper notice to the parties. Once a party has made an application to vary, I do not see that the judge has any lesser powers than he or she would have had if no application had been made.

[10] The quote from *Paniccia Estate* above is a good description of some of the factors the Court may consider under either Rule.

[11] In *Lewis Estates Communities Inc v Brownlee LLP*, 2013 ABQB 731, Brown J (as he then was) considered both *Evans* and *Paniccia Estate*, concluding at para 33:

It makes sense to apply R. 9.13 to correct the sorts of errors identified in *Evans* and *Paniccia Estate*. Doing so not only averts an injustice but saves litigants the costs and delay of bringing an otherwise unnecessary appeal. R. 9.13 is not, however, a vehicle for seeking reconsideration of a judgment call such as the treatment of evidence or the finding of facts. An unsuccessful litigant’s remedy in such a case lies only in an appeal. And, because judgments need not and often will not specifically address every argument put before the Court, where a Court is invited to reconsider under R. 9.13 a matter that it has specifically addressed in its original judgment, the putative error ought be plain and manifest. Otherwise, R. 9.13 would quickly become a vehicle for litigants seeking second kicks at the can. This concern also explains why the test for the admission of fresh evidence on appeals is so high; the trial is designed to determine the facts.

[12] Brown J also cautioned, at para 31, that there may be circumstances where the Court should be slow to revisit a decision, especially when finality and certainty are at stake.

[13] Berry Homes cites *Equitable Trust Co. v Loughheed Block Inc*, 2012 ABCA 171, relating to limits on rearguing a case. There, the Court of Appeal held at para 3:

The test for leave to re-argue requires exceptional, special or unusual circumstances and it is understood that the practice is to be discouraged: *Strichen v Stewart*, 2005 ABCA 201 (CanLII) at para 5, 367 AR 188, citing *Portage Credit Union Ltd v DER Auctions Ltd (#2)* (1994), 1994 ABCA 50 (CanLII), 18

Alta LR (3d) 185. When it is alleged that a court overlooked or misapprehended the evidence, the applicant must show that the overlooked or misapprehended evidence would have affected the outcome: **Arrowhead Auto and Truck Parts Ltd v Calgary (City)**, 1997 ABCA 77 (CanLII), 196 AR 57. The applicant must provide support for the allegation that the court misled itself or was misled having regard to the record or the issues raised: **Greater Montreal Protestant School Board v Quebec (Attorney General)**, 1989 CanLII 76 (SCC), [1989] 2 SCR 167, 97 NR 143. Disagreement by the appellant with certain findings does not warrant leave to re-argue.

[14] Here, I do not see that Westpoint was trying to reargue its case as opposed to pointing me to things that it believes I missed in the decision or did not understand from the argument presented in chambers.

[15] In any event, the quote above from **Equitable Trust** deals with practice in the Court of Appeal and not pursuant to Rules 9.12 or 9.13, so it may have no direct relevance to applications under those rules. Additionally, the Court of Appeal agreed to rehear argument in that case, finding that it did indeed fall within the narrow exception as the Court may have misapprehended the evidence on a point.

[16] Berry Homes also cites **Settlement Lenders Inc v Blicharz**, 2015 ABQB 16. That case approves the principles set out in **Lewis Estates**, as well as citing with approval Greckol J's (as she then was) decision in **Padget Estate (Re)**, 2014 ABQB 750. In that case, Greckol J concluded at paras 16 – 17:

In **Paniccia Estate v Toal**, 2012 ABQB 11 (CanLII), 521 AR 73, Shelley J identified the benefits of Rule 9.13 and noted that the Rule gives judges broad authority to vary judgments before entry. The judgment at issue here has not yet been entered.

In **Paniccia**, Shelley J considered whether to revisit a paragraph in her reasons for judgment. She determined the paragraph contained an incorrect statement of the law and used her authority under Rule 9.13(a) to vary it. She noted that Rule 9.13 gives a broad authority to vary a judgment that did not exist under the old Rules. She remarked on the benefits of Rule 9.13(a), at para 39, and concluded:

Here I act on my own authority, which I conclude is only restricted by the purpose of the Rules, as expressed in Rule 1.2. If I conclude that paragraph 47 is incorrect, and that revision of that part of the Trial Decision meets the objectives of the Rules, then I am permitted, if not obliged, to revise the Trial Decision accordingly.

Conclusion on powers

[17] I am satisfied that I have a broad discretion to correct errors. That discretion is broader when an application has been made for me to do so by one of the parties.

[18] The appropriate process to follow in a matter such as this is two-fold: first to determine if an error has been made; and secondly, to determine if the discretion to correct it should be exercised.

Erroneous interpretation of s 104 of the *Land Titles Act*

[19] Mr. Chapotelle argues that I erred by stating at paragraph 138:

Why a purchaser such as Berry would make such substantial payments in the face of a mortgage in a large amount is not the subject of these proceedings. No priority is provided over the interest of a mortgagee to the extent of monies advanced in good faith on the mortgage prior to the registration of the purchaser's caveat.

[20] As well as at para 161:

There is a very compelling argument that Westpoint has no priority to that \$1,000,000 of the mortgage debt owed by Solomon over Berry's interest in the lands, because Berry's purchaser's caveat was filed long before Westpoint authorized release of the GIC funds to Solomon.

[21] When I wrote the decision, I focused on the rights of builder's lien claimants, and assumed that all subsequent encumbrancers to a registered, but unadvanced, mortgage would be in the same circumstances, whether they be a purchaser, writ-holder or builder's lien claimant,

[22] I am satisfied that assumption was in error. Section 104(1) of the *Land Titles Act* is clear and unequivocal. It states:

104(1) On registration of a mortgage for a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that they are made or incurred subsequent to the registration, on or after January 1, 1983, of any other instrument or caveat.

[23] There is an express statutory exception for builder's liens filed after a mortgage has been registered against title. The registered mortgage has priority for the amount of advances made before the registration of the builder's lien, but the builder's lien has priority over any advances made in the face of the registered lien.

[24] That is provided for not in the *Land Titles Act* but rather in section 11 of the *Builder's Lien Act*, RSA 2000, c B-7:

11(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Notwithstanding subsection (1), a payment made pursuant to an assignment, attachment, garnishment or receiving order that is paid, before a lien is registered, to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, takes priority over the lien.

(3) Notwithstanding subsection (2), no judgment, execution, assignment, attachment, garnishment or receiving order shall affect the amount required to be retained under sections 18(1) or (1.1) and 23(1) or (1.1).

(4) A registered mortgage or a mortgage registered by way of a caveat has priority over a lien to the extent of the mortgage money in good faith

secured or advanced in money prior to the registration of the statement of lien.

- (5) Advances or payments made under a mortgage after a statement of lien has been registered rank after the lien, but a mortgagee who has applied mortgage money in payment of a statement of lien that has been registered is subrogated to the rights and priority of the lienholder who has been so paid to the extent of the money so applied.

[25] That is recognized in s 104(4) of the *Land Titles Act*:

- (4) The rights given under the *Builders' Lien Act* and the *Personal Property Security Act* are not affected by this section.

[26] Mr. Chapotelle argued that my decision relating to advances in the face of other registrations would lead to chaos in the lending industry; this argument focused to some extent on concerns for lending products such as lines of credit secured against real property. Such a line of credit frequently has a maximum amount referenced in the security registered against the lands. The amount of the debt varies on a regular basis, and the amount is, to a large extent, out of the mortgagee's control as the borrower simply draws against the line of credit from time to time. It would be impossible for the lender to check title each time the line of credit increases, because the line of credit will in many cases increase before the lender learns of it.

[27] This situation is expressly dealt with in section 104(2), which states:

- (2) On registration of a mortgage that provides for a revolving line of credit up to a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage notwithstanding
 - (a) that the advances and obligations are made or incurred subsequent to the registration, after December 31, 1982, of any other instrument or caveat, and
 - (b) that at any time during the term of the mortgage there may not be any outstanding advances to be secured.

[28] Mr. Chapotelle argues that lenders of these types of mortgages, such as builder's mortgages or other types of secured loans where the amount of the loan is not fully advanced at the time of registration, do not need to do title searches for encumbrances other than builder's liens or registrations under the *Personal Property Security Act*, RSA 2000, c P-7.

[29] Mr. Chapotelle referred me to a fairly recent decision dealing with s. 104, ***Bank of Montreal v 1323606 Alberta Ltd***, 2013 ABQB 596. This decision had not been previously cited by counsel, and I was not familiar with it when I wrote the decision, at least in relation to the section 104 point.

[30] The ***Bank of Montreal*** case is really about unregistered instruments and deals with the ability of someone who searches title to rely on the state of title as at the time of registration. Topolniski J makes the point at paras 28 and 29:

Section 104(1) clarifies that the priority date of a mortgage is the date (serial number) that the mortgage is registered, and not the point at which money is advanced to the landowner under that mortgage...

...The Torrens system's simple, direct, single-resource mechanism to evaluate land title prompted the observation in ***Community Credit Union Ltd. v. Otto***, 2002 ABQB 317 (CanLII) at para. 9, that is remarkable that someone would develop on land without first making a review of the Land Title Register because:

[s]imply put a person seeking to acquire an interest in land is entitled to rely absolutely on the register and if one ignores the register, it is at one's peril. Conducting a land titles search is simple and inexpensive and access to the registry is unrestricted. ...

[31] In ***Bank of Montreal***, there was no consideration of "advances" and the decision turned on s. 203 of the *Land Titles Act*. Nevertheless, the point under s 104 is made.

[32] The reality of Westpoint's argument is that s. 104 is perfectly clear, and that my consideration of the timing of advances, other than as they relate to builder's lien claims, was in error and flies in the face of the plain and obvious meaning of that section in the *Land Titles Act*.

[33] Mr. Omkar, on behalf of Berry Homes, says that I should not vary my decision in this matter, and argues that his client has not been able to complete its questioning of Westpoint. I note that I was apparently in error in para 106 when I stated that neither Performance Paving nor Berry Homes had brought an application to compel answers objected to on cross-examination. Such an application was brought, and was largely unsuccessful before Master Smart. But as pointed out by Mr. Omkar, that was cross-examination and not questioning in the action. Now that Berry Homes and Performance Paving have been added as parties to the action, they have discovery rights and may have more questions to ask of Westpoint than they chose in cross-examination on affidavits.

[34] Mr. Omkar did not argue that my decision on the point was correct, suggesting rather that the point should be decided by the Court of Appeal as Westpoint has already appealed.

[35] No authority has been cited by any party that expressly deals with s. 104, other than the ***Bank of Montreal*** decision discussed above.

[36] In the end, I am satisfied that I was clearly in error when I indicated that Berry Homes' registered interest as purchaser would take priority over advances made by Westpoint under its registered mortgage after registration of Berry Homes' caveat. That conclusion flies in the face of the plain language of s. 104. I clearly erred in treating mortgage advances the same for encumbrancers as for builder's lien claimants.

[37] That section does not define "advance" or "obligations secured," but does not need to. The only post-registration advances not given priority under section 14 of the *Land Titles Act* are advances made in the face of a registered builder's lien, advances made in the face of registered security agreement under the *Personal Property Security Act*, or fraudulent advances or obligations secured.

[38] Thus, my conclusion in paragraph 161 of the original decision was wrong. Similarly, my comment at paragraph 172 should not have referenced priorities under the *Land Titles Act*.

[39] And in paragraph 178, Berry Homes should not benefit if Westpoint, as mortgagee, advanced monies to Solomon after Berry Homes' caveat had been registered. As between Westpoint and Berry Homes, so long as Westpoint is a mortgagee, the *Land Titles Act* priorities under section 14 and 104 prevail.

[40] Additionally, I should not have included Berry Homes' interest as purchaser in the advance issues as described in paragraph 89(9) of my original decision.

Is Westpoint a mortgagee for the purposes of section 104

[41] I do not think that Westpoint's position is necessarily an absolute one. The documents they rely on are mortgage documents. Their conduct, at least as reflected in the materials before me on the application, resembles the conduct of a mortgage. However, giving a name to someone or something does not always make it so.

[42] In *HME Evans & Co v Pankiw*, 2003 ABQB 246, Master Funduk considered a situation where the defendant claimed that the plaintiff was more than a mortgagee and thus could not rely on sections 14 and 104 of the *Land Titles Act*.

[43] At para 47 Master Funduk stated:

The Plaintiff's primary position is reliance on ss. 14(2), 54, 104 and 203 Land Titles Act. I need not debate those sections or the case law on s. 203. The Plaintiff's position is predicated on it being just a mortgagee. However, it is not clear beyond a balance of probabilities that this is so. Mr. Engelking shows that problem on the cross-examinations and examinations for discovery. It is a live issue that regardless of the form of the documents between the Plaintiff and Guffei they were joint venturers in performing what was required under the Defendants' contract. If that is so the Plaintiff is an "immediate" party, not a third party entitled to the protection of the *Land Titles Act*: ***Landstrom Petroleums Ltd. v. Passburg Petroleums Ltd.***, (1984) 53 A.R. 96 (C.A.), paras. 14 - 16, leave to appeal refused (1984) 56 N.R. 397 n, 54 A.R. 160. If that is indeed the case the equities do matter, as Mr. Engelking says. An example of a situation where a mortgagee in form was not just a mortgagee is ***Northern Electric Company Limited v. The Manufacturers Life Insurance Company***, [1977] 2 S.C.R. 762, a builder's lien case. The Court looked at the substance of the transaction and was not deceived by its form

[44] The door is left open, as recognized in this decision, for a claimant to argue that the interest of another encumbrancer is not that of mortgagee (even though it may be described as such) and may amount to some other characterization.

[45] In that regard, it is clear that Berry Homes has not yet been allowed to explore those issues, which might include whether Westpoint was an "owner" in some fashion (as contrasted with owner for the purposes of the *Builder's Lien Act*), whether Solomon was agent for Westpoint, or whether there was some sort of partnership or other arrangement between Solomon and Westpoint that would have Westpoint characterized as something other than a mortgagee.

[46] It would be inappropriate for me to wade into these issues, or to speculate on them. Suffice it to say that I had already concluded at para 131 that Berry Homes should be able to pursue further questioning of Mr. Virani. I agree with Mr. Omkar's position that even though its

application to compel answers to questions objected to on the cross-examination of Mr. Virani on May 1, 2015 was dismissed by Master Smart, that was before Master Breitkreuz added Berry Homes and Performance Paving as parties to the action.

[47] Being a party to an action gives questioning and document production rights, which are broader than those pertaining to cross-examinations on affidavits for the purposes of a particular application.

[48] In this area, I recognize that I commented in my earlier decision at paragraphs 102 and 128 to 130 that the evidence to date had not satisfied the burden of showing that Westpoint was an owner. My analysis was solely related to whether Westpoint was an owner for the purposes of the *Builder's Lien Act* and not otherwise, so it remains a live issue, unaffected by my earlier decision, as to whether Westpoint was something other than a mortgagee with respect to paragraphs 14 and 104 of the *Land Titles Act*.

[49] I make no comment on whether the relevant time for determining Westpoint's "true" status (if it is other than as a mortgagee) is at the time of registration or whether it is more fluid. Textbook authority cited by Mr. Omkar deals with the merger of the beneficial ownership of the land with the interest of mortgagee. How a merger of such interests might affect advances made to the date of the change in interest may be a live issue that I did not recognize in my earlier decision.

Erroneous conclusion that there was incomplete information regarding the Alberta Treasury Branches GIC, paragraphs 163 and 164

[50] Mr. Chapotelle argues that there was sufficient information on the court file explaining the ATB GIC and what happened to it. He refers to Mr. Virani's affidavit of October 26, 2015, which states that the letter of credit was called by the City of Spruce Grove on September 23, 2015 in the amount of \$596,757.

[51] He also refers to the order of Master Wacowich dated November 2, 2015, which orders that \$600,000 be paid to Westpoint as a result of the City of Spruce Grove making the demand on the letter of credit it held as security from Solomon. The order, argues Mr. Chapotelle, connects the dots between Mr. Virani's affidavit and the \$600,000 paid out in favour of the City of Spruce Grove.

[52] The answer to this issue is in the order itself. Paragraph 2 of the order states:

The City of Spruce Grove shall pay to the Clerk of the Court of Queen's Bench of Alberta, Judicial Center of Edmonton, to the credit of this action any amounts left over from the Letter of Credit No: 462843 in the amount of \$596,757.00 after it has been paid in full for any amounts owing to the City of Spruce Grove under the Development Agreement for Spruce Ridge Gardens Stage 2 entered into with Solomon Spruce Ridge Inc.

[53] There is no information that has been brought to my attention that the City of Spruce Grove has as yet accounted for the monies paid to it under the letter of credit. The letter of credit was drawn because of an alleged default on the part of Solomon. Letters of credit are honoured by the issuing institution without reference to the merits of a dispute.

[54] It may be that the City of Spruce Grove was entitled to call on the letter of credit; it may be that the City has already accounted, or can account, for the full amount received. It may also be that some of the items in dispute between the City and Solomon have not been finally resolved.

[55] Until the City has accounted for the proceeds of the letter of credit, I do not think that it can unquestionably be stated that the \$600,000 paid out under the order of Master Wacowich is irretrievably gone. Were any of that money to go back to Solomon or to Westpoint, it may still be in reach of Performance Paving as a builder's lien claimant.

[56] I do not see that I was in error by characterizing the ATB GIC and letter of credit issue as uncertain, and make no change to my earlier decision in that regard.

[57] In that regard, as a party, Performance Paving is undoubtedly entitled to see relevant documents relating to the development agreement and the letter of credit to determine the City of Spruce Grove's entitlements to the proceeds of the letter of credit.

Conclusion on errors

[58] I recognize that I erred in my treatment of advances under a mortgage. Section 104 is clear: an advance takes priority over other claimants from the date of registration of the mortgage, other than with respect to builder's lien claimants and certain PPSA claimants.

[59] Having regard to the factors described in cases such as *Paniccia Estate*, *Lewis Estates* and *Re Padget Estate*, this is an error that I believe should be corrected. It makes little sense for a misstatement of law to be out there until it is corrected by the Court of Appeal. That is a lengthy and costly process, and when there is a mechanism under the Rules of Court to correct an error, correction is in keeping with the Foundational Rules. There is no benefit relating to certainty of case law, if the case is wrong.

[60] I realize this is the judicial equivalent of falling on one's own sword, but that is a better and fairer result than putting the parties through an unnecessary appeal (at least on this point) and will allow them to address the real issues (whether Westpoint was other than a mortgagee, and whether the ATB GIC is out of the reach of Performance Paving).

[61] On the other hand, I reject the allegation that I erred when I characterized the ATB GIC and letter of credit issue as uncertain, and deny the application to change that portion of the decision.

Way forward

[62] There was some discussion about fraud at the application on June 15, 2017. There are obvious dangers for a claimant to allege fraud and then be unable to prove it. So that there can be definition of Performance Paving's and Berry Homes' claims and allegations, they should file a pleading setting out their position within a reasonable time so that production and questioning can proceed efficiently and effectively.

[63] Master Breitreuz was not clear as to the status afforded to Performance Paving and Berry Homes. It seems that they should be treated as defendants, since the effect of Westpoint's application is to wipe out any claim Performance Paving or Berry Homes may have to the monies in court.

Costs

[64] There was mixed success in the application and therefore each party will bear its own costs of the application.

Heard on the 15th day of June, 2017.

Dated at the City of Edmonton, Alberta, this 9th day of August, 2017.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Kevin Chapotelle
Bryan & Company LLP
for the Appellant Westpoint Capital Corporation

Atul Omkar
Reynolds Mirth Richards & Farmer LLP
for Berry Homes

Iain M. Cameron
Cameron & Cameron
for Performance Paving Services Inc.