Clerk's Stamp

COURT FILE NUMBER	1701-03460
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT/RESPONDENT	LEXIN RESOURCES LTD.
RESPONDENT/APPLICANT	ALBERTA ENERGY REGULATOR
DOCUMENT	**BOOK OF AUTHORITIES OF LEXIN RESOURCES LTD. ON APPLICATION FOR LEAVE TO AMEND THE STATEMENT OF DEFENCE AND TO PROCEED WITH A COUNTERCLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GROIA & COMPANY** **Professional Corporation Lawyers** 365 Bay Street, Suite 1100 Toronto, ON M5H 2V1 Fax: 416-203-9231 **Bonnie Roberts Jones,** LSUC# 41256L Tel: 416-203-4476

INDEX

TAB 1

2003 ABQB 1030
Alberta Court of Queen's Bench

Akita Drilling Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)

2003 CarswellAlta 1802, 2003 ABQB 1030, [2003] A.J. No. 1562, [2004] A.W.L.D. 206, 127 A.C.W.S. (3d) 1275, 30 Alta. L.R. (4th) 75, 351 A.R. 230

Akita Drilling Ltd. (Applicant) and The Appeals Commission of the Workers' Compensation Board of Alberta, The Workers' Compensation Board of Alberta and Doug Masters (Respondents)

Akita Drilling Ltd. (Applicant) and The Appeals Commission of the Workers' Compensation Board of Alberta, The Workers' Compensation Board of Alberta and David Mitchell (Respondents)

Bensler J.

Heard: March 12, 2003
Judgment: December 15, 2003
Docket: Calgary 0201-17948, 0201-17949

Counsel: James A. D'Andrea for Applicant, Akita Drilling Ltd.
Jason J.J. Bodnar for Respondent, Workers' Compensation Board of Alberta
Sandra Hermiston for Respondent, Appeals Commission of the Workers' Compensation Board of Alberta

Subject: Occupational Health and Safety; Public; Employment

Table of Authorities

Cases considered by *Bensler J.*:

Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission) (2003), 2003 ABPC 233, 2003 CarswellAlta 395, 332 A.R. 342 (Alta. Q.B.) — not followed

Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission) (1989), 38 Admin. L.R. 1, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — followed

Pasiechnyk v. Saskatchewan (Workers' Compensation Board) (1997), 1997 CarswellSask 401, 1997 CarswellSask 402, 149 D.L.R. (4th) 577, [1997] 8 W.W.R. 517, 37 C.C.L.T. (2d) 1, (sub nom. *Pasiechnyk v. Procrane Inc.)* 216 N.R. 1, (sub nom. *Pasiechnyk v. Procrane Inc.)* 158 Sask. R. 81, (sub nom. *Pasiechnyk v. Procrane Inc.)* 153 W.A.C. 81, [1997] 2 S.C.R. 890, 30 C.C.E.L. (2d) 149, 50 Admin. L.R. (2d) 1 (S.C.C.) — considered

Pezim v. British Columbia (Superintendent of Brokers) (1994), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, (sub nom. *Pezim v. British Columbia (Securities Commission))* 46 B.C.A.C. 1, (sub nom. *Pezim v. British Columbia (Securities Commission))* 75 W.A.C. 1, 1994 CarswellBC 232, 1994 CarswellBC 1242 (S.C.C.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

R. v. T. (V.) (1992), [1992] 3 W.W.R. 193, [1992] 1 S.C.R. 749, 7 B.C.A.C. 81, 15 W.A.C. 81, 67 B.C.L.R. (2d) 273, 12 C.R. (4th) 133, 134 N.R. 289, 71 C.C.C. (3d) 32, 1992 CarswellBC 142, 1992 CarswellBC 905 (S.C.C.) — considered

Ramey v. Alberta (Workers' Compensation Board Appeals Commission) (1997), 1997 CarswellAlta 476, 146 D.L.R. (4th) 460, (sub nom. *Ramey v. Workers' Compensation Board (Alta.))* 200 A.R. 59, (sub nom. *Ramey v. Workers' Compensation Board (Alta.))* 146 W.A.C. 59, 30 C.C.E.L. (2d) 78, 9 C.P.C. (4th) 41, 51 Alta. L.R. (3d) 218 (Alta. C.A.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — followed

Sammut v. Alberta (Workers' Compensation Board Appeals Commission) (2002), 2002 ABCA 87, 2002 CarswellAlta 462 (Alta. C.A.) — referred to

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — considered

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298 (1988), 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148 (S.C.C.) — referred to

Statutes considered:

Workers' Compensation Act, R.S.A. 2000, c. W-15
Generally — referred to

s. 12(1) — considered

s. 13(1) — referred to

s. 13(6) — referred to

s. 13(7) — referred to

s. 13.1 [en. 2002, c. 27, s. 7] — referred to

s. 13.1(1) [en. 2002, c. 27, s. 7] — considered

s. 13.1(9) [en. 2002, c. 27, s. 7] — referred to

s. 13.2(1) [en. 2002, c. 27, s. 7] — referred to

s. 13.2(6) [en. 2002, c. 27, s. 7] — referred to

s. 13.3(1) [en. 2002, c. 27, s. 7] — referred to

s. 13.4 [en. 2002, c. 27, s. 7] — considered

s. 13.4(1) [en. 2002, c. 27, s. 7] — considered

s. 13.4(8) [en. 2002, c. 27, s. 7] — considered

s. 13.4(11) [en. 2002, c. 27, s. 7] — considered

s. 13.4(12) [en. 2002, c. 27, s. 7] — referred to

APPEAL by drilling company from Workers' Compensation Appeal Commission confirmation of ruling allowing disability benefits to company's leasehands.

***Bensler J.*:**

FACTS

1 Akita Drilling Ltd. is a drilling contractor providing drilling services to oil companies. Mr. Mitchell and Mr. Masters were employed as Leasehands on September 2, 2001, and were assigned to Rig 48 approximately 100 kms outside of Edson, Alberta. They resided at a Work Camp near the Rig site. On September 2, 2001, after finishing a shift at 7:30 p.m., the Respondents showered and drove to Edson for dinner and to get supplies in a vehicle owned by a co-worker Mr. Cannon. When driving back to the work camp at 12:30 a.m., Mr. Mitchell swerved to avoid a deer in the middle of the road and lost control of the vehicle which left the road and rolled. Mr. Mitchell and Mr. Masters were not wearing seatbelts and were injured. The men walked approximately 17 kms to a campsite, were driven back to the Work Camp, and then driven to the Edson Hospital for treatment.

2 On October 3, 2001 and November 7, 2001, respectively, the Claimant Services Division of the Workers' Compensation Board determined that the accident occurred in the course of the Respondents' employment and awarded temporary total disability benefits to both Respondents. The Claimant Services Division determined that the stay at the Work Camp was a requirement of the Respondents' employment obligations with Akita Drilling Ltd. and that the accident occurred on a private road leased by and maintained by Akita Drilling Ltd. pursuant to an agreement entered into with Imperial Oil.

3 The Claims Services Review Committee upheld the decisions of the Claimant Services Division on January 7, 2002. The Committee held that the accident was related to the Respondents' employment even though the travel from the Work Camp was for personal reasons because the Respondents would not have been returning to the Work Camp but for their employment with Akita Drilling Ltd.

4 The Appeals Commission confirmed the Memoranda of Decision of the Committee on April 30, 2002. The Appeals Commission concluded that the accident arose out of and in the course of the Respondents' employment because they were required to and were using a private road "owned" by the Applicant while travelling to the worksite for an employment purpose, namely, to return to the Work Camp to prepare themselves for the next shift at 7:30 a.m. on September 3, 2001. The Appeals Commission also held that the actions of the Respondents did not amount to "serious and wilful misconduct" under the *Workers' Compensation Act*, R.S.A. 2000 c. W-15 and that the injuries were therefore compensable.

ISSUES

1. What is the appropriate standard of review pursuant to a statutory appeal by the Court of Queen's Bench for a decision of the Appeals Commission of the Workers' Compensation Board?

2. Whether the Appeals Commission erred on the appropriate standard of review in finding that the accident arose out of and occurred in the course of the Respondents' employment?

THE FUNCTIONAL AND PRAGMATIC APPROACH TO DETERMINING THE STANDARD OF REVIEW

5 The Supreme Court of Canada clearly established that a functional and pragmatic approach is to be taken in determining what is the appropriate standard of review for a court reviewing the decisions of an administrative tribunal, whether through judicial review or statutory appeal, in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and subsequently offered further clarifications of the approach in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.). In the most recent consideration of the functional and pragmatic approach, Iacobucci J. for a unanimous Supreme Court of Canada in *Ryan v. Law Society (New Brunswick)*, [2003] S.C.J. No. 17 (S.C.C.) noted at para. 24 that:

> In the Court's jurisprudence, only three standards of review have been defined for judicial review of administrative action. The pragmatic and functional approach set out in *Bibeault*, supra, and more recently in *Pushpanathan, supra*, will determine, in each case, which of these three standards is appropriate . . .
>
> [citations omitted]

6 Further, Iacobucci J. noted at para. 27 that in determining what the appropriate standard of review will be:

> The pragmatic and functional approach determines the standard of review in relation to four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question - law, fact, or mixed law and fact.
>
> [citations omitted]

7 After considering the above factors, I find that the appropriate standard of review by the Court of Queen's Bench on decisions of the Appeals Commission is reasonableness simpliciter.

INTERPRETATION OF THE WORKERS' COMPENSATION ACT, R.S.A. 2000 C. W-15 AND ITS SEPTEMBER 1, 2002 AMENDMENT

8 Many of the factors to be considered in determining the appropriate standard of review depend on the interpretation of the enabling statute of the administrative tribunal. In this case the Appeals Commission is a body created by the *Workers' Compensation Act*, R.S.A. 2000 c. W-15 (the *Act*) and empowered to review a variety of decisions most notably the decisions on the Workers' Compensation Board (the Board). The appropriate standard of review in Alberta for judicial review of the Appeals Commission prior to amendment of the *Act* had clearly been established by the courts to be patent unreasonableness where the court would not interfere with a decision of the Appeals Commission on questions of fact, law or jurisdiction unless the decision was patently unreasonable: *Ramey v. Alberta (Workers' Compensation Board Appeals Commission)* (1997), 146 D.L.R. (4th) 460 (Alta. C.A.); *Sammut v. Alberta (Workers' Compensation Board Appeals Commission)*, [2002] A.J. No. 425 (Alta. C.A.)). Nevertheless, all parties to this dispute have agreed that the new *Act*, as modified by the amendments of September 1, 2002, is applicable. Following this amendment that, among other things, introduced a statutory right of appeal to the Court of Queen's Bench, it was uncertain this standard of review had remained the same. Relevant portions of the amended *Act* are as follows:

Power of Appeals Commission

13.1(1) Subject to sections 13.2(11) and 13.4, the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act and the regulations in respect of

(a) appeals from decisions under section 46 made by a review body appointed under section 45,

(b) appeals from decisions under section 120 made by a review body appointed under section 119,

(c) appeals from determinations of the Board under section 21(3), and

(d) any other matters assigned to it under this or any other Act or the regulations under this or any other Act,

and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court.

. . .

(9) No proceedings by or before the Appeals Commission shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by certiorari or otherwise into any court, nor shall any action be maintained or brought against the Appeals Commission or any member of the Appeals Commission in respect of any act done or decision made in the honest belief that it was within the jurisdiction of the Appeals Commission. RSA 2000 cW-15 s12;2002 c27 s7.

Appeals

13.2(1) A person who has a direct interest in and is dissatisfied with

(a) a decision under section 46 made by a review body appointed under section 45,

(b) a decision under section 120 made by a review body appointed under section 119, or

(c) a determination of the Board under section 21(3)

may, in accordance with this section, the regulations and the Appeals Commission's rules, appeal the decision or determination to the Appeals Commission.

. . .

(6) In the hearing of an appeal under this section, the Appeals Commission

(a) shall give all persons with a direct interest in the matter under appeal an opportunity to be heard and to present any new or additional evidence,

(b) is bound by the board of directors' policy relating to the matter under appeal,

(c) shall permit the Board to make representations, in the form and manner that the Appeals Commission directs, as to the proper application of policy determined by the board of directors or of the provisions of this Act or the regulations that are applicable to the matter under appeal,

(d) may confirm, reverse or vary the decision or determination appealed,

(e) may direct that its decision be implemented within a specified time period, and

(f) may refer any matter back to the review body or the Board, as the case may be, for further action or decision, with or without directions.

RSA 2000 cW-15 s13;2002 c27 s7.

Board is bound by decision

13.3(1) The Board is bound by a decision of the Appeals Commission and by any decision rendered on an appeal or review of a decision of the Appeals Commission. 2002 c27 s7

Appeal

13.4(1) The Board and any person who has a direct interest in a decision of the Appeals Commission made pursuant to section 13.2 may appeal the decision to the Court of Queen's Bench on a question of law or jurisdiction.

. . .

(8) The Court may receive any further evidence that the Court considers is necessary in order to determine a question of law or jurisdiction.

. . .

(11) On the hearing of the appeal the Court may

(a) confirm or set aside the decision of the Appeals Commission or any part of it, and

(b) where it sets aside the decision, refer the matter back to the Appeals Commission for reconsideration in accordance with any directions the Court considers appropriate.

(12) If the Court finds that the only ground for appeal that is proven is a defect in form or a technical irregularity, and that no substantial wrong or miscarriage of justice has occurred, it may deny the appeal and confirm the decision of the Appeals Commission notwithstanding the defect or irregularity, and may order that the decision takes effect from the time and on the terms that the Court considers proper. 2002 c27 s7.

9 Mr. Justice Belzil considered the appropriate standard of review in *Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission)*, [2003] A.J. No. 342 (Alta. Q.B.) (*Labounty*) and held at paras. 17-20 that even after the amendments of September 1, 2002 there was still a "full" or "true" privative clause in the *Act* that protected the decisions of the Appeals Commission from interference by the court and maintained the standard of review of patent unreasonableness. With respect, I must disagree with my Honourable brother's conclusion. Taking a functional and pragmatic approach that employs the modern approach of statutory interpretation I conclude that a lesser standard of review was established by the amendments of September 1, 2002.

THE EXISTENCE OF A PRIVATIVE CLAUSE

10 The first factor to be considered in the functional and pragmatic approach is to determine whether there is a privative clause or a right of appeal in the enabling statute of the administrative tribunal. Consequently, the starting point must be interpreting what the enabling statute requires. In *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, Sullivan, R. 2002. Butterworths, Markham, ON., Driedger's modern approach is recommended when interpreting statutes. Driedger notes at p. 1:

> Today there is only one principle or approach [to the interpretation of statutes], namely, 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.

11 The Supreme Court of Canada established the approach to be taken in interpreting statutes when it rejected the competing statutory interpretation approach of the plain meaning rule where extra-textual evidence of legislative intent would only be employed if the text of the statute was ambiguous and a plain meaning could not be found. Instead, in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at p. 41 the Supreme Court declared the modern principle approach of statutory interpretation to be the preferred approach so that a more holistic view of the Legislature's intent for the statute would be given. As Driedger notes at p. 3:

> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms, it is reasonable and just.

12 I find it is highly unlikely that the privative clause protecting the Appeals Commission decisions from interference by the courts is a true or full privative clause. The Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers'*

Compensation Board) (1997), 149 D.L.R. (4th) 577 (S.C.C.) stated at para. 17:

> A "full" or "true" privative clause is one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded.

13 That is clearly not the situation for the *Act* following its amendment.

14 Prior to amendment, s. 12(1) established the powers of the Appeals Commission and included a "true" privative clause that prevented interference by the courts except on a patently unreasonable decision of the Appeals Commission. This privative clause was subject only to s. 13(7) that granted the Workers' Compensation Board the power to direct a rehearing by the Appeals Commission if it disagreed with the Appeals Commission decision. Section 12(1) used to read:

> **Powers of Appeals Commission**
>
> 12(1) Subject to section 13(7), the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act and the regulations in respect of
>
> (a) appeals from decisions of the claims services review committee under section 46,
>
> (b) appeals from decisions of the assessment review committee under section 120,
>
> (c) appeals from determinations of the Board under section 21(3), and
>
> (d) any other matters assigned to it under this or any other Act or the regulations under this or any other Act,
>
> and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court.

15 This was clearly changed by the amendment of the *Act*.

16 Although the last line of s. 13.1(1) "and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court" would seem to indicate that the "true" privative clause had been retained, a complete examination of the section shows otherwise. The opening words of s. 13.1(1) explicitly reduces the effect of the privative clause by making it and all of s. 13.1(1) "Subject to s. 13.2(11) and 13.4". Section 13.4 establishes the statutory appeal to the Court of Queen's Bench of a decision of the Appeals Commission. Consequently, the privative clause must be read to be limited by a statutory appeal. Further, s. 13.4(1) grants the Court the power to examine questions of law or questions of jurisdiction and s. 13.4(11) explicitly gives the Court of Queen's Bench the authority to set aside the decision of and refer the matter back to the Appeals Commission. The presence of a statutory appeal and the ability of the Court of Queen's Bench to set aside the decision so that it is no longer "final and conclusive" are incompatible with the relevant privative clause being a "true" or "full" one.

17 Consequently, I find the proper construction of these sections must take into account these alterations by the Legislature of the "full" or "true" privative clause that previously protected the decisions of the Appeals Commission from court interference. When the sections are read in context I find that for questions of fact there is a "true" privative clause that protects the Appeals Commission decisions from court interference such that there would be a standard of review of patent unreasonableness. However, the express limitation of the privative clause by the opening words of s. 13.2(1) by the statutory appeal and the empowerment of the Court of Queen's Bench to decide questions of law or jurisdiction and even to hear new evidence by s. 13.1(8) clearly grants the decisions of the Appeals Commission less than full privative protection on questions of law or jurisdiction.

EXPERTISE OF THE ADMINISTRATIVE TRIBUNAL

18 No party to this dispute contends that the Appeals Commission lacks expertise in the matters that it hears. It is clear that the Appeals Commission has expertise in deciding whether or not someone is an "employee" under the *Act* at the relevant time. Consequently, the Appeals Commission should be afforded some deference.

THE PURPOSE OF THE AMENDMENTS, OF THE LEGISLATION AND OF S. 13.4

19 In support of his conclusion that the patent unreasonableness standard had not been amended, Belzil J. noted: (1) at para. 20 that the Legislature had not removed the privative clause protecting the decisions of the Appeals Commission, (2) at para. 26, that the real purpose of amending the *Act* was "to eliminate the right of the Board to direct a rehearing and replace this avenue of redress with an appeal to the Court of Queen's Bench"; (3) at para. 23, that there was no right of full appeal to the Court of Queen's Bench since questions of fact were not subject to appeal; and (4) at para. 19 that because the established law in Alberta for the standard of review has been patent unreasonableness for many years that the Legislature would have used plain language to alter the standard of review if it had wanted to vary the established law in Alberta. However, I remain unconvinced that the standard of review has survived the amendments of the *Workers' Compensation Act*.

20 I find from the above discussion that while the Legislature had not removed the privative clause it had modified it and limited its applicability. The "full" privative clause applies only to questions of fact with a lower protection being afforded to questions of law and questions of jurisdiction.

21 Although it is certainly true, as the Appeals Commission points out at paras. 14-15 of its Amended Submission, that one purpose of the amendments was to increase the autonomy of the Appeals Commission from the Workers' Compensation Board (as can be seen in the excerpts of the Hansard on the debate of the amendments), this was not the only purpose. If the Legislature had only wanted to eliminate the power of the Board to direct the Appeals Commission to rehear a matter it could have eliminated s. 13(7) of the pre-amendment *Act* while leaving the privative clause in s. 13(1) completely intact. The relevant portions of s.13 of the pre-amendment *Act* read:

Appeal to Appeals Commission

13(1) An interested party who is dissatisfied with

(a) a decision of the claims services review committee or assessment review committee referred to in section 12(1), or

(b) a determination of the Board under section 21(3)

may, in accordance with the regulations and the Appeals Commission's rules, appeal the decision or determination to the Appeals Commission.

. . .

(6) The Appeals Commission may confirm, reverse or vary the decision or determination appealed, and the Appeals Commission's decision may be enforced in the same way as if it were made by the Board.

(7) In the hearing of appeals under this section, the Appeals Commission is bound by policy determined by the board of directors that relates to the matter under appeal, and where the board of directors considers that the Appeals Commission has not properly applied that policy or the provisions of this Act and the regulations that are

applicable to the matter under appeal, the board of directors may in writing direct the Appeals Commission to rehear the matter and to give fair and reasonable consideration to that policy or those provisions.

22 Such a modification would have clearly and absolutely given the Appeals Commission a "full" or "true" privative clause that would have prevented any interference with its decisions by the Board and also would have prevented the Courts from interfering unless the Appeals Commission made a patently unreasonable decision that would be subject to judicial review. If the Legislature had intended to fully insulate the decisions of the Appeals Commission from interference from any body it would not have included a statutory appeal. It is clear by the modifications made to the *Act* in s. 13.1 and s. 13.4 that the Legislature altered the situation and reduced the final and binding nature of decisions of the Appeals Commission on questions of law and questions of jurisdiction by introducing a statutory appeal. Therefore, the Legislature may also have reduced the level of deference to be given to the decisions of the Appeals Commission. Indeed, the excerpts of the Hansard that the WCB and Akita Drilling Ltd. submitted indicates that another purpose of the amendments was to increase the ability of workers who disagree with the decision of the Appeals Commission to access the courts. Further, the same excerpts suggest that the Legislature intended the courts to apply a less deferential review than existed prior to the amendments.

23 I find at least one reason for the amendments of the *Act* was to introduce an appeal that facilitates the ability of workers to access the courts on a standard less deferential than that for judicial review of patent unreasonableness. Otherwise, why would the Legislature include an appeal at all if it merely wanted to maintain the patent unreasonableness standard of review that could already be accessed by bringing an application for judicial review. Instead the Legislature explicitly granted a statutory appeal on questions of law and jurisdiction and only maintained the old standard of review for questions of fact.

24 For questions of law and questions of jurisdiction, a full appeal is provided by the amendments with the Court of Queen's Bench being granted the power to affirm or overturn and return the decisions of the Appeals Commission. Further, s. 13.4(8) expands the power to consider further evidence not before the Appeals Commission strengthening the right of appeal. With regard to the lack of an appeal on questions of fact, even the Court of Appeal in criminal matters is limited in its ability to interfere with the findings of fact of a trial judge to a standard of review of patent unreasonableness, yet none would suggest this means that there is less than a full right of appeal on criminal convictions. Similarly, the statutory appeal created by the amendments grants a full right of appeal but imposes a higher standard of review on questions of fact which are still subject to judicial review on a standard of patent unreasonableness. In addition, the amendments provide an absolute right of appeal on questions of law or on questions of jurisdiction to the Court of Queen's Bench. No leave to appeal need be sought from either the Appeals Commission or the Court of Queen's Bench prior to beginning the Appeal. Such a requirement for leave to appeal was considered by the Legislature and firmly rejected (see Hansard excerpts).

25 Although for years the law of Alberta was that review of decisions of the Appeals Commission would be on a standard of review of patent unreasonableness alterations in the *Act* must be given effect. There is a clear presumption against the Legislature *impliedly* changing established law particularly the common law. Driedger notes at p. 395 that:

> It is presumed that the legislature does not intend to change existing law [common law] or to depart from established principles policies or practices.

26 In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), Lamer J. noted at para. 85 that:

> . . . in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law.

27 Likewise, L'Heureux-Dube J. in *R. v. T. (V.)*, [1992] 1 S.C.R. 749 (S.C.C.) at p. 763-764 quoted with approval from *Maxwell on the Interpretation of Statutes* (12th Edition, 1969) that:

> It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly

stated in, **or follows by necessary implication from**, the language of the statute in question . . .

[emphasis mine].

28 Nevertheless, such a presumption has its greatest effect when dealing with established common law principles and not when the law is dictated by statute. When the law is dictated by statute, then an alteration in the statute results in an alteration in the law. The old standard of review was a direct result of the pre-amendment wording of the *Act* that gave the Appeals Commission a "full" privative clause (see s. 12(1) above). The amendments altered the privative clause and consequently altered the law that should apply. When the amendments to the *Workers' Compensation Act* are read in conjunction with the indications of intention of the Legislature evidenced in the excerpts of the Hansard, as is required by the modern approach of statutory interpretation, it clearly indicates that a change in the standard of review was intended by the Legislature. At the least, a lessening of the level of deference accorded to the Appeals Commission must follow by necessary implication from the introduction of a statutory appeal that clearly weakens the privative clause protecting the decisions of the Appeals Commission. Further, the excerpts of Hansard leave no doubt that one purpose of the amendment was to make courts more accessible to injured workers and at a less deferential standard of review than previously existed.

29 In conclusion, I find it is clear that the Legislature intended to grant a right of appeal and that the Court of Queen's Bench was to employ a standard of review less deferential to the Appeals Commission than patent unreasonableness.

THE NATURE OF THE QUESTION

30 The statutory right of appeal is limited to questions of law and questions of jurisdiction by s. 13.4(1) of the *Act*. Consequently, there is less deference expected to be shown to the decisions of questions of law and questions of mixed law and fact by the Appeals Commission since the courts may be in as good a position if not better to determine these matters. Nevertheless, the expertise of the Appeals Commission does suggest some deference should be given to its decisions on questions of law and questions of mixed law and fact.

REASONABLENESS SIMPLICITER IS THE APPROPRIATE STANDARD OF REVIEW

31 Mullan, D. J. in *Administrative Law*, 2001, Irwin Law, Toronto, ON. notes at p. 74 that prior to 1989, the mere presence of a statutory appeal resulted in the use of the non-deferential standard of review of correctness for judicial review of questions of law. Gonthier J. writing for the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (S.C.C.) altered that situation by recognizing that although a statutory right of appeal made the patent unreasonableness standard inappropriate, a standard of correctness was also inappropriate since the appellate court was required to accord some deference to the decisions of the tribunal within its area of expertise even if there was no privative clause. The Supreme Court of Canada applied this principle in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) to afford some deference to certain decisions of the British Columbia Securities Commission even though there was a statutory right of appeal and the issues were questions of law. This evolving intermediate standard of review called "reasonableness simpliciter" was compared and contrasted to "patent unreasonableness" by Iacobucci J. writing for the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.). Iacobucci J. applied a pragmatic and functional analysis to determine what the appropriate standard of review should be for a statutory right of appeal on a question of mixed law and fact and concluded at p. 775:

> [W]hat is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise.

32 In the case at bar, there is a statutory appeal which lowers the level of deference from patent unreasonableness. No party to this dispute contends that the Appeals Commission lacks expertise in the matters that it hears and so a standard of correctness is inappropriate. As Mullan notes at p. 77:

> . . . The "pragmatic and functional" approach demands attention not only to the nature of the tribunal under appeal but also to the nature of the issue that is subject to that appeal. Only where there is some match between tribunal expertise and issue will this "reasonableness" form of deference be justified. In relation to all other matters of law and mixed fact and law, correctness scrutiny will be the order of the day.

Consequently, I find the only appropriate standard of review is reasonableness simpliciter.

THE "REASONABLENESS SIMPLICITER" STANDARD OF REVIEW

33 Iacobucci J. at p. 776-77 of the *Southam* case held that review on the basis of unreasonableness would be fulfilled if a decision:

> . . . in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether there are any reasons that support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

34 Iacobucci J. described the difference between the patent unreasonableness standard and the reasonableness simpliciter standard at p. 777 as:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is obvious on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable . . . . This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a reading and thinking will be required before the judge will be able to grasp the dimensions of the problem . . . But, once the lines of the problem have come into focus, if the decision is patently unreasonable, the unreasonableness will be evident.

APPLICATION OF THE STANDARD TO THE CASE AT BAR

35 The Applicants have raised an issue with some of the facts the Appeals Commission relied upon. As stated previously the Appeals Commission concluded the accident arose out of and in the course of the Respondents' employment because they were required to and were using a private road "owned" by the Applicant while travelling to the worksite for an employment purpose. In addition they found that the Respondents' actions did not amount to "serious and wilful" misconduct based on the investigation of the RCMP and the facts before them. The Appellants argue there was no evidence to make the finding that the private road was "owned" by them.

36 The Appeals Commission found as stated at p. 7 of their decision:

> Based on the best evidence available, the commissioners find that the Lovett River Road was a private road leased by Imperial Oil to Akita and that Akita Drilling was responsible at least in part for the maintenance of this road. Although

> Akita was not the primary "owner" of the Lovett river road, they had sufficient interest in, control over and responsibility for this private road to be considered an "owner" within WCB policy 02-01, part II, application 3, point 4.

37 They based that decision on the evidence of Gordon Cook of Imperial Oil, who confirmed this road was a private road owned by Imperial Oil. He stated that oil companies who use the road sign an agreement and pay to use the road. They are in turn responsible to maintain the road.

38 Conflicting hearsay evidence was called by Akita Drilling Ltd., but the Appeals Commission found it was not sufficient to reasonably support Akita's assertion. They based their decision on the best evidence they had before them.

39 No one took issue with the fact that this was the only road or means of access to the worksite from the highway.

40 The decision of the Board was well reasoned. They analysed the facts, the appropriate sections of the *Act*, and the policies of the Workers' Compensation Board. I find the decision of the Board is not unreasonable.

41 Applying the standard of unreasonableness simpliciter to the decision of the Appeals Commission in this case, I find the decision of the Board to be reasonable.

42 Accordingly the appeal is dismissed and the decision of the Appeals Commission is confirmed.

43 In the event counsel are unable to agree to costs leave is granted to speak to costs within 60 days of the filing of this judgment.

Appeal dismissed.

End of Document

TAB 2

2017 SCC 1, 2017 CSC 1
Supreme Court of Canada

Ernst v. Alberta Energy Regulator

2017 CarswellAlta 32, 2017 CarswellAlta 33, 2017 SCC 1, 2017 CSC 1, [2017] 2 W.W.R. 211, [2017] A.W.L.D. 511, [2017] A.W.L.D. 515, [2017] A.W.L.D. 519, [2017] A.W.L.D. 552, [2017] S.C.J. No. 1, 12 Admin. L.R. (6th) 1, 274 A.C.W.S. (3d) 70, 35 C.C.L.T. (4th) 1, 405 D.L.R. (4th) 244, 5 C.E.L.R. (4th) 175

Jessica Ernst (Appellant) and Alberta Energy Regulator (Respondent) and Attorney General of Quebec, Canadian Civil Liberties Association, British Columbia Civil Liberties Association and David Asper Centre for Constitutional Rights (Interveners)

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

Heard: January 12, 2016
Judgment: January 13, 2017
Docket: 36167

Proceedings: affirming *Ernst v. EnCana Corp.* (2014), 319 C.R.R. (2d) 309, 620 W.A.C. 341, 580 A.R. 341, [2014] A.J. No. 975, 2014 ABCA 285, 2 Alta. L.R. (6th) 293, 12 C.C.L.T. (4th) 274, 75 Admin. L.R. (5th) 162, [2014] 11 W.W.R. 496, 85 C.E.L.R. (3d) 39, 2014 CarswellAlta 1588, Frans Slatter J.A., Jack Watson J.A., Jean Côté J.A. (Alta. C.A.); affirming *Ernst v. EnCana Corp.* (2013), [2013] 12 W.W.R. 738, 570 A.R. 317, 5 C.C.L.T. (4th) 285, 292 C.R.R. (2d) 333, 78 C.E.L.R. (3d) 227, 85 Alta. L.R. (5th) 333, 2013 ABQB 537, 2013 CarswellAlta 1836, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: W. Cory Wanless, Murray Klippenstein, for Appellant
Glenn Solomon, Q.C., Christy Elliott, for Respondent
Robert Desroches (written), Carole Soucy (written), for Intervener, Attorney General of Quebec
Stuart Svonkin (written), Brendan Brammall (written), Michael Bookman (written), for Intervener, Canadian Civil Liberties Association
Ryan D.W. Dalziel, Emily Lapper, for Intervener, British Columbia Civil Liberties Association
Raj Anand, Cheryl Milne, for Intervener, David Asper Centre, for Constitutional Rights

Subject: Civil Practice and Procedure; Constitutional; Environmental; Public

Table of Authorities

Cases considered by *Cromwell J.*:

Agnew v. Assn. of Architects (Ontario) (1987), 30 Admin. L.R. 285, 26 O.A.C. 354, 64 O.R. (2d) 8, 1987 CarswellOnt 954 (Ont. Div. Ct.) — referred to

Canada (Attorney General) v. McArthur (2010), 2010 SCC 63, 2010 CarswellOnt 9659, 2010 CarswellOnt 9660, 96 C.L.R. (3d) 59, 13 Admin. L.R. (5th) 1, 56 C.E.L.R. (3d) 62, 327 D.L.R. (4th) 562, 410 N.R. 55, 81 C.R. (6th) 1, 273 O.A.C. 55, [2010] 3 S.C.R. 626, 108 O.R. (3d) 239 (note), 222 C.R.R. (2d) 86 (S.C.C.) — referred to

Canada (Attorney General) v. TeleZone Inc. (2010), 2010 SCC 62, 2010 CarswellOnt 9657, 2010 CarswellOnt 9658, 96 C.L.R. (3d) 1, 13 Admin. L.R. (5th) 24, 56 C.E.L.R. (3d) 1, 327 D.L.R. (4th) 527, 410 N.R. 1, (sub nom. *TeleZone Inc. v. Canada (Attorney General))* 273 O.A.C. 1, [2010] 3 S.C.R. 585, (sub nom. *TeleZone Inc. v. Canada (Attorney General))* 108 O.R. (3d) 239 (S.C.C.) — referred to

Cartier v. Nairn (2009), 2009 HRTO 2208, 2009 CarswellOnt 9111, 8 Admin. L.R. (5th) 150 (Ont. Human Rights Trib.) — referred to

Cooper v. Hobart (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — referred to

Crevier v. Quebec (Attorney General) (1981), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541, 1981 CarswellQue 109, 1981 CarswellQue 109F (S.C.C.) — referred to

Edwards v. Law Society of Upper Canada (2000), 2000 CarswellOnt 1964, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 48 O.R. (3d) 329, 188 D.L.R. (4th) 613, 1 C.C.L.T. (3d) 193, 133 O.A.C. 286, 46 C.P.C. (4th) 30, 24 Admin. L.R. (3d) 203, 98 O.T.C. 80 (Ont. C.A.) — considered

Edwards v. Law Society of Upper Canada (2001), 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 34 Admin. L.R. (3d) 38, 206 D.L.R. (4th) 211, 277 N.R. 145, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388, [2001] 3 S.C.R. 562, 2001 CSC 80, 56 O.R. (3d) 456, 56 O.R. (3d) 456 (note), [2001] O.T.C. 325 (S.C.C.) — considered

Ermina v. Canada (Minister of Citizenship & Immigration) (1998), 1998 CarswellNat 2416, 167 D.L.R. (4th) 764, 160 F.T.R. 317, 1998 CarswellNat 4770 (Fed. T.D.) — referred to

Fray v. Blackburn (1863), 122 E.R. 217, 3 B. & S. 576 (Eng. K.B.) — referred to

Garnett v. Ferrand (1827), 108 E.R. 576, 6 B. & C. 611 (Eng. K.B.) — referred to

Gonzalez v. British Columbia (Ministry of Attorney General) (2009), 2009 BCSC 639, 2009 CarswellBC 1274, 95 B.C.L.R. (4th) 185, [2009] 11 W.W.R. 132, 97 Admin. L.R. (4th) 195, 67 C.H.R.R. D/268 (B.C. S.C.) — referred to

Hazel v. Ainsworth Engineered Corp. (2009), 2009 HRTO 2180, 2009 CarswellOnt 9730, 69 C.H.R.R. D/155 (Ont. Human Rights Trib.) — referred to

Henry v. British Columbia (Attorney General) (2015), 2015 SCC 24, 2015 CSC 24, 2015 CarswellBC 1121, 2015 CarswellBC 1122, 383 D.L.R. (4th) 383, 18 C.R. (7th) 338, 70 B.C.L.R. (5th) 1, 470 N.R. 200, [2015] 6 W.W.R. 407, 18 C.C.L.T. (4th) 177, 369 B.C.A.C. 47, 634 W.A.C. 47, [2015] 2 S.C.R. 214, 336 C.R.R. (2d) 270 (S.C.C.) —

considered

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 50 C.C.L.T. (3d) 1, 50 C.R. (6th) 279, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 285 D.L.R. (4th) 620, 64 Admin. L.R. (4th) 163, 230 O.A.C. 253, 368 N.R. 1, [2007] 3 S.C.R. 129, [2007] R.R.A. 817 (S.C.C.) — referred to

Hinse v. Canada (Attorney General) (2015), 2015 SCC 35, 2015 CSC 35, 2015 CarswellQue 4775, 2015 CarswellQue 4776, 385 D.L.R. (4th) 577, 472 N.R. 200, (sub nom. *Hinse v. Canada (Procureur général)*) 473 N.R. 389 (note), [2015] 2 S.C.R. 621, (sub nom. *R. v. Hinse*) 337 C.R.R. (2d) 146 (S.C.C.) — considered

MacKay v. Manitoba (1989), [1989] 6 W.W.R. 351, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385, 99 N.R. 116, 61 Man. R. (2d) 270, 43 C.R.R. 1, 1989 CarswellMan 184, 1989 CarswellMan 332 (S.C.C.) — considered

MacKeigan v. Hickman (1989), 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796, (sub nom. *MacKeigan, J.A. v. Royal Comm. (Marshall Inquiry)*) 94 N.S.R. (2d) 1, 41 Admin. L.R. 236, 50 C.C.C. (3d) 449, 72 C.R. (3d) 129, (sub nom. *MacKeigan, J.A. v. Royal Comm. (Marshall Inquiry)*) 247 A.P.R. 1, 100 N.R. 81, 1989 CarswellNS 391, 1989 CarswellNS 24 (S.C.C.) — referred to

Mackin v. New Brunswick (Minister of Justice) (2002), 2002 SCC 13, 2002 CarswellNB 59, 2002 CarswellNB 60, (sub nom. *Mackin v. New Brunswick (Minister of Finance)*) 209 D.L.R. (4th) 564, (sub nom. *Rice, P.C.J. v. New Brunswick*) 282 N.R. 201, (sub nom. *Mackin v. New Brunswick (Minister of Finance)*) 91 C.R.R. (2d) 1, 17 C.P.C. (5th) 1, 31 C.C.P.B. 55, (sub nom. *Rice, P.C.J. v. New Brunswick*) 245 N.B.R. (2d) 299, (sub nom. *Rice, P.C.J. v. New Brunswick*) 636 A.P.R. 299, [2002] 1 S.C.R. 405, 2002 CSC 13 (S.C.C.) — referred to

Manuge v. R. (2010), 2010 SCC 67, 2010 CarswellNat 4838, 2010 CarswellNat 4839, 2010 C.E.B. & P.G.R. 8417 (headnote only), 86 C.C.P.B. 159, 13 Admin. L.R. (5th) 144, (sub nom. *Manuge v. Canada*) 327 D.L.R. (4th) 602, (sub nom. *Manuge v. Canada*) 410 N.R. 113, (sub nom. *Manuge v. Canada*) [2010] 3 S.C.R. 672, 222 C.R.R. (2d) 1 (S.C.C.) — referred to

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

Nelles v. Ontario (1989), 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 1989 CarswellOnt 963, 1989 CarswellOnt 415, 69 O.R. (2d) 448 (S.C.C.) — considered

Nu-Pharm Inc. v. Canada (2010), 2010 SCC 65, 2010 CarswellNat 4836, 2010 CarswellNat 4837, 13 Admin. L.R. (5th) 100, 89 C.P.R. (4th) 199, 327 D.L.R. (4th) 580, (sub nom. *Nu-Pharm Inc. v. Canada (Attorney General)*) 410 N.R. 82, (sub nom. *Nu-Pharm Inc. v. Canada (Attorney General)*) [2010] 3 S.C.R. 648 (S.C.C.) — referred to

Olymel, s.e.c. c. I.P.F.P. (2010), 2010 SCC 66, 2010 CarswellQue 13350, 2010 CarswellQue 13351, 13 Admin. L.R. (5th) 116, (sub nom. *Agence canadienne de l'inspection des aliments v. Institut professionnel de la fonction publique du Canada)* 327 D.L.R. (4th) 588, (sub nom. *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada)* 410 N.R. 94, (sub nom. *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada)* [2010] 3 S.C.R. 657, 13 Admin. L.R. (4th) 116 (S.C.C.) — referred to

Ontario (Energy Board) v. Ontario Power Generation Inc. (2015), 2015 SCC 44, 2015 CSC 44, 2015 CarswellOnt 14395, 2015 CarswellOnt 14396, 388 D.L.R. (4th) 540, (sub nom. *Power Workers' Union v. Ontario Energy Board)* 475 N.R. 1, (sub nom. *Power Workers' Union v. Ontario Energy Board)* 338 O.A.C. 1, 95 Admin. L.R. (5th) 1, [2015] 3 S.C.R. 147 (S.C.C.) — referred to

Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food) (2010), 2010 SCC 64, 2010 CarswellNat 4834, 2010 CarswellNat 4835, 13 Admin. L.R. (5th) 85, 327 D.L.R. (4th) 573, 410 N.R. 72, (sub nom. *Parrish & Heimbecker Ltd. v. Canada (Agriculture & Agri-Food))* [2010] 3 S.C.R. 639 (S.C.C.) — referred to

R. v. Mills (1986), [1986] 1 S.C.R. 863, (sub nom. *Mills v. R.)* 29 D.L.R. (4th) 161, (sub nom. *Mills v. R.)* 67 N.R. 241, 16 O.A.C. 81, (sub nom. *Mills v. R.)* 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, (sub nom. *Mills v. R.)* 21 C.R.R. 76, (sub nom. *Mills v. R.)* 58 O.R. (2d) 544 (note), 1986 CarswellOnt 1716, 1986 CarswellOnt 116 (S.C.C.) — considered

R. v. Sappier (2006), 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 274 D.L.R. (4th) 75, 355 N.R. 1, [2006] 2 S.C.R. 686, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199, 799 A.P.R. 199 (S.C.C.) — referred to

Rivard c. Morier (1985), [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1, 64 N.R. 46, 17 Admin. L.R. 230, 1985 CarswellQue 115, 1985 CarswellQue 92 (S.C.C.) — referred to

Royer c. Mignault (1988), 13 Q.A.C. 39, (sub nom. *Royer v. Mignault)* 32 C.R.R. 1, (sub nom. *Royer v. Mignault)* 50 D.L.R. (4th) 345, [1988] R.J.Q. 670, 1988 CarswellQue 178, 1988 CarswellQue 1598 (C.A. Que.) — referred to

Sirros v. Moore (1974), [1975] Q.B. 118, [1974] 3 All E.R. 776 (Eng. C.A.) — considered

Slansky v. Canada (Attorney General) (2013), 2013 FCA 199, 2013 CarswellNat 3338, 364 D.L.R. (4th) 112, 449 N.R. 28, 60 Admin. L.R. (5th) 211, 2013 CAF 199, 2013 CarswellNat 6951, [2015] 1 F.C.R. 81 (F.C.A.) — referred to

Taylor v. Canada (Attorney General) (2000), 2000 CarswellNat 354, 184 D.L.R. (4th) 706, 253 N.R. 252, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27, 44 C.P.C. (4th) 1, 2000 CarswellNat 3253, 37 C.H.R.R. D/368 (Fed. C.A.) — referred to

Taylor v. Canada (Attorney General) (2000), 2000 CarswellNat 2566, 2000 CarswellNat 2567, 263 N.R. 399 (note), [2000] 2 S.C.R. xiv (note) (S.C.C.) — referred to

Ward v. Vancouver (City) (2010), 2010 SCC 27, 2010 CarswellBC 1947, 2010 CarswellBC 1948, 75 C.C.L.T. (3d) 1, [2010] 9 W.W.R. 195, 321 D.L.R. (4th) 1, 7 B.C.L.R. (5th) 203, 76 C.R. (6th) 207, 404 N.R. 1, 290 B.C.A.C. 222, 491

W.A.C. 222, (sub nom. *Vancouver (City) v. Ward)* 213 C.R.R. (2d) 166, (sub nom. *Vancouver (City) v. Ward)* [2010] 2 S.C.R. 28 (S.C.C.) — followed

Cases considered by *Abella J.*:

Alkasabi v. Ontario (1994), 1994 CarswellOnt 3639 (Ont. Gen. Div.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — referred to

Broddy v. Alberta (Director of Vital Statistics) (1982), [1983] 1 W.W.R. 481, 23 Alta. L.R. (2d) 77, 31 R.F.L. (2d) 225, 41 A.R. 255, 142 D.L.R. (3d) 151, 1982 CarswellAlta 213 (Alta. C.A.) — referred to

Cooper v. Hobart (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — referred to

Eaton v. Brant (County) Board of Education (1996), 31 O.R. (3d) 574 (note), 41 C.R.R. (2d) 240, 142 D.L.R. (4th) 385, (sub nom. *Eaton v. Board of Education of Brant County)* 207 N.R. 171, (sub nom. *Eaton v. Board of Education of Brant County)* 97 O.A.C. 161, [1997] 1 S.C.R. 241, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036 (S.C.C.) — considered

Edwards v. Law Society of Upper Canada (2000), 2000 CarswellOnt 1964, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 48 O.R. (3d) 329, 188 D.L.R. (4th) 613, 1 C.C.L.T. (3d) 193, 133 O.A.C. 286, 46 C.P.C. (4th) 30, 24 Admin. L.R. (3d) 203, 98 O.T.C. 80 (Ont. C.A.) — considered

Edwards v. Law Society of Upper Canada (2001), 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 34 Admin. L.R. (3d) 38, 206 D.L.R. (4th) 211, 277 N.R. 145, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388, [2001] 3 S.C.R. 562, 2001 CSC 80, 56 O.R. (3d) 456, 56 O.R. (3d) 456 (note), [2001] O.T.C. 325 (S.C.C.) — referred to

Guindon v. R. (2015), 2015 SCC 41, 2015 CSC 41, 2015 CarswellNat 3231, 2015 CarswellNat 3232, 21 C.R. (7th) 23, [2015] 6 C.T.C. 1, 387 D.L.R. (4th) 228, (sub nom. *Guindon v. Minister of National Revenue)* 473 N.R. 120, 2015 D.T.C. 5086, 327 C.C.C. (3d) 308, (sub nom. *Guindon v. Canada)* [2015] 3 S.C.R. 3, (sub nom. *Guindon v. Canada)* 342 C.R.R. (2d) 254 (S.C.C.) — followed

Henry v. British Columbia (Attorney General) (2015), 2015 SCC 24, 2015 CSC 24, 2015 CarswellBC 1121, 2015 CarswellBC 1122, 383 D.L.R. (4th) 383, 18 C.R. (7th) 338, 70 B.C.L.R. (5th) 1, 470 N.R. 200, [2015] 6 W.W.R. 407, 18 C.C.L.T. (4th) 177, 369 B.C.A.C. 47, 634 W.A.C. 47, [2015] 2 S.C.R. 214, 336 C.R.R. (2d) 270 (S.C.C.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — referred to

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered

MacKeigan v. Hickman (1989), 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796, (sub nom. *MacKeigan, J.A. v. Royal Comm. (Marshall Inquiry))* 94 N.S.R. (2d) 1, 41 Admin. L.R. 236, 50 C.C.C. (3d) 449, 72 C.R. (3d) 129, (sub nom. *MacKeigan, J.A. v. Royal Comm. (Marshall Inquiry))* 247 A.P.R. 1, 100 N.R. 81, 1989 CarswellNS 391, 1989 CarswellNS 24 (S.C.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65, 2008 CSC 9 (S.C.C.) — referred to

R. v. Aberdeen (2006), 2006 ABCA 164, 2006 CarswellAlta 600, 384 A.R. 395, 367 W.A.C. 395, 212 C.C.C. (3d) 505, 141 C.R.R. (2d) 152 (Alta. C.A.) — considered

R. v. Lilgert (2014), 2014 BCCA 493, 2014 CarswellBC 3783, 72 M.V.R. (6th) 23, 16 C.R. (7th) 346, 318 C.C.C. (3d) 30, 365 B.C.A.C. 95, 627 W.A.C. 95 (B.C. C.A.) — referred to

R. v. Redhead (2006), 2006 ABCA 84, 2006 CarswellAlta 294, 56 Alta. L.R. (4th) 15, 206 C.C.C. (3d) 315, [2006] 6 W.W.R. 19, 384 A.R. 206, 367 W.A.C. 206 (Alta. C.A.) — referred to

Rivard c. Morier (1985), [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1, 64 N.R. 46, 17 Admin. L.R. 230, 1985 CarswellQue 115, 1985 CarswellQue 92 (S.C.C.) — referred to

Seweryn v. Alberta (Appeals Commission for Alberta Workers' Compensation) (2016), 2016 ABCA 239, 2016 CarswellAlta 1481 (Alta. C.A.) — referred to

Slansky v. Canada (Attorney General) (2013), 2013 FCA 199, 2013 CarswellNat 3338, 364 D.L.R. (4th) 112, 449 N.R. 28, 60 Admin. L.R. (5th) 211, 2013 CAF 199, 2013 CarswellNat 6951, [2015] 1 F.C.R. 81 (F.C.A.) — considered

Taylor v. Canada (Attorney General) (2000), 2000 CarswellNat 354, 184 D.L.R. (4th) 706, 253 N.R. 252, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27, 44 C.P.C. (4th) 1, 2000 CarswellNat 3253, 37 C.H.R.R. D/368 (Fed. C.A.) — referred to

TransCanada Pipelines Ltd. v. Beardmore (Township) (2000), 2000 CarswellOnt 1072, 186 D.L.R. (4th) 403, (sub nom. *Ontario (Minister of Municipal Affairs & Housing) v. TransCanada Pipelines Ltd.)* [2000] 3 C.N.L.R. 153, 137 O.A.C. 201 (Ont. C.A.) — referred to

Ward v. Vancouver (City) (2010), 2010 SCC 27, 2010 CarswellBC 1947, 2010 CarswellBC 1948, 75 C.C.L.T. (3d) 1, [2010] 9 W.W.R. 195, 321 D.L.R. (4th) 1, 7 B.C.L.R. (5th) 203, 76 C.R. (6th) 207, 404 N.R. 1, 290 B.C.A.C. 222, 491 W.A.C. 222, (sub nom. *Vancouver (City) v. Ward)* 213 C.R.R. (2d) 166, (sub nom. *Vancouver (City) v. Ward)* [2010] 2 S.C.R. 28 (S.C.C.) — considered

Cases considered by *McLachlin C.J.C., Moldaver, Brown JJ.* (dissenting):

Cooper v. Hobart (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — refered to in a minority or dissenting opinion

Edwards v. Law Society of Upper Canada (2001), 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 34 Admin. L.R. (3d) 38, 206 D.L.R. (4th) 211, 277 N.R. 145, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388, [2001] 3 S.C.R. 562, 2001 CSC 80, 56 O.R. (3d) 456, 56 O.R. (3d) 456 (note), [2001] O.T.C. 325 (S.C.C.) — refered to in a minority or dissenting opinion

Gonzalez v. British Columbia (Ministry of Attorney General) (2009), 2009 BCSC 639, 2009 CarswellBC 1274, 95 B.C.L.R. (4th) 185, [2009] 11 W.W.R. 132, 97 Admin. L.R. (4th) 195, 67 C.H.R.R. D/268 (B.C. S.C.) — refered to in a minority or dissenting opinion

Henry v. British Columbia (Attorney General) (2015), 2015 SCC 24, 2015 CSC 24, 2015 CarswellBC 1121, 2015 CarswellBC 1122, 383 D.L.R. (4th) 383, 18 C.R. (7th) 338, 70 B.C.L.R. (5th) 1, 470 N.R. 200, [2015] 6 W.W.R. 407, 18 C.C.L.T. (4th) 177, 369 B.C.A.C. 47, 634 W.A.C. 47, [2015] 2 S.C.R. 214, 336 C.R.R. (2d) 270 (S.C.C.) — considered in a minority or dissenting opinion

Hinse v. Canada (Attorney General) (2015), 2015 SCC 35, 2015 CSC 35, 2015 CarswellQue 4775, 2015 CarswellQue 4776, 385 D.L.R. (4th) 577, 472 N.R. 200, (sub nom. *Hinse v. Canada (Procureur général))* 473 N.R. 389 (note), [2015] 2 S.C.R. 621, (sub nom. *R. v. Hinse)* 337 C.R.R. (2d) 146 (S.C.C.) — considered in a minority or dissenting opinion

Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered in a minority or dissenting opinion

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)*

419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered in a minority or dissenting opinion

Mackin v. New Brunswick (Minister of Justice) (2002), 2002 SCC 13, 2002 CarswellNB 59, 2002 CarswellNB 60, (sub nom. *Mackin v. New Brunswick (Minister of Finance))* 209 D.L.R. (4th) 564, (sub nom. *Rice, P.C.J. v. New Brunswick)* 282 N.R. 201, (sub nom. *Mackin v. New Brunswick (Minister of Finance))* 91 C.R.R. (2d) 1, 17 C.P.C. (5th) 1, 31 C.C.P.B. 55, (sub nom. *Rice, P.C.J. v. New Brunswick)* 245 N.B.R. (2d) 299, (sub nom. *Rice, P.C.J. v. New Brunswick)* 636 A.P.R. 299, [2002] 1 S.C.R. 405, 2002 CSC 13 (S.C.C.) — considered in a minority or dissenting opinion

Nelles v. Ontario (1989), 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 1989 CarswellOnt 963, 1989 CarswellOnt 415, 69 O.R. (2d) 448 (S.C.C.) — considered in a minority or dissenting opinion

Odhavji Estate v. Woodhouse (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69 (S.C.C.) — considered in a minority or dissenting opinion

Sirros v. Moore (1974), [1975] Q.B. 118, [1974] 3 All E.R. 776 (Eng. C.A.) — refered to in a minority or dissenting opinion

Taylor v. Canada (Attorney General) (2000), 2000 CarswellNat 354, 184 D.L.R. (4th) 706, 253 N.R. 252, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27, 44 C.P.C. (4th) 1, 2000 CarswellNat 3253, 37 C.H.R.R. D/368 (Fed. C.A.) — refered to in a minority or dissenting opinion

Taylor v. Canada (Attorney General) (2000), 2000 CarswellNat 2566, 2000 CarswellNat 2567, 263 N.R. 399 (note), [2000] 2 S.C.R. xiv (note) (S.C.C.) — refered to in a minority or dissenting opinion

Ward v. Vancouver (City) (2010), 2010 SCC 27, 2010 CarswellBC 1947, 2010 CarswellBC 1948, 75 C.C.L.T. (3d) 1, [2010] 9 W.W.R. 195, 321 D.L.R. (4th) 1, 7 B.C.L.R. (5th) 203, 76 C.R. (6th) 207, 404 N.R. 1, 290 B.C.A.C. 222, 491 W.A.C. 222, (sub nom. *Vancouver (City) v. Ward)* 213 C.R.R. (2d) 166, (sub nom. *Vancouver (City) v. Ward)* [2010] 2 S.C.R. 28 (S.C.C.) — considered in a minority or dissenting opinion

Statutes considered by *Cromwell J.*:

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

Generally — referred to

s. 2(b) — considered

s. 24(1) — considered

Court of Queen's Bench Act, R.S.A. 2000, c. C-31
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

Energy Resources Conservation Act, R.S.A. 2000, c. E-10
s. 3 — considered

s. 16 — referred to

s. 20 — referred to

s. 43 — considered

Gas Resources Preservation Act, R.S.A. 2000, c. G-4
Generally — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6
Generally — referred to

Oil Sands Conservation Act, R.S.A. 2000, c. O-7
s. 7 — referred to

Pipeline Act, R.S.A. 2000, c. P-15
Generally — referred to

s. 6 — referred to

s. 12 — referred to

Provincial Court Act, R.S.A. 2000, c. P-31
Generally — referred to

Statutes considered by *Abella J.*:

Administrative Tribunals Act, S.B.C. 2004, c. 45
Pt. 8 — referred to

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

s. 1 — referred to

s. 2(b) — considered

s. 24(1) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52 — referred to

Court of Queen's Bench Act, R.S.A. 2000, c. C-31
s. 14 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 33.1(21) [en. 1994, c. 12, s. 13] — referred to

s. 49(27) — referred to

s. 82 — referred to

s. 86.2(19) [en. 1996, c. 25, s. 1(18)] — referred to

Energy Resources Conservation Act, R.S.A. 2000, c. E-10
Generally — referred to

s. 16 — referred to

s. 43 — considered

Environmental Review Tribunal Act, 2000, S.O. 2000, c. 26, Sched. F
s. 8.1(1) [en. 2009, c. 33, Sched. 2, s. 29] — referred to

Federal Courts Act, R.S.C. 1985, c. F-7
s. 12(6) — referred to

Human Rights Code, S.M. 1987-88, c. 45
s. 62 — referred to

Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

s. 24 — referred to

Justices of the Peace Act, R.S.N.W.T. 1988, c. J-3
s. 4(5) — referred to

Justices of the Peace Act, 1988, S.S. 1988-89, c. J-5.1

s. 12.9 [en. 1997, c. 10, s. 8] — referred to

Labour Board Act, S.N.S. 2010, c. 37
s. 11 — referred to

Labour Relations Code, R.S.B.C. 1996, c. 244
s. 145.4 [en. 2007, c. 9, s. 86] — referred to

Law Society Act, R.S.O. 1990, c. L.8
Generally — referred to

s. 9 — referred to

Provincial Court Act, R.S.A. 2000, c. P-31
s. 68 — referred to

Provincial Court Act, R.S.B.C. 1996, c. 379
s. 27.3 [en. 2007, c. 9, s. 115] — referred to

s. 42 — referred to

Public Inquiry Act, S.B.C. 2007, c. 9
s. 32 — referred to

Sex Offender Information Registration Act, S.C. 2004, c. 10
Generally — referred to

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A
s. 179(1) — referred to

Statutes considered by *McLachlin C.J.C., Moldaver, Brown JJ.* (dissenting):

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

s. 1 — referred to

s. 2(b) — considered

s. 24(1) — considered

Energy Resources Conservation Act, R.S.A. 2000, c. E-10
Generally — referred to

s. 27 — referred to

s. 43 — considered

Judicature Act, R.S.A. 2000, c. J-2
s. 24 — referred to

Responsible Energy Development Act, S.A. 2012, c. R-17.3
Generally — referred to

Rules considered by *Abella J.*:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 3.68 — referred to

Rules considered by *McLachlin C.J.C., Moldaver, Brown JJ.* (dissenting):

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 3.68 — referred to

APPEAL by plaintiff from judgment reported at *Ernst v. EnCana Corp.* (2014), 2014 ABCA 285, 2014 CarswellAlta 1588, 85 C.E.L.R. (3d) 39, [2014] 11 W.W.R. 496, 75 Admin. L.R. (5th) 162, [2014] A.J. No. 975, 580 A.R. 341, 620 W.A.C. 341, 12 C.C.L.T. (4th) 274, 319 C.R.R. (2d) 309, 2 Alta. L.R. (6th) 293 (Alta. C.A.), dismissing plaintiff's appeal from judgment striking portion of statement of claim in proceeding against energy board.

POURVOI formé par la demanderesse à l'encontre d'une décision publiée à *Ernst v. EnCana Corp.* (2014), 2014 ABCA 285, 2014 CarswellAlta 1588, 85 C.E.L.R. (3d) 39, [2014] 11 W.W.R. 496, 75 Admin. L.R. (5th) 162, [2014] A.J. No. 975, 580 A.R. 341, 620 W.A.C. 341, 12 C.C.L.T. (4th) 274, 319 C.R.R. (2d) 309, 2 Alta. L.R. (6th) 293 (Alta. C.A.), ayant rejeté l'appel interjeté par la demanderesse à l'encontre d'un jugement ayant radié une partie de la requête introductive dans le cadre d'une procédure déposée contre un organisme.

***Cromwell J.* (Karakatsanis, Wagner and Gascon JJ. concurring):**

I. Introduction

1 The appellant, Ms. Ernst, claims that a quasi-judicial, regulatory board, the Alberta Energy Regulator (the "Board"), breached her right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. She brought a claim against the Board for damages as an "appropriate and just" remedy under s. 24(1) of the *Charter* for that alleged

breach. The Board applied to strike this claim on the basis, among others, that it is protected by an immunity clause which precludes all claims in relation to the Board's actions purportedly done pursuant to the legislation which the Board administers.

2 Ms. Ernst's position, in both her factum and oral argument, is that this immunity provision is unconstitutional because it purports to bar her claim for *Charter* damages. She submits that the *only* issue on this appeal is whether the immunity clause is constitutionally inapplicable or inoperable to the extent that it bars a claim against the Board for *Charter* damages. She accepts, as the Alberta courts found, that the immunity clause on its face bars her claim; the issue she brings to the Court is whether this immunity clause is unconstitutional to the extent that it does so.

3 That the provision purports to bar her damages claim is the foundation on which her appeal was argued. It follows that the Court must give effect to the immunity clause and strike Ms. Ernst's claim unless she successfully challenges the clause's constitutionality. In my view, she has not done so.

4 Like the Alberta courts in this case, although for somewhat different reasons, I conclude that the claim for *Charter* damages should be struck out. I would therefore dismiss the appeal.

II. Background

5 My reference to the relevant background will be very brief because my colleagues, the Chief Justice and Justices Moldaver and Brown, and Justice Abella, have detailed the claims and proceedings giving rise to the appeal.

6 In a nutshell, Ms. Ernst claims that the Board breached her *Charter* right to freedom of expression by punishing her for publicly criticizing the Board and by preventing her, for a period of 16 months, from speaking to key offices within it. As she alleges in her claim, these restrictions limited her ability "to lodge complaints, register concerns and to participate in the [Board's] compliance and enforcement process": A.R., at p. 76. The Alberta Court of Queen's Bench concluded that Ms. Ernst has pleaded a breach of her right to freedom of expression under the *Charter* and that this claim ought not to be struck out at this preliminary stage of the action: 2013 ABQB 537, 570 A.R. 317 (Alta. Q.B.). Notwithstanding the Board's submissions to the contrary, I accept that conclusion for the purposes of my analysis.

7 The Board is a statutory, independent, quasi-judicial body responsible for regulating Alberta's energy resource and utility sectors: Alberta Ministry of Energy, *2005-2006 Annual Report*, at p. 7.[1] It has regulatory and quasi-judicial duties under a number of Alberta statutes: *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, ss. 16 and 20, and see, e.g., *Gas Resources Preservation Act*, R.S.A. 2000, c. G-4; *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6; *Pipeline Act*, R.S.A. 2000, c. P-15. The Board is responsible for granting and overseeing licenses and making orders regarding energy related activities, such as pipeline construction and oil sand sites: *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, s. 7; *Pipeline Act*, ss. 6 and 12. The Board has the power to conduct inquiries, inspections, investigations and hearings, and to carry out remedial action where required. Additionally, the Board has procedures in place to receive public complaints and concerns and to perform its enforcement functions where its orders or regulatory rulings are not complied with.

8 There is now no dispute that the Board does not owe Ms. Ernst a common law duty of care; her claim in negligence was struck out for that reason and the affirmation of that order by the Court of Appeal has not been appealed: 2014 ABCA 285, 2 Alta. L.R. (6th) 293 (Alta. C.A.).

9 The Board is protected by a broadly worded immunity clause, namely, s. 43 of the *Energy Resources Conservation Act*:

Protection from action

43. No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

10 We have received virtually no argument concerning the interpretation of this clause because it is common ground between the parties that this provision, on its face, purports to bar Ms. Ernst's claim for *Charter* damages, to the extent that she has such a claim against the Board. This point leads me to have some difficulty with the reasons of the Chief Justice and Justices Moldaver and Brown.

11 The Chief Justice and Justices Moldaver and Brown would allow the appeal on the basis that, contrary to Ms. Ernst's position, it is not plain and obvious that the immunity provision on its face bars her claim for *Charter* damages. However, it is not open to the Court to dispose of the appeal on this basis, for several related reasons.

12 First, not only did Ms. Ernst repeatedly submit, in writing and orally, that the immunity provision on its face bars her claim, this position was the foundation of her appeal.

13 In her factum in this Court, Ms. Ernst submitted that the immunity provision on its face purports to bar her *Charter* damages claim. As she put it in her factum, the provision "completely eliminates the right to bring an action against [the Board] in all circumstances ... On its face, s. 43 is a total bar to any 'action or proceeding' whatsoever brought against [the Board] by anyone in all circumstances. Section 43 destroys *all* rights of action, and entirely eliminates the ability of any and all persons to even start a lawsuit against [the Board], regardless of the nature of the claim": A.F., at para. 63 (emphasis in original). Ms. Ernst's position is that the *only* issue on appeal is the constitutional question: whether the immunity clause is constitutionally inapplicable or inoperable to the extent that it bars a damages claim against the Board for a breach of the *Charter*: A.F., at para. 41.

14 Ms. Ernst took the same position — repeatedly — in oral submissions. Her counsel said that a valid cause of action "is clearly defeated" by the immunity provision: Transcript, at pp. 3-4. He referred to the provision as barring any action in respect of "any act or thing done": p. 12. He also referred to the provision as "an immunity clause of general application" which "simply on its face seems to apply to all claims against [the Board] *no matter what they are about*": p. 12 (emphasis added). He further submitted that the immunity provision does not simply limit rights or restrict the remedies that are appropriate, but that "it blocks all rights": p. 12. Ms. Ernst's counsel further submitted that "the issue for today is section 43 [i.e. the immunity provision] which is a blanket statutory immunity clause. *It says no proceeding or action no matter what we do*": pp. 19-20 (emphasis added).

15 The Court of course is not bound by positions taken by parties on questions of law such as this one: see, e.g., *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.), at para. 62. But I see no reason to think that Ms. Ernst's position on the interpretation of the immunity provision is wrong in law. No one has cited any authority — and I am aware of none — to suggest that it is wrong. I agree with Abella J. that we should hold that it is "plain and obvious" that the immunity clause on its face bars Ms. Ernst's claim for *Charter* damages.

16 To do otherwise is unfair to the Board. In light of Ms. Ernst's position in her factum and during oral submissions, the Board had no reason to think that there was any doubt that the provision purports to bar her claim. The Board had no indication that this issue was in question, let alone that it could become the basis on which the appeal might be decided against it. The holding proposed by the Chief Justice and Justices Moldaver and Brown would deprive the Board of any opportunity to make submissions on what has become, unbeknownst to the parties, the key point in the case. This is unfair.

17 Finally, the reasons of the Chief Justice and Justices Moldaver and Brown, without citing authority in support and without the benefit of any argument on the point, cast doubt on the scope of this immunity clause where there has up until now been none. And in doing that, doubt is also cast on the scope of scores of other immunity provisions in many statutes across Canada. As I see it, this result is unnecessary, undesirable and unjustified.

18 I will therefore approach the appeal on the basis that Ms. Ernst herself urged us to adopt — that the immunity provision (s. 43) purports to bar her *Charter* damages claim.

19 That leaves only one issue for decision: Has Ms. Ernst successfully challenged the constitutionality of s. 43? If the provision on its face bars her claim and she has not successfully challenged the provision's constitutionality, the Court must give effect to the immunity clause and strike the claim.

III. Analysis

20 Ms. Ernst has not successfully challenged the constitutionality of s. 43. If, as my colleagues would hold, the record were not adequate to consider the constitutionality of s. 43, then it should follow that Ms. Ernst's constitutional challenge cannot succeed and the appeal should be dismissed, contrary to the result reached by the Chief Justice and Justices Moldaver and Brown. In my view, however, we should consider the constitutional challenge on its merits, and when we do so, the appeal should still be dismissed.

A. If the Record Were Inadequate to Address the Constitutionality of the Provision, the Appeal Must Be Dismissed

21 When a court is faced with an immunity clause that bars a plaintiff's claim (as this one does), the court cannot refuse to rule on the law's constitutionality and yet also refuse to apply the clause. Having had more than ample opportunity to do so, Ms. Ernst has failed to discharge her burden of showing that the law is unconstitutional, a burden sometimes described as a presumption of constitutionality: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 124-25.

22 Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails. As Cory J. put it on behalf of the Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.), at p. 366, "the absence of a factual base is not just a technicality that could be overlooked, but rather *it is a flaw that is fatal to the appellants' position*" (emphasis added).

23 It follows that if, as Ms. Ernst maintains, the immunity provision clearly purports to bar her damages claim, and if the record before the Court is not adequate to permit a decision on its constitutionality, then the immunity clause must be applied, Ms. Ernst's claim for *Charter* damages struck out and the appeal dismissed.

B. Charter Damages Would Never Be an Appropriate Remedy Against This Board

24 If *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board, then s. 43 does not limit the availability of such a remedy under the *Charter* and the provision cannot be unconstitutional. In my view, *Charter* damages could not be an appropriate remedy.

25 Underlying the question of whether *Charter* damages could be an appropriate remedy is a broader issue. It concerns how to strike an appropriate balance so as to best protect two important pillars of our democracy: constitutional rights and effective government; see, e.g., *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 S.C.R. 405 (S.C.C.), at para. 79. Granting *Charter* damages may vindicate *Charter* rights, provide compensation and deter future violations. But awarding damages may also inhibit effective government, and remedies other than damages may provide substantial redress for the claimant without having that sort of broader adverse impact. Thus there is a need for balance with respect to the choice of remedies. This concern for balance was emphasized recently in *Henry v. British Columbia (Attorney General)* in words that are especially apt in this case: "Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far" (2015 SCC 24, [2015] 2 S.C.R. 214 (S.C.C.), at para. 91).

26 The leading case about when *Charter* damages are an appropriate and just remedy is *Ward v. Vancouver (City)*, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.). Applying the principles set out in that case, damages are not an appropriate and just remedy for *Charter* violations by this Board. Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration on its particular merits. *Ward* held that *Charter* damages will not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance. These considerations, taken together, support the conclusion that the proper balance would be struck by holding that damages are not an appropriate remedy.

27 Section 24(1) of the *Charter* confers on the courts a broad remedial authority. As has been said, "[i]t is difficult to imagine ... a wider and less fettered discretion": *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), at p. 965. This broad discretion

should not be narrowed by "casting it in a straight-jacket of judicially prescribed conditions": *Ward*, at para. 18. But this does not mean that *Charter* breaches should always, or even routinely, be remedied by awards of *Charter* damages. The remedy of damages is limited to situations in which it is "appropriate and just" because it serves one or more of the compensatory, vindicatory and deterrent purposes which support that choice of remedy: *Ward*, at para. 32. Countervailing factors may establish that damages are not an appropriate and just remedy even though they would serve these ends: *Ward*, at para. 33.

28 The list of countervailing factors is not closed. So far, two have been identified: the existence of alternative remedies and concerns for good governance: (*Ward*, at para. 33; see also para. 42). I conclude, therefore, that *Ward* does not preclude the immunity of the Board to *Charter* damages. Rather, *Ward* set out two countervailing factors that could negate the appropriateness of *Charter* damages and specifically left open the development of others.

29 The jurisprudence does not require that every pleaded claim for *Charter* damages be assessed on an individualized, case-by-case basis. *Ward*, for example, specifically contemplates the development of new defences to *Charter* damages claims and these defences are not limited to enhanced liability thresholds. Countervailing factors against granting *Charter* damages may be of a more generalized nature, reflecting the availability of other remedies, the accumulated wisdom of the common law and strong indications of public policy.

30 First, there is an alternative remedy — judicial review — that substantially addresses the alleged *Charter* breach. Judicial review is available to vindicate *Charter* rights and to clarify the law so as to prevent similar future breaches. Second, good governance concerns are also engaged as granting damages undermines the effectiveness of the Board and inhibits effective governance. Third, to determine the appropriateness of *Charter* damages against this type of board on a case-by-case basis in a highly factual and contextual manner largely undermines the purposes served by an immunity.

31 When these countervailing factors are considered collectively — that is, when one looks at their cumulative effect — they negate the appropriateness of an otherwise functionally justified award of *Charter* damages against this Board. In short, damages are not an appropriate and just remedy for the Board's *Charter* breaches.

(1) Judicial Review Is an Available Alternative Remedy

32 The first countervailing factor discussed in *Ward* was the availability of alternative remedies: para. 33. Once the claimant establishes that damages would further one or more of the objectives of compensation, vindication and deterrence, it is open to the state to show that other remedies are available that will sufficiently address the breach: para. 35. As stated in *Henry*, where another remedy is available to effectively address a *Charter* breach, damages may be precluded by virtue of this countervailing factor: para. 38. In my view, the availability of judicial review to address alleged *Charter* breaches by the Board is a strong countervailing factor.

33 I have no doubt, as my colleague Justice Abella notes, that judicial review is available to address the Board's alleged *Charter* breaches. Both the Alberta Court of Queen's Bench and the Court of Appeal so found. Ms. Ernst does not deny this in her factum and the brief oral submissions suggesting that judicial review was not available were not persuasive. Further, the statutory immunity clause cannot bar access to judicial review: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.).

34 The availability of judicial review is important for two reasons.

35 First, judicial review can provide substantial and effective relief against alleged *Charter* breaches by a quasi-judicial and regulatory board like this one. The facts of this case strikingly illustrate the utility of the remedy of judicial review. The basis of Ms. Ernst's complaint is that the Board abused its discretion and breached the *Charter* by refusing to deal with her. If that claim were established in the context of judicial review, a superior court could set aside the directive which Ms. Ernst alleges was issued to stop interaction with her and could order corrective action. Such orders would go a long way towards vindicating Ms. Ernst's *Charter* rights.

36 Moreover, judicial review would in all likelihood provide vindication in a much more timely manner than an action for damages. Again, the facts of this case provide a good example of how this could be so. Ms. Ernst did not start her action for damages until some two years after the alleged breach, and several months *after* the Board had rescinded the directive which

she challenged. A prompt application for judicial review had the potential to achieve practical relief much sooner. While an application for judicial review would not have led to an award of damages, it might well have addressed the breach much sooner and thereby significantly reduced the extent of its impact as well as vindicated Ms. Ernst's *Charter* right to freedom of expression. Finally, judicial review would have provided a convenient process to clarify what the *Charter* required of the Board. That sort of clarification plays an important role in preventing similar future rights infringements.

37 Thus, judicial review of the Board's decisions and directives has the potential to provide prompt vindication of *Charter* rights, to provide effective relief in relation to the Board's conduct in the future, to reduce the extent of any damage flowing from the breach, and to provide legal clarity to help prevent any future breach of a similar nature. While the remedies available under judicial review do not include *Charter* damages, *Ward* directs us to consider the existence of alternative remedies, not identical ones: para. 33.

38 The availability of judicial review is important for a second reason: it distinguishes this case from others in which the Court has crafted an elevated liability threshold in preference to a complete immunity. For example, the rationale for denying absolute immunity to prosecutors in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), does not apply to claims against quasi-judicial regulatory boards. Lamer J. (as he then was) in *Nelles* found that none of the alternative remedies to a civil suit for malicious prosecution adequately redressed that wrong: p. 198. However, unlike in *Nelles*, a claimant who alleges the decision or action of a quasi-judicial regulatory body has infringed his or her *Charter* rights or freedoms is not without a remedy, given the availability of judicial review. Similarly, in *Henry*, which established an elevated liability threshold for *Charter* damages for failure of the prosecutor's duty to disclose, the majority of the Court noted that such conduct is, for practical purposes, largely untouchable by way of judicial review: para. 49. In contrast to the claims arising out of alleged misconduct by prosecutors as in *Nelles* and *Henry*, there is a wide range of remedies available through judicial review for *Charter* breaches by quasi-judicial and regulatory boards such as this one. The availability and utility of the remedy of judicial review in this context supports a different remedial balance than was struck in *Nelles* and *Henry*.

39 The Court's decision in *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621 (S.C.C.), like the decision in *Henry*, underlines the importance of the entire context in establishing this remedial balance. And, of course, the availability of judicial review is only one of these considerations. The issue in *Hinse* was whether the general Quebec rules of extracontractual civil liability apply to the federal Crown in relation to the exercise of the royal prerogative of mercy: para. 45. In deciding on the proper scope of immunity, the Court considered the context: the nature of the Minister's functions in exercising the royal prerogative of mercy; the relevant law in relation to the liability threshold applying to Crown prosecutors; the availability of judicial review; and the general principles of civil law. As the Court noted, significant differences in the content of the duties under consideration mean that the duties must be analyzed from a different perspective: para. 44. Both *Hinse* and *Henry* demonstrate that the contours of liability must be considered in the context of, among other things, the particular state actor, having regard to the nature of the duties, the potential availability of other remedies and general principles of liability. That is the analysis that I have conducted in this case.

40 Ms. Ernst submits that the potential to be granted a remedy through judicial review cannot be used to bar a *Charter* claim under s. 24(1). Citing *Manuge v. R.*, 2010 SCC 67, [2010] 3 S.C.R. 672 (S.C.C.), Ms. Ernst argues that if a plaintiff has pleaded a valid cause of action for *Charter* damages, the provincial superior court should not decline jurisdiction on the basis that the claim could be pursued by judicial review. This submission, however, overstates the holding in *Manuge* and the other *TeleZone* line of cases: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.); *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626 (S.C.C.); *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)*, 2010 SCC 64, [2010] 3 S.C.R. 639 (S.C.C.); *Nu-Pharm Inc. v. Canada*, 2010 SCC 65, [2010] 3 S.C.R. 648 (S.C.C.); *Olymel, s.e.c. c. I.P.F.P.*, 2010 SCC 66, [2010] 3 S.C.R. 657 (S.C.C.). The issue in those cases was whether a successful application for judicial review was a prerequisite to seeking damages. The Court held it was not. The Court did not comment on the appropriateness of a *Charter* damages award against a quasi-judicial board.

41 In sum, judicial review is an alternative, and more effective, remedy for *Charter* breaches by the Board. And, as I will discuss, the availability of judicial review is only one of the countervailing factors that weigh heavily against the appropriateness of *Charter* damages awards against the Board.

(2) Good Governance Concerns

(a) The "Practical Wisdom" of Private Law

42 "[C]oncern for effective governance" was the second category of factors identified in *Ward* as militating against damages being an appropriate and just remedy: para. 38. The Court in *Ward* noted that "the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform.... [I]mmunity is justified because the law does not wish to chill the exercise of policy-making discretion": para. 40. Quintessentially, the Board is a state actor whose responsibilities are of a policy-making and adjudicative nature.

43 *Charter* damages are, of course, a distinct and autonomous remedy. But that does not mean that the development of that remedy should ignore the accumulated insights of the general law. *Ward* noted that private law thresholds and defences may offer guidance about when *Charter* damages may be an appropriate remedy because "the existing causes of action against state actors embody a certain amount of 'practical wisdom' concerning the type of situation in which it is or is not appropriate to make an award of damages against the state": para. 43. Considering private law is not, of course, simply transposing private law rules into the *Charter* context. The majority of the Court in *Henry*, for example, considered the policy factors outlined in the malicious prosecution context in *Nelles* and found it appropriate to rely on them heavily in establishing the liability threshold for *Charter* damages: *Henry*, at paras. 66-74. It is therefore helpful to consider the law governing Ms. Ernst's private law claim in negligence against the Board.

44 No one contests that the Board owes Ms. Ernst no duty of care under the private law of negligence. In negligence law, whether there is a duty of care depends on the existence of foreseeability and proximity, and the absence of countervailing policy considerations: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), at para. 30; *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.). In the case of public regulators, for reasons of insufficient proximity or countervailing policy considerations, or both, courts have generally held that these state actors do not owe claimants a duty of care: *Cooper*; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.).

45 The policy reasons considered capable of negating a *prima facie* duty of care have included (i) excessive demands on resources, (ii) the potential "chilling effect" on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making: see, e.g., A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at s. 9.65, citing S. Sugarman, "A New Approach to Tort Doctrine: Taking the Best From the Civil Law and Common Law of Canada" (2002), 17 *S.C.L.R.* (2d) 375, at p. 388.

46 The reasons of the Court of Appeal called on these sorts of policy considerations to uphold the Court of Queen's Bench's finding that the Board did not owe a duty of care to Ms. Ernst:

> Forcing the Board to consider the extent to which it must balance the interests of specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme. [para. 18]

47 Brief reference to the Board's mandate underlines the wisdom of these comments. Section 3 of the *Energy Resources Conservation Act* required the Board to undertake its duties respecting proposed energy resource projects in light of the public interest and with regard to the social, economic, and environmental effects of the project. The Board had the public duty of balancing several potentially competing rights, interests and objectives. Allowing claimants to bring claims for damages against the Board has the potential to deplete the Board's resources, with respect to both funds and time. Allowing a claimant to bring a damages claim against the Board may also result in defensive actions by the Board, which would "chill" its ability to otherwise carry out its statutory duties effectively and in the public interest. Likewise, the Board is required to balance public and private interests in the execution of its quasi-judicial duties, and this responsibility is inconsistent with being liable to an individual claimant for damages.

48 This jurisprudence also cautions against attempting to segment the functions of a quasi-judicial regulatory board such as this one into adjudicative and regulatory activity for the purposes of considering whether its actions should give rise to liability. For example in *Edwards*, this Court endorsed the Ontario Court of Appeal's refusal to distinguish between the Law Society's adjudicative and investigatory functions for the purpose of the duty of care analysis: see para. 11, citing (2000), 48 O.R. (3d) 329 (Ont. C.A.), at para. 30. The Board has a broad mandate to, among other things, conduct inquiries and investigations, make inspections and conduct hearings, making it impractical and artificial to try to distinguish among its various roles for the purposes of liability.

49 While, as noted, *Charter* damages are an autonomous remedy, and every state actor has an obligation to be *Charter*-compliant, the same policy considerations as are present in the law of negligence nonetheless weigh heavily here, particularly in light of the availability of judicial review to uphold constitutional rights.

(b) Statutory and Common Law Immunities

50 The strong common law immunity of judges from civil suits has been extended by common law and statute to many quasi-judicial bodies and agencies including administrative bodies such as the Board, as aptly articulated by my colleague Justice Abella in her reasons; and see also, e.g., *Rivard c. Morier*, [1985] 2 S.C.R. 716 (S.C.C.); *Crispin v. Registrar of the District Court* [1986] 2 N.Z.L.R. 246, at p. 252; *Sirros v. Moore* (1974), [1975] Q.B. 118 (Eng. C.A.), at p. 136, cited by *Morier*, at pp. 739-40; *Hazel v. Ainsworth Engineered Corp.*, 2009 HRTO 2180, 69 C.H.R.R. D/155 (Ont. Human Rights Trib.), at para. 84; *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.); *Ermina v. Canada (Minister of Citizenship & Immigration)* (1998), 167 D.L.R. (4th) 764 (Fed. T.D.); *Cartier v. Nairn*, 2009 HRTO 2208, 8 Admin. L.R. (5th) 150 (Ont. Human Rights Trib.); *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Provincial Court Act*, R.S.A. 2000, c. P-31; *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31; A. A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (1993), at pp. 1-32; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 289. This immunity is broad and has been applied even in the face of alleged human rights infringements: *Hazel*; *Cartier*; *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185 (B.C. S.C.); *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298 (Fed. C.A.), leave to appeal refused, [2000] 2 S.C.R. xiv (note) (S.C.C.). The common law is a source of "practical wisdom" about exposing quasi-judicial and regulatory decision-makers such as the Board to damages claims. And the policy reasons that have led legislatures across Canada to enact many statutory immunity clauses, like the one that protects this Board, may also inform the analysis of countervailing considerations relating to good governance. Of course, these sorts of statutory provisions cannot override constitutional rights, but the policy reasons on which they are based can and should be taken into account by a reviewing court.

51 The rationales underlying the common law and statutory immunity for quasi-judicial and regulatory decision-makers fall into two main interrelated categories. First, immunity from civil claims permits decision-makers to fairly and effectively make decisions by ensuring freedom from interference, which is necessary for their independence and impartiality: *Morier*, at pp. 737-38, citing *Garnett v. Ferrand* (1827), 6 B. & C. 611, 108 E.R. 576 (Eng. K.B.), at pp. 581-82, and *Fray v. Blackburn* (1863), 3 B. & S. 576, 122 E.R. 217 (Eng. K.B.). Second, immunity protects the capacity of these decision-making institutions to fulfill their functions without the distraction of time-consuming litigation.

52 These grounds for immunity resonate in the context of claims for *Charter* damages.

53 If actions for *Charter* damages were brought against the Board, it would inevitably be involved in defending those suits and thereby distracted from its statutory responsibilities. As Hogg, Monahan and Wright observe in relation to judicial immunity, the public relies on judges and the courts to resolve difficult problems, and "a judge would be placed in an intolerably vulnerable position, and there would be no end to litigation, if a disappointed litigant could turn around and bring fresh proceedings against the judge": p. 283. The same may be said of quasi-judicial decision-makers: Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), at p. 29.

54 Furthermore, allowing *Charter* damages claims to be brought for the Board's actions and decisions has the potential to distort the appeal and review process. The corollary of immunity is that a judicial or quasi-judicial decision can be challenged only through judicial review or the appeals process: *Royer c. Mignault*, [1988] R.J.Q. 670 (C.A. Que.), at pp. 673-74. This prevents judicial and quasi-judicial decision-makers from having to justify their decisions beyond the justification disclosed by the record which will be available for appeal or judicial review: *Slansky v. Canada (Attorney General)*, 2013 FCA 199,

[2015] 1 F.C.R. 81 (F.C.A.), at para. 136, per Mainville J.A., concurring. It is worth remembering that in order not to compromise the decision-maker's impartiality or the finality of his or her decision, the decision-maker has a limited role in an appeal or judicial review proceeding: see, e.g., *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 (S.C.C.). However, no such limit can apply to the scope of a quasi-judicial regulatory board's defence against damages claims. Moreover, damages claims against such bodies, whether under the *Charter* or otherwise, open up new avenues of collateral attack. By protecting judicial and quasi-judicial decision-makers from having to defend their decisions against damages suits, the immunity simultaneously strengthens public confidence in the legal system, preserves impartiality, both in fact and in perception, and closes off routes of collateral attack. See *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.), at pp. 828-30.

55 To conclude on this point, the policy reasons that underlie the common law and statutory immunities for regulatory and quasi-judicial boards like this one relate directly to the types of good governance concerns identified in *Ward*. Opening the Board to damages claims will distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions.

(3) Case-by-Case Consideration Undermines the Purposes of the Immunity

56 Ms. Ernst argues that claims for *Charter* damages must be assessed on a case-by-case basis to determine whether damages would be an appropriate and just remedy. However, as has been pointed out many times, requiring a case-by-case examination of particular claims largely undermines the purpose of conferring immunity in the first place: *Gonzalez*, at para. 49.

57 Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct: *Gonzalez*, at para. 53. Even qualified immunity undermines the decision-maker's ability to act impartially and independently, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her. As Lord Denning M.R. held, to be truly free in thought, judges should not be "plagued with allegations of malice or ill-will or bias or anything of the kind": *Sirros*, at p. 136, cited by *Morier*, at pp. 739-40.

C. To sum up

58 As Ms. Ernst accepts, the immunity clause purports to bar her claim for *Charter* damages. That being the case, her damages claim must be struck and the appeal dismissed unless she succeeds in challenging the constitutionality of the immunity provision. She has failed to do so. It follows that her claim for *Charter* damages should be struck out and the appeal dismissed.

59 I would answer the constitutional question as follows:

> Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: To the extent that s. 43 purports to bar a claim for *Charter* damages, the answer is no.

IV. Disposition

60 I would dismiss the appeal with costs.

Abella J.:

61 Two statutory provisions are at stake. The first is Alberta's requirement that before a constitutional challenge can be

brought, the government must be given notice so that the law is given a thorough airing, with all parties having a chance to bring and test the evidence. This protects the public interest by ensuring that laws are not casually or cavalierly either set aside or upheld. It also ensures the existence of a full and proper record on appeal.

62 The second provision is an immunity clause protecting an administrative tribunal (like almost all quasi-judicial and judicial bodies in Alberta and the rest of Canada) from being sued for damages. This protects the public interest by ensuring that adjudicative bodies responsible for making independent decisions are not casually or cavalierly dragged into litigation that drains their attention and public resources.

63 Jessica Ernst is asking this Court to decide whether an immunity clause insulating a quasi-judicial tribunal from lawsuits, bars her from bringing a claim for *Charter* damages against that tribunal.

64 Ms. Ernst's claim is for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* from a quasi-judicial administrative body, the Energy Resources Conservation Board.[2] She claims that *Charter* damages are warranted because of the Board's decision to stop communicating with her, in essence finding her to be a vexatious litigant. Bypassing judicial review, she chose instead to designate the Board's decision as unconstitutional, claiming it breached her right to freedom of expression under s. 2(*b*) of the *Charter*. The Alberta Court of Queen's Bench and the Alberta Court of Appeal had no difficulty finding that s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, an immunity clause in the Board's enabling statute, bars any and all claims against the Board, including claims for *Charter* damages.

65 Ms. Ernst at no stage gave the required *formal* notice of a constitutional challenge to s. 43. In fact, in both prior proceedings, she expressly denied that she was challenging the constitutionality of the immunity clause. Instead, she was challenging the *applicability* of the clause to her *Charter* claim. She claimed to be entitled to a remedy for a *Charter* breach under s. 24(1), regardless of whether s. 43 entitled her to get a remedy.

66 Ms. Ernst's argument that she was not seeking to challenge the validity of s. 43, only its applicability to a *Charter* damages claim, is unsustainable. The immunity clause either complies with the *Charter* or it does not. But either way, there must be a judicial determination of the constitutional validity, and therefore the constitutional applicability, of the provision. Ms. Ernst's argument that the immunity clause does not apply when a *Charter* remedy is being sought, is an argument that there is no need to go through the necessary steps to determine whether a provision is *Charter*-compliant in order to disregard it. This invokes Alice in Wonderland.

67 Since Ms. Ernst did not seek to challenge the constitutionality of s. 43 in the prior proceedings, there is no record either to justify or impugn the provision. This means that for the time being, the provision's constitutionality is intact, which means that the Board's immunity is intact, which means that Ms. Ernst cannot, under these circumstances, legally sustain a claim that the Board is vulnerable to a damages claim, either under the *Charter* or otherwise. As a result, I agree with the Alberta courts that Ms. Ernst's claim ought to be struck.

68 *Knight v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 (S.C.C.), sets out the accepted test for striking out a claim:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> . . . . .
>
> ... The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson* [, [1932] A.C. 562 (H.L.)] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. (at paras. 17-21)

69 This is not a cascading, multi-factored test, it is a simple one: Is it plain and obvious that s. 43 bars Ms. Ernst's claim?

70 The immunity clause in this case is absolute and unqualified:

> **43** No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

71 The legislature clearly chose not to qualify the immunity in any way. Any argument that it should not apply to conduct alleged to be punitive, or that it applies to adjudicative but not to other kinds of Board decisions, is nowhere evident in the statutory language. That is precisely why determining the constitutionality of the clause based on a full evidentiary record is so important. It may be that the clause could be amended to permit suits for punitive conduct, but that is *not* what the clause now says. Moreover, creating a novel distinction between adjudicative and non-adjudicative conduct for purposes of limiting the scope of the immunity clause, strikes me as being an unhelpful unravelling of established jurisprudence.

72 As a result, it is plain and obvious, based on the plain and obvious language of s. 43, that Ms. Ernst's claim is barred. The fact that her claim alleges "punitive" conduct cannot change the unqualified language in s. 43.

73 Without a proper determination of the constitutionality of the immunity clause, there can be no assessment of its inapplicability or inoperability. It follows that Ms. Ernst's claim for *Charter* damages should be struck, and the appeal dismissed.

Background

74 The Board is an independent quasi-judicial body responsible for regulating the development of Alberta's energy resources. It licenses gas wells and enforces legislative and regulatory provisions that are intended to protect the groundwater supply from interference or contamination due to oil and gas development. The Board has detailed procedures for receiving and investigating public complaints, conducting compliance inspections, and taking appropriate enforcement and remedial action when necessary. As set out in its enabling legislation, the Board is authorized to conduct hearings, inquiries and investigations, award costs and receive witnesses.

75 Ms. Ernst owns land near Rosebud, Alberta. She opposed the activities of EnCana Corporation, which engaged in hydraulic fracturing and drilling close to her property. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns about the negative impacts caused by oil and gas development near her home. She did this through contact with the Board's compliance, investigation and enforcement offices. She also voiced her concerns publicly.

76 EnCana's activities resulted in Ms. Ernst bringing claims against EnCana, the Board, and the government of Alberta in December of 2007.

77 The claim against EnCana was based on damage to Ms. Ernst's water supply. Alberta was sued because it had failed to respond to her complaints about EnCana's activities notwithstanding that it owed Ms. Ernst a duty to protect her water supply. Ms. Ernst's claims against EnCana and against the province were not before this Court.

78 The claim against the Board was binary. One claim was in negligence, alleging that the Board, which has regulatory jurisdiction over the activities of EnCana, had negligently administered the regulatory regime under the *Energy Resources Conservation Act*.

79 The second claim against the Board was that it had breached Ms. Ernst's s. 2(*b*) right to freedom of expression by "arbitrarily, and without legal authority" restricting her communications with the Board.

80 Ms. Ernst claimed that because of her public criticisms, and because of a reference she made to Weibo Ludwig (who

was convicted for carrying out bombings and other destructive acts against oil industry installations in Alberta), the Board prohibited her from communicating with it. As a result, Ms. Ernst claimed she was unable to properly register her concerns that EnCana was adversely impacting the Rosebud Aquifer and her groundwater supply.

81 The Manager of the Board's Compliance Branch wrote to Ms. Ernst and told her that all staff were instructed to avoid further contact with her, and that he had reported her to the Attorney General of Alberta, the RCMP and the Board's Field Surveillance Branch.

82 When Ms. Ernst sought clarification of the restrictions she faced, she was directed to the Board's Legal Branch, which informed her that the Board "took a decision in 2005 to discontinue further discussion with" her, and would not re-open communications through the regular channels unless she agreed to raise her concerns only through the Board.

83 In March 2007, Ms. Ernst was informed that she was again free to communicate with any staff at the Board.

84 Rather than seeking judicial review of the Board's decision to stop communicating with her when she was first informed of this in November 2005, Ms. Ernst waited two years and then filed a statement of claim on December 3, 2007, an amended statement of claim on April 21, 2011, and a second amended statement of claim on February 7, 2012.

85 The remedy Ms. Ernst sought for this second breach was "damages in the amount of $50,000.00 under section 24(1) of the *Canadian Charter of Rights and Freedoms*".

86 The Board applied to strike out portions of Ms. Ernst's pleadings for failing to disclose a reasonable cause of action. It relied on its immunity clause, s. 43 of the *Energy Resources Conservation Act*, arguing that it provided a complete bar to both the negligence and *Charter* damage claims against the Board. The Board also argued that the appropriate way for Ms. Ernst to challenge the Board's discretionary decision was through judicial review.

87 The case management judge at the Queen's Bench, Wittmann C.J., found that the proposed negligence claim was unsupportable at law since there was no private law duty of care owed to Ms. Ernst by the Board based on this Court's decisions in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.), and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (S.C.C.) ((2013), 85 Alta. L.R. (5th) 333 (Alta. Q.B.), at paras. 28-29).

88 Wittmann C.J. also held that s. 43 barred Ms. Ernst's claim for *Charter* damages. He stated that in order to properly challenge the constitutionality of s. 43, Ms. Ernst was required to give the necessary notice to the Attorneys General of Alberta and Canada but had failed to do so:

> ... if Ernst seeks as a remedy a declaration striking down section 43 of the [*Energy Resources Conservation Act*], a Notice of Constitutional Question should be given to the Attorney General of Alberta and Canada, pursuant to section 24 of the *Judicature Act*, RSA 2000, c J-2. The ensuing constitutional litigation could be pursued in a procedural matrix, which would consider the constitutional validity of the legislation, including whether a section 1 *Charter* defence might be available to the Legislature in the event a *Charter* breach is found. The procedural requirement to provide a Notice of Constitutional Question facilitates full argument of any constitutional issues and is a matter of procedural fairness necessary to ensure the Attorneys General of Alberta and Canada have an opportunity to be heard. (at para. 89)

89 In Wittmann C.J.'s view, to allow personal *Charter* damage claims to circumvent statutory immunity clauses would cause the "[p]arties [to] come to the litigation process dressed in their *Charter* clothes whenever possible", and to allege "such a breach ... in litigation against the government wherever possible".

90 In any event, Wittmann C.J. noted that Ms. Ernst was not without a remedy since he agreed with the Board that she could have brought judicial review proceedings, the "time-tested and conventional challenge to an administrative tribunal's decision".

91 Ms. Ernst set out three issues in her formal Notice of Appeal:

> Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars an otherwise valid claim for breach of the right to freedom of expression made pursuant to the *Canadian Charter of Rights and Freedoms*?
>
> Did the Court err in finding that the [Board] does not owe a private duty of care to Ms. Ernst?
>
> Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars Ms. Ernst's claim against the [Board] for negligent omissions?

92 Of particular significance, is Ms. Ernst's answer to question 7 in the Notice of Appeal. The question on the form was: "Is the constitutional validity of an Act or Regulation being challenged as a result of this appeal?" Ms. Ernst's response was: "No. The appeal, however, does relate to a claim made under s. 24 of the *Canadian Charter of Rights and Freedoms*."

93 In other words, once again, she denied that she was seeking to challenge the constitutionality of s. 43.

94 Nonetheless, she sent a letter to the Attorneys General of Alberta and Canada, paradoxically confirming that she was not challenging the constitutionality of s. 43 under the *Charter*, but was challenging whether it applied to *Charter* claims:

> Please note that it is the Appellant's position that she is not challenging the *constitutional validity* of any enactment (i.e. she is not seeking as a remedy a declaration striking down the section) but rather is challenging the *constitutional applicability* of s. 43 of the *Energy Resources Conservation Act* ("*ERCA*") to claims made pursuant to the *Canadian Charter of Rights and Freedoms*. Specifically, her position is that the statutory immunity contained within s. 43 of the *ERCA* cannot apply to claims made pursuant to the *Charter*. In the alternative the Appellant is seeking a declaration that to the extent that s. 43 of the *ERCA* is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect. Because the Appellant is not challenging the constitutional validity of any enactment, the Appellant's position is that notice is not required under s. 24(1) the *Judicature Act*. Nevertheless, the Appellant is providing this notice out of an abundance of caution.
>
> .....
>
> The Appellant has brought a claim against the Energy Resources Conservation Board alleging that the ERCB infringed her right to freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Appellant seeks a remedy, namely *Charter* damages, under s. 24(1) of the *Charter*.
>
> .....
>
> The Appellant will argue that a statutory immunity clause cannot provide immunity from valid *Charter* claims. The *Charter* guarantees not only fundamental freedoms, but crucially, also guarantees the right of Canadians to seek a remedy when these fundamental *Charter* rights and freedoms are violated. Section 24(1) of the *Charter* specifically provides remedies for unconstitutional government acts. These constitutional rights cannot be taken away by a statutory enactment purporting to grant immunity to the ERCB.
>
> .....
>
> In sum, the Appellant is challenging the applicability of s. 43 of the *Energy Resources Conservation Act* to claims made pursuant to the Canadian *Charter of Rights and Freedoms*. To the extent that s. 43 of the ERCA is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect. (Underlining added; footnotes omitted.)

95 The Attorney General of Alberta intervened, arguing that because proper notice had not been given under s. 24 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2, he had been precluded from adducing evidence under s. 1. The Court of Appeal summarized his argument as follows:

> The Minister of Justice and Solicitor General of Alberta intervened on the appeal arguing that proper notice had not been given (under s. 24 of the *Judicature Act*, RSA 2000, c. J-2) of the constitutional challenge to s. 43 of the *Energy Resources Conservation Act*. The Minister of Justice took the position that the appellant was attempting to raise a new

argument on appeal, and that Alberta had been denied the opportunity to call evidence on the topic.

96 The Court of Appeal dismissed the appeal.

97 On appeal to this Court, Ms. Ernst reformulated her claim to add a challenge to the constitutional validity of s. 43.

Analysis

98 All the provinces have statutes that require notice to be given to the Attorney General of that province in any proceeding where the constitutionality of a statute is in issue. Most provinces require that notice be given to the Attorney General of Canada as well. In Alberta, this requirement is found in s. 24 of Alberta's *Judicature Act*:

> **24(1)** If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.
>
> **(2)** When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.
>
> **(3)** The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.
>
> **(4)** The Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.

99 Notice requirements serve a "vital purpose" when constitutional questions arise in litigation. They ensure "that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation" (*Guindon v. R.*, [2015] 3 S.C.R. 3 (S.C.C.), at para. 19; see also *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at paras. 58-59; *R. v. Aberdeen* (2006), 384 A.R. 395 (Alta. C.A.); *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at paras. 160-62; *R. v. Lilgert* (2014), 16 C.R. (7th) 346 (B.C. C.A.), at paras. 7-22).

100 In Alberta, the Court of Appeal has emphasized that it requires strict adherence to the notice provisions regarding constitutional questions found in the *Judicature Act* (*Aberdeen*; *Broddy v. Alberta (Director of Vital Statistics)* (1982), 142 D.L.R. (3d) 151 (Alta. C.A.), at para. 41; *Seweryn v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2016 ABCA 239 (Alta. C.A.), at paras. 3-5; *R. v. Redhead* (2006), 384 A.R. 206 (Alta. C.A.), at paras. 46-47). In *Aberdeen*, the Crown appealed a determination made as to the constitutionality of the retrospective application of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, on the ground that proper notice under the *Judicature Act* was not given to the Attorneys General of Alberta and Canada. The Court of Appeal allowed the appeal in language of relevance to our case:

> The requirement of notice is to ensure that governments have a full opportunity to support the constitutional validity of their legislation, or to defend their action or inaction, and to ensure that courts have an adequate evidentiary record in constitutional cases. The notice requirements depend on whether a constitutional remedy is sought and whether the remedy falls under s. 52(1) of the *Constitution Act*, 1982 or ss. 24(1) or 24(2) of the *Charter*.
>
> That raises the question, what is the nature of the constitutional remedy sought here? The respondents submit that the remedy being sought is under s. 24(1) of the *Charter* and therefore the notice is not required. We disagree. The nature of the relief sought is essentially a s. 52(1) remedy. We find the reasoning adopted by the court in *R. v. Murrins (D.)* (2002), 201 N.S.R. (2d) 288 [C.A.], persuasive. In *Murrins*, supra, the court considered the retrospective application of a

> DNA order in the face of the same s. 11(i) *Charter* argument as is made before us. The court held that if the retrospective application of a DNA order resulted in a *Charter* infringement of Murrins' rights, it would violate the s. 11(i) *Charter* right of every offender who is subject to such an application and who committed the designated offence prior to its enactment. Thus, the issue was not simply whether Murrins' right under s. 11(i) *Charter* was infringed, but whether the provision was constitutionally valid.
>
> That logic applies with equal force to the appeals before us. Despite the attempt by defence counsel to characterize the issue as a s. 24(1) *Charter* remedy, it is in effect a s. 52(1) *Charter* remedy that challenges the constitutional validity of the retrospective application of [the *Sex Offender Information Registration Act*, S.C. 2004, c. 10].
>
> The argument that de facto notice was received is not supported by the evidence. The practical effect of the absence of notice was addressed in *Eaton v. Board of Education of Brant County*, [1997] 1 S.C.R. 241, where the court favoured the view that in the absence of notice, the decision is ipso facto invalid. Were we in error on the approach to be taken, the record itself establishes prejudice to the Crown: no one appeared for the federal Crown and hence it had no opportunity to make submissions or to supplement the record. Secondly, there was no opportunity to put forward an evidentiary record in support of a s. 1 *Charter* argument on the part of either Attorney General.
>
> (*Aberdeen*, at paras. 12-15, per Paperny J.A.)

101 This approach is precisely the route Ms. Ernst took almost a decade after the Alberta Court of Appeal impugned it, arguing that her claim was a s. 24(1) *Charter* remedy and that notice was therefore not required. As in *Aberdeen*, hers is a veiled s. 52 *Charter* claim.

102 The Alberta Court of Appeal's censure was echoed by this Court in *Guindon*. In *Guindon*, this Court concluded that a new constitutional question ought not be answered at this level unless the state of the record, the fairness to all parties, the importance of having the issue resolved by this Court, the question's suitability for decision, and the broader interests of the administration of justice demand it. *Guindon* emphasized that the "test for whether new issues should be considered is a stringent one", and the discretion to hear new issues "should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties".

103 The threshold for the exceptional exercise of this Court's discretion to answer a new constitutional question, articulated most recently in *Guindon* but also in full view in this Court's prior decision in *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.), is nowhere in sight in this case.

104 As the prior jurisprudence confirms, the fact that, at the request of a party, the Chief Justice has framed a constitutional question, does not obligate the Court to answer it if it would be inappropriate to do so (*Bell ExpressVu Limited Partnership*, at para. 59; *Eaton*, at para. 47).

105 The Attorney General of Alberta and the Board both explicitly articulated their concerns objecting to the improper notice and the raising of new constitutional questions on appeal. The Board raised the matter before this Court in its response to Ms. Ernst's motion to state a constitutional question. The Attorney General of Alberta raised the notice issue at the Alberta Court of Appeal, and his materials were attached in the Board's response materials as well.

106 While those concerns were raised before *Guindon* was released, they were nevertheless based on Alberta's and this Court's analogous jurisprudence. The Board's response to Ms. Ernst's motion to state a constitutional question, for example, stated:

> This Court generally, and save in exceptional circumstances, will not state a constitutional question where, as here, that issue has not been raised in the courts below. The Appellant did not challenge the constitutional validity or applicability of s. 43 of the *ERCA* in the Court of Queen's Bench. At the Court of Appeal, the Appellant did not raise a proper constitutional question in respect of s. 43 of the *ERCA*. The Court did not address the constitutional applicability or validity of that section.

> The distinction between the issue raised by the Appellant in the Courts below and a proper constitutional question is not a mere technicality, of no import to the parties. It is a question of procedural fairness. If the Appellant seeks to challenge the constitutional applicability or validity of a legislative provision, she is required to do so expressly, properly and precisely. If the Appellant wishes to raise a constitutional question, the parties are entitled to know what that question is. Indeed, the ERCB should not be made the primary defender of the constitutionality of legislation. That is the primary function of the Attorney General.

107 This brings us to the factors set out in *Guindon*, which gave structure to this Court's prior jurisprudence. Beginning with the "state of the record", Ms. Ernst is asking this Court to pronounce on the constitutional applicability and operability of s. 43 in the absence of any submissions or evidence from the Attorney General of Alberta. This is troubling for several reasons.

108 First, the public interest requires that the fullest and best evidence possible be put before the Court when it is asked to decide the constitutionality of a law. This was explained by Sopinka J. in *Eaton* where he said:

> In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, *we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.*
>
> (Emphasis added; para. 48)

109 This requires the participation and input of the appropriate Attorneys General, especially from the jurisdiction of the legislation in question. In this case, there is no such evidentiary record about the constitutionality of s. 43 because until she came to this Court, Ms. Ernst denied that she was even challenging the constitutionality of s. 43.

110 In *Guindon*, the Court was also concerned about the waste of judicial resources that would result from the Court not considering the case on its merits by "[i]nsisting on the notice provision in the lower courts, where ... it would serve no purpose to do so" because this Court had "the benefit of fully developed reasons for judgment on the constitutional point in both of the courts below", and several Attorneys General had "addressed the merits of the constitutional argument" before this Court (at paras. 35-36).

111 In the case before us, the constitutionality of s. 43 was never fully or properly addressed, again because of Ms. Ernst's express denial that she was challenging it. This meant that the Attorney General of Alberta, among others, was prevented from offering justificatory evidence for the Court of Appeal's — and this Court's — consideration.

112 The "fairness to the parties" factor also weighs heavily against this Court exercising its discretion to decide the constitutionality of s. 43. In *Guindon*, in finding that the constitutionality of the provision at issue *should* be decided, the Court observed that "[n]o one has suggested that any additional evidence is required, let alone requested permission to supplement the record" (para. 35). In this case, the opposite is true. The Board, as already stated, asked this Court not to hear the constitutional question because it was not properly raised in the courts below, leaving it, rather than the Attorney General, unfairly as the sole defender of a provision in its enabling statute. At the Alberta Court of Appeal, the Attorney General of Alberta, for his part, also expressly raised concerns about the lack of notice and his inability to adduce evidence at the trial court and the appellate court. He stated that the government was "depriv[ed] ... of an opportunity to adduce any relevant evidence", and that it was "precluded from considering whether to call evidence of justification under s. 1" essentially because of the indirect and unclear nature of how the issue was raised there.

113 The failure to provide notice about the intention to challenge the constitutionality of s. 43 has therefore resulted in no

record and in the Attorney General of Alberta having lost the opportunity to properly meet the case against it. This makes Ms. Ernst's request that this Court assess the application of the statutory immunity clause inappropriate — and unwise.

114 Ms. Ernst's approach represents not only an improper collateral attack on s. 43's constitutionality, it is a dramatic jurisprudential development with profound implications for judicial and quasi-judicial decision-makers across Canada. It is crucial to note that immunity clauses protecting judicial and quasi-judicial bodies are found in, among other Canadian statutes, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 33.1(21), 49(27), 82, and 86.2(19), providing immunity for Judges, Masters, Case Management Masters, and Judicial Council; the *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 68, providing immunity for Mediators; the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 14, providing immunity for Masters; the *Provincial Court Act*, R.S.B.C. 1996, c. 379, ss. 27.3 and 42, providing immunity for tribunals, any person acting on their behalf, and Provincial Court Judges; the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 12(6), providing immunity for Prothonotaries; the *Justices of the Peace Act*, R.S.N.W.T. 1988, c. J-3, s. 4(5), providing immunity for the Justices of the Peace Review Council; *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 12.9, providing immunity for the Chief Judge, the Justices of the Peace Review Council, the investigation committee and any member or officer of the Council or committee; *The Human Rights Code*, C.C.S.M., c. H175, s. 62, providing immunity for the Manitoba Human Rights Commission, any of its members, officers, employees and adjudicators; the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, Part 8, providing immunity to tribunal members, adjudicators and registrars; the *Law Society Act*, R.S.O. 1990, c. L.8, s. 9, providing immunity for benchers, officers and employees; the *Labour Board Act*, S.N.S. 2010, c. 37, s. 11, providing immunity for the Labour Board and its members; the *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 145.4, providing immunity for mediators and the industrial inquiry commission; the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 179(1), providing immunity for members, officers and employees of the Workplace Safety and Insurance Board or a person engaged by the Board to conduct examinations; the *Environmental Review Tribunal Act, 2000*, S.O. 2000, c. 26, Sch. F, s. 8.1(1), providing immunity for any member or employee of the Tribunal; and the *Public Inquiry Act*, S.B.C. 2007, c. 9, s. 32, providing immunity for a commission, commissioners, and persons acting on behalf of or under the direction of a commissioner.

115 The jurisprudence also confirms that judicial and quasi-judicial decision-makers are protected by common law immunities. This includes law society benchers and investigators acting on their behalf (*Edwards*); public inquiry officials (*Alkasabi v. Ontario*, 1994 CarswellOnt 3639, 48 A.C.W.S. (3d) 1306 (Ont. Gen. Div.), at paras. 15-17; *Rivard c. Morier*, [1985] 2 S.C.R. 716 (S.C.C.), at pp. 737-45); and judges (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.), at pp. 830-31; *Taylor v. Canada (Attorney General)* (2000), 184 D.L.R. (4th) 706 (Fed. C.A.), at paras. 25-29); see also discussions in Peter W. Hogg, Patrick J. Monahan, and Wade K. Wright, *Liability of the Crown*, (4th ed. 2011), at pp. 283-91; and Robert D. Kligman, "Judicial Immunity" (2011), 38 *Adv. Q.* 251, at pp. 251-61.

116 Immunizing these judicial and quasi-judicial adjudicators from personal damages claims is grounded in attempts to protect their independence and impartiality, and to facilitate the proper and efficient administration of justice. In *Slansky v. Canada (Attorney General)* (2013), [2015] 1 F.C.R. 81 (F.C.A.), at paras. 134-37, Mainville J.A. summarized the role that immunity plays for the judiciary:

> The principle of judicial independence has resulted in concomitant immunities, most notably (a) the immunity of a judge from suit and prosecution, and (b) the immunity of a judge from testifying about or otherwise justifying the reasons for a particular decision beyond those given in open court: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (MacKeigan), at page 830.
>
> The immunity of a judge from suit and prosecution has long been recognized as necessary to maintain public confidence in the judicial system: *Garnett v. Ferrand* (1827), 6 B. & C. 611, at pages 625-626, quoted approvingly in *Morier et al. v. Rivard*, [1985] 2 S.C.R. 716 (*Morier*), at page 737. The immunity serves to ensure that the judge is free in thought and independent in judgment: *Morier*, at pages 737-745. As noted by Lord Denning in *Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.), quoted approvingly in *Morier*, at page 739 and in *R. v. Lippé*, (C.A.), [1991] 2 S.C.R. 114, at pages 155-156:
>
>> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to

turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable to damages?"

> The additional immunity from accounting for or justifying judicial decisions beyond those reasons provided in open court also serves to ensure the independence of judges and to instil public confidence in the judicial process: *MacKeigan*, at pages 828-830. As noted by McLachlin J. (as she then was), at page 831 of that decision, "To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence."
>
> It is important to bear in mind that these immunities are there not for the benefit of individual judges; rather they exist for the benefit of the community as a whole. Indeed, an independent judiciary free from improper influence is an essential component of a free and democratic society.

117 The same analysis applies to quasi-judicial decision-makers, which is why legislatures and Parliament have extended statutory immunity to administrative boards and tribunals: see Hogg, Monahan and Wright, at p. 289, and Kligman, at pp. 259-61.

118 Further, this Court has already accepted an immunity that protects regulatory boards from negligence claims that arise from the policy decisions they make, whether or not they are made in their adjudicative capacity: *Cooper*, at para. 38, and *Edwards*. In *Edwards*, for example, the Law Society of Upper Canada was sued in negligence for failing to properly investigate and remedy a situation where a lawyer's trust fund had been compromised, despite the Law Society being advised of the suspicious use of the fund by the lawyer himself. The *Law Society Act* has an immunity clause in s. 9 which states:

> **9.** No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure or for any neglect or default in the performance or exercise in good faith of any such duty or power.

119 The claim was struck as disclosing no cause of action by Sharpe J., who found that the Law Society's quasi-judicial function immunized it from liability in negligence. Finlayson J.A. at the Court of Appeal agreed with Sharpe J., and concluded that the jurisprudence "clearly establishes a judicial immunity from negligence for the Law Society's discipline process" ((2000), 48 O.R. (3d) 329 (Ont. C.A.), at p. 343). On appeal to this Court, no issue was taken with Finlayson J.A.'s finding that the quasi-judicial immunity provided by s. 9 of the *Law Society Act* also extended to the Law Society's employees who investigate complaints. Applying the same logic, the immunity in s. 43 of the *Energy Resources Conservation Act* would apply to the Compliance Branch's decision to cease communicating with Ms. Ernst. That means that artificial binary distinctions between adjudicative and other administrative decisions should be avoided, since these decisions too are subject to judicial review.

120 The analogous functions between courts and quasi-judicial decision-makers mean that extra caution should be exercised before this Court nibbles away at the immunity clause in this case. There are profound and obvious implications for *all* judges and tribunals from such a decision, and it should not be undertaken without a full and tested evidentiary record. It may or may not be the case that governments will be able to justify immunity from *Charter* damages, but until the s. 1 justificatory evidence is explored, this Court should not replace the necessary evidence with its own inferences.

121 This Court said in *Ward v. Vancouver (City)*, [2010] 2 S.C.R. 28 (S.C.C.), that "granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally" (para. 21). It is worth noting that this Court has found *Charter* damages to be available on only two occasions: in response to a *Charter* breach resulting from abusive police conduct towards a detained suspect (*Ward*), and in response to a *Charter* breach resulting from a prosecutor's inadequate evidentiary disclosure to a criminal accused (*Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214 (S.C.C.)). In both cases, the conduct justifying damages was committed by individuals who were under the direction of the state. *Charter* damages have never been awarded against independent judicial or

quasi-judicial decision-makers. This does not mean that such damages are beyond reach, but they are tied to the question of the constitutionality of immunity clauses and the extent to which they should be read down.

122 Moreover, it is important to note that in *Ward* and *Henry*, this Court had the benefit of significant contributions from various Attorneys General when deciding the s. 24(1) damages claims. In *Ward*, the Attorney General of British Columbia was directly involved in the litigation from the trial stage onwards, and before this Court, the Attorneys General of Canada, Ontario and Quebec intervened. Similarly in *Henry*, the Attorneys General of British Columbia and Canada were involved from the trial stage onwards, and before this Court, eight other provincial Attorneys General intervened.

123 I agree that an analysis pursuant to *Ward* likely leads to the conclusion that *Charter* damages are not an "appropriate and just" remedy in the circumstances, but in my respectful view the question of whether such damages are appropriate requires a prior determination of the constitutionality of the immunity clause. If the clause is constitutional, there is no need to embark on a *Ward* analysis. If, on the other hand, it is found to be unconstitutional, only then does a *Ward* analysis become relevant.

124 A final comment about the questionable nature in which the new constitutional question has arisen before this Court. Ms. Ernst acknowledged in the hearing before us that she was aware that s. 43 was being used to bar her claim at the Court of Queen's Bench and that she did not give the proper notice there. She must also be taken to be aware of the requirement of constitutional notice confirmed by Alberta's Court of Appeal, which expressly rejected the approach taken by Ms. Ernst of arguing that she was seeking a finding of constitutional inapplicability under s. 24(1) rather than unconstitutionality under s. 52. Yet at the Court of Appeal, Ms. Ernst's Notice of Appeal stated that she was *not* challenging the constitutional validity of s. 43, and that, as a result, no notice was required. She also stated, confusingly, that she would be arguing that s. 43 was "of no force and effect". This is hardly the kind of notice required by s. 24 of the *Judicature Act*. It was not until she was before this Court that she first expressed a clear intention to challenge the constitutionality of s. 43, essentially depriving both the Alberta Attorney General and others from the opportunity of meaningfully participating in prior proceedings.

125 This is not conduct that should be rewarded in this Court with redemptive forgiveness. Ms. Ernst's conduct was procedurally in breach of her province's jurisprudence and statutory requirements, and of the public interest that jurisprudence and legislation was designed to protect.

126 I therefore agree with both Wittmann C.J. and the Alberta Court of Appeal that Ms. Ernst's *Charter* claim should be dismissed for not disclosing a reasonable cause of action pursuant to the *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.68, in light of the immunity clause.

127 I also agree with them that judicial review was the appropriate means of addressing her concerns. As Wittmann C.J. concluded, "the time-tested and conventional challenge to an administrative tribunal's decision is judicial review, not an action against the administrative tribunal". The Court of Appeal agreed, and held that

> ... limits on remedies do not offend the rule of law, so long as there remains some effective avenue of redress: *Ward* at paras. 34-5, 43. The long standing remedy for improper administrative action has been judicial review. There is nothing in s. 43 that would have prevented the appellant from seeking an order in the nature of *mandamus* or *certiorari* to compel the Board to receive communications from her. Further, she could have appealed any decisions of the Board to this Court, with leave .... (at para. 30)

128 When the Board made the decision to stop communicating with Ms. Ernst through the normal complaints process, it was exercising its discretionary authority under its enabling legislation (s. 16 of the *Energy Resources Conservation Act*). Issues about the legality, reasonableness, or fairness of this discretionary decision are issues for judicial review (*New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), at para. 28). Even the language used by Ms. Ernst in her statement of claim — that the Board's decision "was made arbitrarily, and without legal authority" — evokes the terminology of a claim for judicial review.

129 Ms. Ernst had the opportunity to seek timely judicial review of the Board's decision. She chose not to. Instead, she attempted to frame her grievance as a claim for *Charter* damages. That is precisely why s. 43 exists — to prevent an end-run

by litigants around the required process, resulting in undue expense and delay for the Board and for the public (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.)).

130 I would dismiss the appeal with costs.

McLachlin C.J.C., Moldaver, Brown JJ. **(dissenting) (Côté J. concurring):**

131 Section 24(1) of the *Canadian Charter of Rights and Freedoms* ensures that those whose rights or freedoms have been violated have access to "appropriate and just" remedies. But s. 24(1) was not enacted in a vacuum. It was born into a legal system with limits which, in some cases, prevent claims from being brought, including claims against the state. This appeal concerns the operation of one such limit — a statutory immunity clause — on an application to strike a claim for a remedy under s. 24(1).

132 The appellant, Jessica Ernst, brought a claim against the respondent, the Alberta Energy Regulator (the "Board"), seeking, among other things, *Charter* damages under s. 24(1) for breaching her right to freedom of expression under s. 2(*b*) of the *Charter*. In moving to strike Ms. Ernst's claim, the Board relied in part on s. 43 of its enabling statute[3] which essentially bars all claims against the Board. The case management judge found that, although Ms. Ernst's pleadings raised an arguable *Charter* claim, s. 43 immunized the Board. He accordingly struck her claim for *Charter* damages, and his decision was upheld by the Court of Appeal of Alberta.

133 We would allow the appeal. Just as it is not plain and obvious that *Charter* damages could in no circumstances be an appropriate and just remedy in a claim against the Board or any quasi-judicial decision-maker like it, it is not plain and obvious that Ms. Ernst's claim is barred by s. 43. Ms. Ernst seeks *Charter* damages as a remedy for actions by the Board that Ms. Ernst says were intended to punish her. It is arguable that such punitive acts fall outside the scope of the immunity that s. 43 confers. Accordingly, we would hold that Ms. Ernst's claim cannot be struck on the basis of s. 43.

134 On appeal to this Court, Ms. Ernst argued that it is not plain and obvious that s. 43 bars her claim for *Charter* damages because, in her submission, s. 43 is unconstitutional. Since we would conclude that it is not plain and obvious that s. 43 bars her claim at all, it is not necessary to consider s. 43's constitutionality at this stage of the proceedings. If it is subsequently determined that s. 43 does, indeed, bar Ms. Ernst's claim for *Charter* damages, then she may challenge its constitutionality at that juncture.

135 We add this. This is a difficult case raising novel and difficult issues. It is not surprising that counsel and judges at all levels have struggled to find the appropriate template through which to view Ms. Ernst's claim. In the end, and with great respect for contrary views, we have concluded that the test for striking out Ms. Ernst's claim at the outset has not been satisfied, and that the matter should be returned to the Alberta courts to decide the important issues of free speech and *Charter* remedies that her case raises.

I. Factual Background

136 In 2007, Ms. Ernst claimed against the Board, EnCana Corporation, and the Province of Alberta, alleging that EnCana contaminated her water while shallow drilling for the extraction of methane gas, and that Alberta and the Board were indirectly responsible for this contamination. Only the claim against the Board is raised here.

137 Ms. Ernst's claim against the Board is twofold. First, she says the Board was negligent in administering its statutory regime, and that its failure to comply with certain statutory duties resulted in the contamination of her well. Secondly, she says that the Board breached her right to freedom of expression under s. 2(*b*) of the *Charter*, and that she is entitled to *Charter* damages under s. 24(1). Only this second aspect of her claim is before us.

138 Because this matter arises from an application to strike, Ms. Ernst's allegations must be taken as true. Those allegations are straightforward.

139 Ms. Ernst lives near Rosebud, Alberta. A well draws water for her home from geological formations that comprise an aquifer, or a series of aquifers.

140 The Board is a statutory government agency established to regulate the oil and gas industry in Alberta. It conducts inspections and investigations in respect of legislative and regulatory provisions intended to protect groundwater from contamination due to oil and gas development, and takes enforcement action when warranted. To these ends, it has a specific process for communicating with the public and hearing public complaints.

141 In 2004 and 2005, Ms. Ernst was a critic of the Board. She frequently expressed her concerns to the Board about the oil and gas development near her home. She also spoke to the media and to the public.

142 Ms. Ernst alleges that her public criticism was a source of embarrassment to the Board, prompting it to take steps to silence her. In November 2005, the manager of the Board's Compliance Branch informed her by letter that all of its staff had been instructed to avoid contact with her. When Ms. Ernst wrote several letters asking why she was being excluded from the Board's public complaints process, the Board directed her to its legal branch, which initially ignored and later refused her request for an explanation. Eventually, the Board informed Ms. Ernst that it would communicate with her only if she agreed to raise her concerns directly with the Board, and not through the media or members of the public.

143 In October 2006, Ms. Ernst wrote to the Board, asking that she be free to communicate unconditionally with the Board, like other members of the public. This letter went unanswered. It was not until March 2007 that the Board informed Ms. Ernst that she was free to communicate unconditionally with it.

144 In her statement of claim, Ms. Ernst alleges that the Board breached her right to freedom of expression under s. 2(*b*) of the *Charter*, in that the Board's actions "were a means to punish Ms. Ernst for past public criticisms" and "to prevent her from making future public criticisms" of the Board (A.R., at p. 72). In particular, Ms. Ernst alleges that the Board "*punitively*" excluded her from its own complaints, investigation and enforcement process "in retaliation for her vocal criticism" and "*arbitrarily*" removed her "from a public forum of communication with a government agency that had been established to accept public concerns and complaints" (A.R., at p. 72 (emphasis added)). Ms. Ernst claims damages of $50,000 and relies on s. 24(1) of the *Charter*, which provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

145 The Board applied to strike Ms. Ernst's claim in negligence and her *Charter* damages claim, arguing that s. 43 of the *ERCA* plainly and obviously bars both claims. Section 43 reads as follows:

> **43** No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) [technical specialists or personnel] in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

II. Decisions Below

146 The case management judge struck both of Ms. Ernst's claims (2013 ABQB 537, 570 A.R. 317 (Alta. Q.B.)). He disposed of the negligence claim as barred by s. 43 and, though he rejected the Board's argument that Ms. Ernst's pleadings did not disclose a violation of s. 2(*b*) of the *Charter*, he struck her claim for *Charter* damages as barred by the same provision.

147 The Court of Appeal unanimously dismissed Ms. Ernst's appeal (2014 ABCA 285, 580 A.R. 341 (Alta. C.A.)). In doing so, it did not consider whether Ms. Ernst's pleadings made out a s. 2(*b*) claim, as the Board did not raise this issue on appeal. The Court of Appeal agreed with the case management judge that s. 43 of the *ERCA* barred Ms. Ernst's claim for *Charter* damages.

III. Analysis

148 A claim "will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" (*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 17; see also Rule 3.68 of the *Alberta Rules of Court*, Alta. Reg. 124/2010). The issue on this appeal is thus whether Ms. Ernst's claim should be struck out because it discloses no cause of action, either because it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in Ms. Ernst's action against the Board, or else because it is plain and obvious that the immunity clause in s. 43 of the *ERCA* bars her claim.

149 In deciding whether a claim for *Charter* damages should be struck out on the basis of a statutory immunity clause, the court must first determine whether it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of the plaintiff's claim. If it is not plain and obvious that *Charter* damages could not be appropriate and just, then the court must determine whether it is plain and obvious that the immunity clause, on its face, applies to the plaintiff's claim for *Charter* damages. If it is plain and obvious that the immunity clause applies, then the court must give effect to the immunity clause and strike the plaintiff's claim, unless the plaintiff successfully challenges the clause's constitutionality.

150 In this case, then, the first issue is whether it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of Ms. Ernst's claim. If it is, the appeal may be dismissed and the claim struck without any reliance on the immunity clause. Our colleague Cromwell J. goes further; he would hold not only that *Charter* damages are not appropriate and just in the circumstances of Ms. Ernst's claim, but also that *Charter* damages could *never* be appropriate and just in the circumstances of *any* claim against the Board — or, indeed, against any quasi-judicial decision-maker like it. He therefore concludes that s. 43 is not unconstitutional to the extent that it bars a claim against the Board for *Charter* damages.

151 If, by contrast, it is not plain and obvious that *Charter* damages could not be an appropriate and just remedy, the Court must consider the second issue — whether it is plain and obvious that s. 43 of the *ERCA* applies to Ms. Ernst's claim. If it is, the appeal must be dismissed and the claim struck on the basis of the immunity clause, unless the immunity clause is unconstitutional and therefore of no force and effect.

152 If, however, it is not plain and obvious that s. 43 applies to Ms. Ernst's claim, the appeal must be allowed and it will not be necessary to consider s. 43's constitutionality at this stage. We would dispose of the appeal on this basis.

A. It Is Not Plain and Obvious That Charter Damages Could Not Be an Appropriate and Just Remedy

153 In *Ward v. Vancouver (City)*, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.), this Court set out a framework for assessing whether damages are an appropriate and just remedy in the circumstances. We turn now to consider how that framework can be applied here, at the application to strike stage.

154 To survive an application to strike, the claimant must first plead facts which, if true, could prove a *Charter* breach (see *Ward*, at para. 23). MS. ERNST HAS MET THIS THRESHOLD.

155 The Board submits that Ms. Ernst's s. 2(*b*) claim must be struck because s. 2(*b*) does not guarantee a right to be heard. We do not agree that Ms. Ernst's claim necessarily depends on her establishing that s. 2(*b*) guarantees the positive right she asserts.

156 A s. 2(*b*) infringement may result where state action, *in purpose or effect*, "restrict[s] attempts to convey a meaning" (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 973). If an individual's expression promotes one of the principles underpinning s. 2(*b*) of the *Charter* and state action has the effect of limiting that expression, a s. 2(*b*) infringement may result (*Irwin Toy*, at p. 976). These principles were summarized in *Irwin Toy* as follows:

> ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. [p. 976]

157 Ms. Ernst has pleaded that the Board is a government agency and a public body that encouraged public participation and communication in its regulatory process. She has pleaded that she was a "vocal and effective" critic of the Board, but that the Board took steps to restrict her speech by refusing to communicate with her or allow her to participate in its compliance and enforcement process until she "agreed to raise her concerns only with the [Board] and not publicly through the media or through communications with other citizens" (A.R., at pp. 70-71). The effect of the Board's action was to "greatly limi[t] her ability to lodge complaints, register concerns and to participate in the [Board's] compliance and enforcement process" (A.R., at p. 70).

158 Ms. Ernst's pleadings raise two possible sources of limits on her freedom of expression: (1) the Board told her she had to stop expressing herself *to the media and the public* or else it would not hear her complaints; and (2) Ms. Ernst was prohibited *from participating in the Board's public complaints and enforcement process*. The first amounts to an allegation that the Board acted with the *purpose* of limiting Ms. Ernst's expressive activity in the public sphere. The second amounts to an allegation that the Board's action had the *effect* of limiting Ms. Ernst's expression in the Board's complaints and enforcement process, where that expression was consistent with her participation in social and political decision making relating to oil and gas development in southern Alberta.

159 On either front, these pleadings establish the elements of an admittedly novel s. 2(*b*) claim. The test for granting an application to strike is stringent: it is "only if the statement of claim is certain to fail because it contains a 'radical defect' that the plaintiff should be driven from the judgment" (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 15). A court must "err on the side of permitting a novel but arguable claim to proceed" (*Imperial Tobacco*, at para. 21). We cannot say, on the basis of Ms. Ernst's pleadings, that it is plain and obvious that she cannot establish a breach of s. 2(*b*) of the *Charter*.

160 Ms. Ernst has therefore pleaded a viable s. 2(*b*) claim against the Board for the purposes of the first step of the *Ward* analysis on an application to strike. The second step, on an application to strike, requires the claimant to demonstrate that damages could fulfill one or more of the functions of compensation, vindication, or deterrence (*Ward*, at paras. 24-31). Ms. Ernst has met this threshold, as well. She has not pleaded any injury caused by the Board that could give rise to compensatory *Charter* damages. But the fact that the claimant has not suffered compensable loss "does not preclude damages where the objectives of vindication or deterrence" are served by an award of *Charter* damages (*Ward*, at para. 30). Ms. Ernst's pleadings allege that the Board's actions were punitive, arbitrary, and retaliatory. These allegations are sufficient to establish that the functions of vindication and deterrence could be supported by an award of *Charter* damages.

161 WE note the case management judge's concern that, absent the automatic application of statutory immunity clauses, "[p]arties would come to the litigation process dressed in their *Charter* clothes whenever possible" (trial reasons, at para. 81). However, parties can only come to court "in their *Charter* clothes" if they have pleaded all the elements of a *Charter* breach, and facts upon which an award of *Charter* damages could be functionally justified. *Charter* claims are not easy to make out; they require specific factual allegations. Where the state shows that a claimant has merely affixed a *Charter* label on what is in substance a private law claim, that claim should be struck at one of the first two steps of the *Ward* analysis.

162 AT THE THIRD STEP OF *WARD*, AS APPLIED ON AN APPLICATION TO STRIKE, THE STATE MAY SHOW THAT COUNTERVAILING CONSIDERATIONS MAKE IT PLAIN AND OBVIOUS THAT *CHARTER* DAMAGES COULD NOT BE APPROPRIATE AND JUST (SEE *WARD*, AT PARAS. 32-45). WE WILL RETURN TO THIS STEP SHORTLY. The fourth step of the *Ward* analysis concerns the quantum of damages that would be appropriate and just in the circumstances. Since this is a matter best left for summary procedure or trial, the claimant need not plead facts which show that the quantum of damages sought is appropriate and just.

163 To be clear, claims that proceed beyond the application to strike stage need not advance to a full trial on the merits. Other summary procedures — in Alberta, for example, summary judgment or summary trial — can be employed on a more fully developed record.

164 Cromwell J. accepts that Ms. Ernst has pleaded facts which satisfy the first two steps of the *Ward* analysis for the purposes of an application to strike. At the third step, however, he holds that countervailing factors make it plain and obvious that *Charter* damages cannot be an appropriate and just remedy in the circumstances of Ms. Ernst's claim against the Board — or, indeed, in *any* claim against the Board, or against any quasi-judicial decision-maker like it. We respectfully disagree.

165 *Charter* damages will not be available where countervailing factors render s. 24(1) damages inappropriate or unjust. In *Ward*, this Court identified such countervailing factors as including the availability of alternative remedies and good governance concerns. We propose to elaborate briefly on these two factors.

(1) Alternative Remedies

166 *Charter* damages, to be recoverable, must meet at least one of the following objectives: compensating the loss caused by the breach, vindicating or affirming the right with respect to the harm done to the claimant and society, and deterring future breaches of the right by regulating state behaviour. Where a plaintiff has pleaded facts on the basis of which an award of *Charter* damages could be justified under one or more of these objectives, the burden shifts to the state to show that it is plain and obvious that the same objective or objectives can be met through other remedies.

167 The Board submits, and our colleagues Abella and Cromwell JJ. agree, that Ms. Ernst had an alternative and effective remedy because she could have pursued judicial review of the Board's conduct. We cannot agree. In our view, the Board has not shown that it is plain and obvious that judicial review will meet the same objectives as an award of *Charter* damages, namely, vindicating Ms. Ernst's *Charter* right and deterring future breaches. At the very least, it would be premature to conclude, based on the pleadings alone, that judicial review would provide an effective alternative remedy to *Charter* damages in this case, let alone in *all* cases, against the Board. We note that, under the *Alberta Rules of Court*, damages are not available through judicial review.[4]

(2) Good Governance Concerns

168 In *Ward*, this Court recognized that good governance concerns may render an award of *Charter* damages unjust or inappropriate. Such concerns were understood in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214 (S.C.C.), as "policy factors that will justify restricting the state's exposure to civil liability" (para. 39).

169 A court must keep two interrelated principles in mind when considering such concerns. First, as *Ward* makes clear, *Charter* compliance is itself a foundational principle of good governance (para. 38). Second, courts must consider good governance concerns in a manner that remains protective of *Charter* rights, since the "appropriate and just" analysis under s. 24(1) is designed to redress the *Charter* breach.

170 Bearing those principles in mind, if the state can establish, without relying on an immunity clause, that good governance concerns make it plain and obvious that *Charter* damages cannot be appropriate and just in the circumstances, then the plaintiff's claim will be struck. This, in substance, is the conclusion reached by Cromwell J. He points to common law and statutory immunities enjoyed by judges and various quasi-judicial decision-makers, as well as good governance concerns rooted in the "practical wisdom" of the common law, to support his conclusion that *Charter* damages can never be an appropriate and just remedy in an action against the Board.

171 We acknowledge that our common law recognizes absolute immunity from personal liability for judges in the exercise of their adjudicative function. This is necessary to maintain judicial independence and impartiality (*Sirros v. Moore* (1974), [1975] Q.B. 118 (Eng. C.A.); *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185 (B.C. S.C.); *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298 (Fed. C.A.), leave to appeal refused, [2000] 2 S.C.R. xiv (note) (S.C.C.)). Such immunity is not inconsistent with the *Charter*, as judicial immunity itself is a fundamental constitutional principle (*Taylor*, at para. 57). Similarly, we anticipate that compelling good governance concerns rendering *Charter* damages inappropriate or unjust will exist where the state actor has breached a *Charter* right while performing an adjudicative function.

172 But that is not the case before us. There is nothing in the record which indicates that the Board was acting in an adjudicative capacity when it informed Ms. Ernst that she could no longer write to the Board until she stopped publically criticizing it. We see no compelling policy rationale to immunize state actors in *all* cases, including where, as here, the impugned conduct is said to have been "punitive" in nature. To be precise, what Ms. Ernst alleges is that the Board, far from exercising an adjudicative function, effectively sought to punish her by barring access to those functions so long as she continued to criticize the Board in public. Our colleague Abella J. suggests that the Board, in deciding to stop communicating with Ms. Ernst, "in essence f[ound] her to be a vexatious litigant" (para. 64). We see no basis for our colleague's characterization.

173 Further, we disagree with our colleague Cromwell J. that the policy concerns which underlie the negation of any negligence law duty of care owed by the Board to Ms. Ernst support an absolute immunity from *Charter* damages claims for the Board. In his view, certain policy considerations which negate a duty of care should also render an award of *Charter* damages inappropriate or unjust, namely: (i) excessive demands on resources, (ii) the potential "chilling effect" on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making. However, immunity in negligence law does not necessarily translate into immunity under the *Charter*. Though public regulators such as the Board will rarely be found to owe a duty of care in negligence law (*Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.), at para. 18; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.)), this Court has rejected the argument that "the balancing of policy factors ... which led this Court to establish a qualified immunity shielding prosecutors from tort liability absent a showing of malice ... is also dispositive" in the context of *Charter* damages (*Henry*, at paras. 52 and 56). Considerations supporting private law immunity from liability for negligent conduct do not automatically support absolute immunity from *Charter* damages claims for more serious misconduct, including conduct amounting to bad faith or an abuse of power.

174 Because good governance concerns should limit the availability of *Charter* damages only so far as necessary, this Court has recognized qualified immunities from claims for *Charter* damages, preconditioning an award upon the claimant establishing a threshold of misconduct or fault. In *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 S.C.R. 405 (S.C.C.), the Court recognized that state actors should be afforded some immunity from claims for *Charter* damages, so as not to unduly constrain the effectiveness of state action under statutes that are subsequently declared invalid. This was said to furnish "a means of creating a balance between the protection of constitutional rights and the need for effective government" (para. 79). *Mackin* cautions, however, that immunity — even in this qualified form — would not cover conduct that is "clearly wrong, in bad faith or an abuse of power" (*ibid.*). The state and its representatives are required to exercise their powers in good faith and to respect constitutional rights. This makes sense because, as noted in *Henry*, *Charter* breaches "cover a spectrum of blameworthiness, ranging from the good faith error, quickly rectified, to the rare cases of egregious failures" (para. 91). In *Henry*, the Court held that a heightened liability threshold must be met in cases of wrongful non-disclosure, which addressed concerns about the "risk of undue interference with the ability of prosecutors to freely carry out their duties" (para. 76).

175 In the private law context, the Court recognized in *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621 (S.C.C.), that the Minister of Justice's exercise of the power of mercy is entitled to only a *qualified* immunity from claims for damages. In that case, the Court held that damages in a civil case could still be awarded where the Minister of Justice acts in "bad faith" or with "serious recklessness" when reviewing an application for mercy (para. 69). Likewise, in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), Lamer J. (as he then was) noted that an action for malicious prosecution against the Attorney General or a Crown Attorney will lie only where the prosecutor has "perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice" (p. 194).

176 These cases demonstrate that certain state actors are subject to *qualified* immunities. A judge, though absolutely immune in respect of his or her adjudicative role, is not necessarily immune in respect of acts or omissions outside his or her adjudicative role. A prosecutor is not immune where he or she perverts or abuses his or her office or intentionally withholds material evidence that he or she knows or should know is material to an accused's ability to make full answer and defence. The Minister of Justice is not immune when he or she acts in bad faith or with serious recklessness in reviewing an application for mercy. Never has this Court held, simply because a governmental decision-maker has *an* adjudicative role — or a prosecutorial role, or a ministerial role — that *Charter* damages can never be an appropriate and just remedy, regardless of the circumstances.

177 Cromwell J. asserts that when the countervailing factors he identifies are considered cumulatively, rather than individually or in isolation, they justify complete immunity from *Charter* damages claims for the Board and decision-makers like it. He would therefore hold, for the first time, that *Charter* damages can never be an appropriate and just remedy in *any* action against *any* quasi-judicial decision-maker like the Board. In our view, whether the countervailing factors are examined individually or collectively, the record at this juncture does not support recognizing such a broad, sweeping immunity for the Board in this case, let alone in every case.

178 In the final analysis, it is not plain and obvious to us that *Charter* damages could not be an appropriate and just remedy in the circumstances of Ms. Ernst's claim against the Board. That being so, the remaining question is whether it is plain and obvious that s. 43 of the *ERCA* bars that claim. In our view, it does not.

B. It Is Not Plain and Obvious That the Immunity Clause Bars the Plaintiff's Claim

179 Recall that s. 43 of the *ERCA* provides that "[n]o action or proceeding may be brought against the Board ... in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board." The issue is thus whether it is plain and obvious that the wrong pleaded — i.e., acts intended to punish Ms. Ernst — would always and inevitably fall within the s. 43 bar to litigation. More precisely, the question is whether punitive conduct is clearly caught by the phrase, "any act or thing *done purportedly in pursuance* of" the *ERCA* or other legislation administered by the Board, or any regulation, or any "decision, order or direction".

180 We cannot conclude that it is plain and obvious that actions taken by the Board purely to punish a member of the public would necessarily fall within the phrase "done purportedly in pursuance" of the *ERCA* or any other instrument. It is arguable that the *ERCA* does not authorize punitive conduct, either expressly or impliedly. Nor does it plainly and obviously give persons acting under it or any other instrument the power to punish anyone as it allegedly punished Ms. Ernst. If, as Ms. Ernst asserts, "the decision to restrict her communication with the [Board], and the decision to continue such restriction, was made *arbitrarily, and without legal authority*" (A.R., at p. 72 (emphasis added)), the immunity clause may not apply to her claims in respect of these particular allegations.

181 The courts below assumed that, by its terms, s. 43 of the *ERCA* plainly and obviously bars Ms. Ernst's entire claim. In his submissions to this Court, Ms. Ernst's counsel did the same. That assumption may ultimately prove correct, but it is not plainly and obviously so at this stage. If it is ultimately established that the actions of which Ms. Ernst complains were, in fact, "purportedly in pursuance" of the *ERCA*, other legislation or regulation, or a Board decision, order or direction, the immunity clause will bar her claim unless s. 43 is unconstitutional. In our view, those issues remain to be determined on a fuller record.

182 Our colleague Cromwell J. takes issue with our approach to the immunity clause. He stresses that this argument was not made by Ms. Ernst before this Court. We accept that this is so. However, as he correctly notes, the Court is not bound by the positions taken by the parties on questions of law. Ms. Ernst's assumption that s. 43 of the *ERCA* bars all actions or proceedings against the Board, "regardless of the nature of the claim" (A.F., at para. 63), is not binding on us. The interpretation of s. 43 and particularly the phrase "in respect of any act or thing done purportedly in pursuant of this Act" raises a question of law, involving as it does a matter of statutory interpretation.

183 Apart from our not being bound by the positions of the parties on questions of law, as we shall explain, the circumstances of this case are exceptional and, in our view, compel the Court to consider an issue not raised by the parties.

184 First, Ms. Ernst raises a novel and difficult legal problem involving the interplay between legislative immunity clauses and s. 24(1) of the *Charter*. The significance of this issue cannot be overstated and it has proved challenging to counsel and the courts below. The complexity of this matter has understandably resulted in submissions which have not comprehensively addressed the issues in this case. In these circumstances, the Court may go beyond the parties' submissions to make a proper determination of the matter according to law.

185 Second, the issues raised by Ms. Ernst's claim are of significant public importance. The allegations against the Board are serious. She says that the Board abused its powers to punish a citizen and to curtail her freedom of expression, thereby

breaching her s. 2(*b*) *Charter* right. Whether Ms. Ernst may advance a claim for *Charter* damages against the Board in the face of a statutory immunity clause which may bar such claims will have consequences which extend far beyond the facts of this case. In our view, the fact that Ms. Ernst did not argue that s. 43 does not apply to her claim should not impede the just determination of a legal issue which has such broad ramifications for the public.

186 Since it is not plain or obvious that *Charter* damages could never be appropriate and just or that s. 43 of the *ERCA* bars Ms. Ernst's claim, the application to strike must fail and the appeal must be allowed. It is therefore unnecessary to determine s. 43's constitutionality, and we would decline to do so.

C. We Decline to Answer the Constitutional Question

187 The constitutional question at issue on this appeal was stated by the Chief Justice as follows:

> Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

188 Where the state applies to strike a claim for *Charter* damages on the basis of a statutory immunity clause and it is not plain and obvious that *Charter* damages could not be an appropriate and just remedy but it *is* plain and obvious that the immunity clause would bar the plaintiff's claim, the plaintiff may defeat the application to strike by successfully challenging the clause's constitutionality. That is what Ms. Ernst sought to do in her appeal to this Court.

189 We would decline her invitation to strike down s. 43 as unconstitutional, for two reasons. First, it is not necessary to do so to dispose of this appeal; as discussed above, it is not plain and obvious that, on its face, s. 43 bars Ms. Ernst's claim for *Charter* damages. Second, even if it were necessary to consider s. 43's constitutionality, the record before us does not provide an adequate basis on which to do so; we have received neither submissions nor evidence on the application, if any, of s. 1 of the *Charter* to s. 43, for example.

190 We would therefore leave for another day the question of whether s. 43 or a similar immunity clause can constitutionally bar a claim for *Charter* damages. All we have determined on this appeal is that, for the purposes of the application to strike, it is not plain and obvious that s. 43 applies to Ms. Ernst's claim. If a court ultimately finds that s. 43 does bar Ms. Ernst's claim, Ms. Ernst would still have the opportunity to seek a declaration that s. 43 of the *ERCA* is unconstitutional and to provide proper notice of her constitutional challenge to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta in accordance with s. 24 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2.

191 The constitutionality of s. 43 could then be dealt with at first instance. It would be open to the state to adduce evidence of countervailing considerations which may render *Charter* damages inappropriate or unjust, to make submissions on the extent, if any, to which s. 1 applies to Ms. Ernst's s. 24(1) claim and to provide any other evidence in support of the clause's constitutionality. Of course, it would be similarly open to Ms. Ernst to answer such evidence or submissions with evidence and submissions of her own.

IV. Conclusion

192 We would allow the appeal, and set aside the order striking the claim, with costs to Ms. Ernst throughout. Ms. Ernst may proceed with her claim for *Charter* damages unless and until it is established that it is barred by s. 43.

Appeal dismissed.
Pourvoi rejeté.

Footnotes

1 This document refers to the Energy and Utilities Board which was comprised, in part, of members of the Alberta Energy Regulator's predecessor, the Energy Resources Conservation Board.

2 Now known as the Alberta Energy Regulator.

3 The Board's enabling statute was at all material times the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 ("*ERCA*"). This statute has since been repealed and replaced with the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3. The new legislation has a provision similar to s. 43 of the *ERCA* (s. 27). Under the *ERCA*, the regulator was known as the Energy Resources Conservation Board (the "ERCB"). The new statute replaced the ERCB with the Board, and as a result, the Board is named as the respondent as the successor to the ERCB.

4 Rule 3.24.

End of Document

TAB 3

TAB 4

1995 CarswellOnt 363
Ontario Court of Justice (General Division), In Bankruptcy

Francisco, Re

1995 CarswellOnt 363, [1995] O.J. No. 917, 19 C.L.R. (2d) 146, 32 C.B.R. (3d) 29, 54 A.C.W.S. (3d) 428

Re bankruptcy of CASIMIRO ALMEIDA FRANCISCO

Adams J.

Judgment: March 31, 1995
Docket: Doc. Toronto Estate No. 31-292784

Counsel: *Pauline Bosman*, for appellant BPCO, a division of EMCO Limited.
Craig Colraine, for respondent bankrupt Casimiro Almeida Francisco.

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

Table of Authorities

Cases considered:

Abstainer's Insurance Co. v. Pellegrino (1989), 77 C.B.R. (N.S.) 108 (Ont. Dist. Ct.) — *referred to*

Advocate Mines Ltd., Re (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.) — *considered*

Cravit, Re (1984), 47 C.P.C. 31, 54 C.B.R. (N.S.) 214 (Ont. S.C.) — *referred to*

J.B. Allen & Co. v. D.E. Witmer Plumbing & Heating Ltd. (1992), 12 C.B.R. (3d) 272, 1 C.L.R. (2d) 148 (Ont. Bktcy.) — *referred to*

Smith v. Henderson (1992), 10 C.B.R. (3d) 153, 64 B.C.L.R. (2d) 144, 10 B.C.A.C. 249, 21 W.A.C. 249 (C.A.) — *referred to*

Turner v. Midland Doherty Ltd. (1992), 13 C.B.R. (3d) 16, 70 B.C.L.R. (2d) 268 (S.C.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 69

s. 178(1)(*d*)

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 8

s. 13(1)

s. 13(2)

Appeal from order of registrar dismissing application for leave to continue action against bankrupt.

Adams J.:

1 This is an appeal from an order of Registrar Ferron dismissing an application for leave to continue with an action against a bankrupt. In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings. See *Re Cravit* (1984), 54 C.B.R. (N.S.) 214 (Ont. S.C.); and *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.). On appeal, the reviewing court cannot substitute its opinion for that of the court of first instance given the discretionary nature of the decision appealed from. But such discretion must be exercised in accordance with legal principle.

2 The appellant BPCO sold and delivered roofing materials to Caldense Roofing and Insulation Limited ("Caldense") between August 23, 1988 and October 31, 1989 for installation at construction projects on which Caldense was working. The amount due to BPCO was $120,159.06. Casimiro Francisco, Carlos Santos and Antonio Santos were shareholders, officers and directors of Caldense at various times. On February 16, 1990, BPCO commenced an action against Caldense and Francisco for these unpaid invoices and for breach of trust pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended. Ultimately, Carlos Santos was added as a defendant, and Carlos Santos and Antonio Santos were added as Third Parties. Section 8 and ss. 13(1) and 13(2) of that statute provide:

8. — (1) All amounts,

(*a*) owing to a contractor or subcontractor, whether or not due or payable; or

(*b*) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fraud to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

3 [R.S.O. 1990, c. C.30, s. 8.]

. . . . .

13. — (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(*a*) every director or officer of a corporation; and

(*b*) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

4 It would appear the funds received by Caldense from construction projects were all deposited into one bank account without differentiating the various jobs and payments were made out of these funds on a running account basis.

5 In his Third Party claim, Francisco alleges he was out of the country from July 1, 1989 to August 17, 1989 and further alleges that, in his absence and without his consent, the Third Parties caused Caldense to pay $100,000 to Antonio Santos from its general account comprised of monies paid to Caldense on account of the projects subject to BPCO's claim. The Third Parties deny that payment was made without Francisco's knowledge and assure that the monies paid were not from the projects subject to BPCO's action.

6 Caldense consented to summary judgment against it by order of Hoilett J. dated May 9, 1990 in the amount of $117,000. Paragraph 2 of that order provides:

This Court ORDERS that this judgment against the Defendant, Caldense Roofing and Insulation Limited is without prejudice to the Plaintiff continuing its claim against the Defendant, Casimiro Francisco.

Paragraphs 4, 9 and 10 of BPCO's claim alleges:

4. The Defendant, Casimiro Francisco resides in the Province of Ontario and was at all material times an officer, director and person having effective control of Caldense.

9. The plaintiff further alleges that Caldense, in breach of the Construction Lien Act, 1983 appropriated or converted to its own use or a use not authorized by the trust the funds received on the projects referred to in paragraph 8 hereof and thereby caused the Plaintiff damages thereby to the extent of its claim herein.

10. The Plaintiff further alleges that the Defendant, Casimiro Francisco was and is an officer, director and person with the effective control of the affairs of the Corporation and assented to and/or ac quiesced in conduct which he knew or ought to reasonably have known amounts to a breach of trust by the Corporation and is personally liable to the Plaintiff herein for such breach pursuant to Section 13 of the said Act.

7 BPCO was unable to collect its judgment against Caldense, and the trial of the action against Francisco commenced on September 26, 1994 before Davidson J. After three days of hearing, however, the trial was adjourned to a date to be fixed in order to permit BPCO further discovery of Francisco on documents produced by him at trial and not previously produced. Costs were also awarded against Francisco.

8 On October 28, 1994, Francisco made an assignment in bankruptcy, and on November 14, 1994 BPCO filed a proof of claim in the bankruptcy proceeding. BPCO, however, also took the position that Francisco's liability to BPCO survives his bankruptcy because it is a "liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity" within the meaning of s. 178(1)(*d*) of the *Bankruptcy and Insolvency Act*. The argument is that the failure to pay BPCO out of project funds received by Caldense made Francisco liable for misappropriation or defalcation while he was acting in a fiduciary capacity given that the funds were impressed with a statutory trust, the breach of which Francisco was made liable by s. 13(1) of the *Construction Lien Act*.

9 Section 178(1)(*d*) of the *Bankruptcy and Insolvency Act* provides:

> 178. (1) An order of discharge does not release the bankrupt from
>
> .....
>
> (*d*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity ...

10 Master Ferron refused leave to continue the action. His endorsement took the following summary form:

> January 5, 1995
>
> — None of the items described in subparas. (*d*) or (*e*) of s. 178 have been pleaded against the Bankrupt.
>
> — Further, the reasons for lifting the stay which I listed in *Re Advocate Mines* are not present.
>
> — The action against the company of which the Bankrupt was an officer has been concluded and Judgment rendered.
>
> In that action and in the Judgment there was no finding of fraud, misrepresentation, etc., against the company.
>
> The Bankrupt liability, if any, must be established through the company, that is, his liability is vicarious.
>
> It must follow that if the company has been adjudicated not to be liable on any grounds except breaching a simple contract, no liability under the *Construction Lien Act* can be attributed to the Bankrupt. It is not sufficient to suggest that the breaching the trust provisions [sic] of the Act can be established against the company in an action against the principal.
>
> This is not an appropriate case for lifting the s. 69 stay.

11 With the greatest of respect, I have come to the conclusion that Registrar Ferron erred in principle in rejecting the application. Therefore, this appeal must be allowed. Consent to the action continuing is granted.

12 Without intending to usurp the role of the trial judge to decide otherwise on the facts established before him, I am satisfied BPCO has pleaded sufficient allegations to bring its claim, at least arguably, within s. 178(1)(*d*). Francisco is alleged to have been a director or officer of a corporation who assented to or acquiesced in conduct he knew or should have known amounted to breach of trust by the corporation. Section 13(1) of the *Construction Lien Act* makes such a person "liable to the breach of trust." Thus, it is reasonably arguable that a director acts in a fiduciary capacity with respect to the beneficiaries of this trust relationship. For very similar fact situations see, for example, *J.B. Allen & Co. v. D.E. Witmer Plumbing & Heating Ltd.* (1992), 12 C.B.R. (3d) 272 (Ont. Bktcy.), and *Smith v. Henderson* (1992), 10 C.B.R. (3d) 153 (B.C. C.A.).

13 It should be understood that *Re Advocate Mines Ltd.*, supra, is not an exhaustive codification of the policy underlying the *Bankruptcy and Insolvency Act*. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view *Advocate Mines* as a limiting or exhaustive instrument is an error in

principle. Moreover, I am satisfied the action in question is one in respect of which a discharge may not be a defence and, further, that the action had progressed to a point where logic dictated the action be permitted to continue to judgment.

14 While the action against Caldense had culminated in a consent summary judgment, the fact that there had been "no finding of fraud, misrepresentation etc. against the company" was not material to issue before the learned registrar. The words "misappropriate" and "defalcation" are not used in a pejorative or accusatory sense and are applicable simply where there has been a failure to properly account for funds. See *Abstainer's Insurance Co. v. Pellegrino* (1989), 77 C.B.R. (N.S.) 108 (Ont. Dist. Ct.), and *Turner v. Midland Doherty Ltd.* (1992), 13 C.B.R. (3d) 16 (B.C. S.C.).

15 Further, it was not for the registrar to determine that the liability of a director under s. 13(1) of the *Construction Lien Act* is merely "vicarious." I personally have difficulty with this conclusion given the wording of that subsection. But this is for the trial judge to determine. The consent judgment against Caldense was made expressly subject to the right of the plaintiff to proceed against Francisco. I do not appreciate the existence of any a priori legal principle precluding BPCO from establishing facts which demonstrate Caldense's conduct as a background to establishing Francisco's independent liability for breach of trust. In any event, this too is a matter for the trial judge.

16 Accordingly, the appeal is allowed and the s. 69 stay is lifted. BPCO may continue its action against the bankrupt and in respect of which the applicability of s. 178(1)(*d*) can be definitively determined. See *Turner v. Midland Doherty Ltd.*, supra.

17 I may be spoken to concerning costs on appointment.

Appeal allowed.

End of Document

TAB 5

2006 BCSC 504
British Columbia Supreme Court

Lang Michener v. American Bullion Minerals Ltd.

2006 CarswellBC 753, 2006 BCSC 504, [2006] B.C.W.L.D. 3227, [2006] B.C.W.L.D. 3328, [2006] B.C.J. No. 685, 17 B.L.R. (4th) 113, 21 C.B.R. (5th) 118, 267 D.L.R. (4th) 553, 53 B.C.L.R. (4th) 380

Lang Michener and Lang Michener LLP (Solicitors) and American Bullion Minerals Ltd. (Client)

Tysoe J.

Heard: March 6-8, 2006
Judgment: March 29, 2006
Docket: Vancouver L042722

Counsel: Gordon Turriff, Q.C. for Lang Michener, Lang Michener LLP
John Grieve, Kimberley Robertson for American Bullion Minerals Ltd.

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

Table of Authorities

Cases considered by *Tysoe J.*:

Bank of Montreal v. Northguard Holdings Ltd. (1989), 74 C.B.R. (N.S.) 86, 58 Man. R. (2d) 241, 1989 CarswellMan 23 (Man. C.A.) — referred to

Carborundum Abrasives Ltd. v. Bank of New Zealand (No. 2) (1992), [1992] 3 N.Z.L.R. 757 (New Zealand H.C.) — referred to

First Investors Corp. v. Prince Royal Inn Ltd. (1988), 60 Alta. L.R. (2d) 269, [1988] 5 W.W.R. 375, 69 C.B.R. (N.S.) 50, (sub nom. *Dworkin, Heumann v. Prince Royal Inn Ltd.)* 88 A.R. 372, 1988 CarswellAlta 294 (Alta. C.A.) — referred to

First Pacific Credit Union v. Grimwood Sports Inc. (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7, 1984 CarswellBC 605 (B.C. C.A.) — referred to

Meadow Rue Holdings Ltd. v. Alberta (1989), 98 A.R. 394, 76 C.B.R. (N.S.) 167, 1989 CarswellAlta 361 (Alta. Master) — considered

Newhart Developments Ltd. v. Cooperative Commercial Bank Ltd. (1978), [1978] Q.B. 814, [1978] 2 All E.R. 896 (Eng.

C.A.) — considered

Paramount Acceptance Co. v. Souster (1981), [1981] 2 N.Z.L.R. 38 (New Zealand C.A.) — referred to

Société générale (Canada) v. 743823 Ontario Ltd. (1989), 41 C.P.C. (2d) 286, 1989 CarswellOnt 468 (Ont. Master) — referred to

Sutton v. GE Captial Commercial Finance Limited (March 19, 2004), Chadwick L.J., Rix L.J. (Eng. C.A.) — considered

Toronto Dominion Bank v. Fortin (1978), [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111, 1978 CarswellBC 273 (B.C. S.C.) — considered

Tudor Grange Holdings Ltd v. Citibank NA (1991), [1991] 4 All E.R. 1 (Eng. Ch. Div.) — considered

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15
s. 91 — referred to

Business Corporations Act, S.B.C. 2002, c. 57
Generally — referred to

s. 105 — referred to

Companies Act, S.B.C. 1973, c. 18
Generally — referred to

Company Act, R.S.B.C. 1996, c. 62
s. 98 — considered

s. 126 — referred to

s. 126(1) — referred to

s. 126(2) — referred to

Legal Profession Act, S.B.C. 1998, c. 9
Generally — referred to

s. 64(1) "person charged" — referred to

s. 70(14) — referred to

s. 72 — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359
s. 61 — referred to

s. 61(1) — referred to

s. 61(2) — referred to

HEARING held to determine entitlement of law firm to payment of legal accounts.

Tysoe J.:

Introduction

1 This proceeding, which is a review of legal accounts under the *Legal Profession Act*, S.B.C. 1998. c. 9, raises an interesting issue of receivership law regarding the residual powers of the directors of a company in receivership. American Bullion Minerals Ltd. ("American Bullion") is one of the relatively few companies that manage to survive a receivership. Lang Michener and Lang Michener LLP (the "Law Firm") is now looking to American Bullion for payment of its legal accounts in the approximate amount of $400,000 for services performed and disbursements incurred on the instructions of the three directors of American Bullion while it was in receivership. Those three directors resigned as part of the process of American Bullion coming out of receivership.

2 The matter initially came before the court as a review hearing before Master Groves (as he then was) sitting as a registrar under the *Legal Profession Act*. At the instance of American Bullion, Master Groves referred the following two-part question to the court for direction and determination pursuant to s. 70(14) of the *Legal Profession Act*:

> Did the new directors have the ability during the receivership to agree on behalf of [American Bullion] to pay for Lang Michener's legal services such that [American Bullion] is properly a person charged or a person who has agreed to pay for legal services under the *Legal Profession Act* and, if so, are Lang Michener or the directors estopped from claiming those fees or any portion thereof as a result of the directors or Lang Michener's conduct during the receivership?

The phrase "person charged" is defined in s. 64 of the *Legal Profession Act* to include "a person who has agreed to pay for legal services". If American Bullion is determined to be a "person charged", it will be responsible to pay some or all of the Law Firm's accounts following a review by a registrar in accordance with the court's determination of the question referred by Master Groves.

3 In dealing with this reference, I exercised my discretion to allow the parties to call witnesses. Mr. Reardon testified on behalf of the Law Firm and a representative of the Receiver-Manager, D. Manning & Associates Inc., and its legal counsel were called on behalf of American Bullion. Counsel also agreed that most of the pleadings and affidavits in the court proceedings involving American Bullion could be introduced as exhibits.

Facts

4 American Bullion was a publicly traded company but, by 2002, it had been de-listed and a cease trade order had been made in respect of its shares. It was involved primarily in the mining industry and its principal asset was an 80% ownership mineral claim in northern British Columbia known as Red Chris.

5 American Bullion had borrowed the sum of $400,000 (U.S.) from a company called Evanton Limited ("Evanton") in 1997. The monies had not been repaid and, in August 2002, American Bullion agreed to grant a general security agreement to Evanton in consideration of an extension of the time for repayment. The general security agreement was granted by American Bullion to Evanton in September 2002 (the "General Security Agreement").

6 On or about October 18, 2002, American Bullion entered into a joint venture agreement (the "Joint Venture Agreement") with Red Chris Development Company Ltd. ("Red Chris"), a company owned by a publicly traded company called bcMetals Corporation ("bcMetals"). Under the Joint Venture Agreement, American Bullion transferred its ownership interest in the mineral claim to Red Chris in exchange for a 30% reversionary carried ownership interest in the claim plus cash payments in a minimum amount of $2 million, together with a further $10 million out of commercial production in the event that a mine was built. The sum of $250,000 was paid to American Bullion in the fall of 2002 and the remainder of the $2 million minimum payment was payable over a six year period after Red Chris obtained all necessary regulatory and shareholder approvals for the acquisition and the proposed assignment of its interest in the Joint Venture Agreement to a publicly listed company, which I presume was intended to be bcMetals ($500,000 upon receiving the approvals, $625,000 on the first anniversary of the date of the last of the approvals and $125,000 on each of the second through sixth anniversaries of the date of the last of the approvals).

7 Some of American Bullion's shareholders became dissatisfied with its management and took steps to hold a meeting of the shareholders for the purpose of electing different directors. A proxy battle ensued between two groups of shareholders, one group supporting the existing directors and the other group supporting new nominees, Mr. Barker, Mr. Gold and Mr. Kermeen, none of whom owned shares in American Bullion. Mr. Zinkhofer of the Law Firm assisted the group of dissatisfied shareholders in the proxy battle. The meeting took place on December 30, 2002, and Messrs. Barker, Gold and Kermeen were elected as the new directors of American Bullion (the "New Directors").

8 I gather that Evanton was not pleased with the election of the New Directors. It was suggested in the testimony of the representative of the Receiver-Manager that Evanton was concerned that the New Directors wanted to challenge the validity of the Joint Venture Agreement, which Evanton saw as the means of repaying the indebtedness owed to it. Relying on a default under the General Security Agreement, Evanton appointed the Receiver-Manager by instrument accepted on December 31, 2002.

9 When the New Directors persisted in making public statements to the effect that the Joint Venture Agreement was invalid, Evanton commenced an action against American Bullion on January 30, 2003. On that same day, it obtained an *ex parte* injunction enjoining American Bullion from dealing with the Joint Venture Agreement.

10 The Receiver-Manager was of the view that it was in the best interests of American Bullion to preserve the Joint Venture Agreement and that the Joint Venture Agreement represented the only source of funds to pay the indebtedness owed under the General Security Agreement. At the request of Red Chris, the Receiver-Manager confirmed the Joint Venture Agreement and acknowledged that it would not be challenging the Joint Venture Agreement.

11 On February 10, 2003, despite the opposition of American Bullion on the instructions of the New Directors, Mr. Justice Groberman granted an Order appointing the Receiver-Manager. He decided that it was not necessary to deal with a cross-application made by the New Directors to dissolve the injunction in view of the appointment of the Receiver-Manager. In his Reasons for Judgment, Mr. Justice Groberman mentioned that if the directors and shareholders of American Bullion wanted to get rid of the Joint Venture Agreement, they could apply for leave of the court to commence an action.

12 The New Directors brought two applications on behalf of American Bullion in the Court of Appeal with respect to the Order granted by Mr. Justice Groberman. On April 14, 2003, Madam Justice Ryan granted a stay of the Order, until the application for leave to appeal the Order, to the extent that it permitted a sale of American Bullion's assets and an application for approval of any such sale. On May 28, 2003, Madam Justice Levine granted leave to appeal the Order and continued the stay pending the appeal. However, the appeal was not pursued by the New Directors and I gather that it lapsed when American Bullion failed to file an appeal record by the due date of July 28, 2003.

13 In the meantime, the New Directors continued making public statements to the effect that the Joint Venture Agreement

was invalid and that court proceedings would be commenced to have it set aside. This caused difficulties for bcMetals, which was trying to raise funds from the public for the purpose of conducting exploratory work on the Red Chris claim.

14 In June 2003, the New Directors made application under s. 126 of the *Company Act*, R.S.B.C. 1996, c. 62, for leave to commence an action to have the Joint Venture Agreement set aside or declared invalid. Mr. Justice Pitfield dismissed the application. An application for leave to appeal was filed in respect of this decision, but it was never pursued by the New Directors.

15 While the receivership was ongoing, the New Directors instructed the Law Firm to take certain steps to preserve the corporate standing of American Bullion. Those steps included the calling and holding of an annual general meeting of American Bullion on June 30, 2003. At that meeting, the New Directors were reelected.

16 During the first half of 2003, two bankruptcy petitions were filed against American Bullion. The first petition was filed in February 2003 by Hunterbrooke Capital Corp., which claimed to be owed management fees. The second petition was filed in May 2003 by Evanton. Mr. Reardon testified that the New Directors instructed him to defend the petitions on behalf of American Bullion and that, after Mr. Reardon argued that the petitions had been brought for improper purposes, the presiding judges adjourned each of the hearings generally. Neither of the two hearings was re-scheduled.

17 It had been anticipated that the regulatory and shareholder approvals referred to in the Joint Venture Agreement would be obtained approximately six months after its execution in October 2002. As a result of delays caused by the New Directors making efforts to have the Joint Venture Agreement set aside, Red Chris requested the Receiver-Manager to postpone the due dates for each of the installments of the remaining $1,750,000 minimum payment due to American Bullion under the Joint Venture Agreement. The Receiver-Manager applied to court for directions in connection with this request and was supportive of postponing the payment dates of the remaining installments by a period of six months each. The New Directors opposed any postponement of the payments. On July 28, 2003, Mr. Justice Williamson agreed to a postponement of the payment date of the first $500,000 installment for a period of six months, but he did not agree to postponing the final six payments.

18 In August 2003, bcMetals bought out the position of Evanton and took an assignment of the General Security Agreement. bcMetals was subsequently substituted as the Plaintiff in the action commenced by Evanton.

19 Two courses of action were being pursued during the late summer and early fall of 2003. The first related to an attempt by bcMetals to resolve the receivership and the second related to efforts by the New Directors to obtain refinancing in order to pay out or redeem the General Security Agreement.

20 After bcMetals took an assignment of the Evanton security, it approached the Receiver-Manager with a form of settlement proposal. It was suggested by bcMetals that it would take ownership of American Bullion's interest in the Joint Venture Agreement and would issue shares in its capital to the shareholders of American Bullion. In this way, bcMetals would effectively own all of the Red Chris claim (at some stage it bought the other 20% of the claim from Tech/Cominco) and the shareholders of American Bullion would be able to participate in the future development of the claim. It was proposed that bcMetals could take ownership of American Bullion's interest in the Joint Venture Agreement by way of a voluntary foreclosure under s. 61 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359. The Receiver-Manager would allow the voluntary foreclosure to occur by refraining to give a notice of objection under s. 61(2). This proposal became known as the voluntary foreclosure proposal. bcMetals gave a notice of voluntary foreclosure under s. 61(1) but neglected to first get leave of the court as required by the Order of Mr. Justice Groberman appointing the Receiver-Manager.

21 The focus of the New Directors at this time was, in the words of Mr. Reardon, to find a white knight. They found a party called Quest Capital Corp. which was prepared to provide financing in an amount sufficient to pay out or redeem the General Security Agreement. This would enable the receivership to be brought to an end and for American Bullion to retain its interest in the Joint Venture Agreement. In brief terms, the financing involved a loan in the amount of $1,525,000 for a term of approximately 9 months, with Quest Capital Corp. being granted security over all of the assets of American Bullion and being issued shares in American Bullion giving it approximately 25% of the equity. This became known as the Quest financing proposal.

22 The New Directors instructed the Law Firm to make an application to court on behalf of American Bullion for, among

other things, an order authorizing two of the New Directors to sign all necessary documents in connection with the Quest financing proposal and an order discharging the Receiver-Manager upon payment of the amount required to redeem the General Security Agreement. As a result of this development, bcMetals made a financing proposal with the same basic terms as the Quest financing proposal, but it was slightly more favourable to American Bullion. This became known as the bcMetals financing proposal.

23 The application came before me on October 7, 2003. I was advised that the Receiver-Manager considered the bcMetals financing proposal to be better for American Bullion than the Quest financing proposal. I refused to approve the application brought by the New Directors on the basis that good reason was not shown why the court should decline to follow the views of the Receiver-Manager. I now understand from the testimony of Mr. Evans in this proceeding that he preferred the voluntary foreclosure proposal over both of the financing proposals because a refinancing only postponed the problem for a short period of time and did not address the real issue, which was the lack of funds to repay the secured indebtedness. Leave to appeal my order was granted by the Court of Appeal on December 15, 2003, but no further steps were taken in the appeal.

24 The next step taken in the proceedings was an application by bcMetals, which was heard by Mr. Justice Masuhara on November 6, 2003. bcMetals sought leave, *nunc pro tunc*, to issue its voluntary foreclosure notice in order to implement the voluntary foreclosure proposal or, alternatively, for approval of the bcMetals financing proposal. Mr. Justice Masuhara reserved his decision and issued Reasons for Judgment on December 30, 2003. In his Reasons, Mr. Justice Masuhara approved the bcMetals financing proposal and authorized the Receiver-Manager to implement it.

25 The New Directors instructed the Law Firm to seek leave on behalf of American Bullion to appeal the order of Mr. Justice Masuhara. Prior to the hearing of the application for leave, the New Directors negotiated a new financing package with Amarc Resources Ltd. and instructed the Law Firm to go back before Mr. Justice Masuhara. A hearing occurred before him on February 6, 2004 and he refused to consider the Amarc financing proposal because it was too late. The leave application was heard later in February and, on March 2, 2004, Madam Justice Huddart refused leave to appeal the order of Mr. Justice Masuhara.

26 On April 16, 2004, bcMetals and Red Chris obtained leave to commence an action against American Bullion. The Statement of Claim asserted causes of action in interference in economic interests and defamation. I gather that the causes of action were based on the steps taken and things said by the New Directors in connection with the Joint Venture Agreement. Substantial damages were claimed.

27 The Receiver-Manager then entered into negotiations with bcMetals and Red Chris, and a settlement agreement was reached. On June 29, 2004, Mr. Justice Pitfield approved the settlement. He also adjourned an application which the Law Firm had made for a charging order after bcMetals gave an undertaking to return a specified amount of funds to the Receiver-Manager if the Law Firm established that it held a lien in priority to the General Security Agreement. I gather that bcMetals (and Red Chris) also made allegations against the New Directors and that a settlement of those allegations involved the resignation of the New Directors as directors of American Bullion.

28 It is my understanding that the overall result of the bcMetals financing proposal and the settlements is that bcMetals now owns 51% of American Bullion, which continues to hold its interest in the Joint Venture Agreement. The New Directors no longer have any involvement with American Bullion and are not in a position to cause it to pay any of the Law Firm's accounts.

29 The present management of American Bullion (which was put in place by bcMetals) disputes the entitlement of the Law Firm to charge any of its accounts to American Bullion. Counsel for American Bullion in this proceeding (who was the counsel for bcMetals in the receivership proceeding) says that bcMetals would never have gone forward with the bcMetals financing proposal and the settlements if it had known that American Bullion could be liable to the Law Firm for approximately $400,000 in legal fees and disbursements.

Issues

30 Master Groves phrased the first part of the question he referred to the court in the language of the *Legal Profession Act*; that is, whether American Bullion is a "person charged" within the meaning of the *Act*. Counsel are agreed that the true

issue in this regard is whether the New Directors had the authority to bind American Bullion to pay the Law Firm's charges during the receivership of American Bullion. Although counsel for American Bullion raised the point that Mr. Zinkhofer did not testify as to the retainer between the Law Firm and American Bullion, I am satisfied from the testimony of Mr. Reardon and the letter dated May 6, 2003 from the Law Firm to American Bullion entered as an exhibit in this proceeding that the New Directors did purport to agree on behalf of American Bullion to pay the charges of the Law Firm. The real issue is whether they had the authority to do so.

31 Master Groves worded the second part of the question in terms of whether the Law Firm or the New Directors are estopped from claiming the legal fees as a result of their conduct during the receivership. I gather that counsel's argument before him was made in these terms. I have some difficulty with the use of the word "estopped" because the doctrine of estoppel has a special meaning in law. I do not believe that anything turns on it, but I interpret the second part of the question to be whether there was anything in the conduct of the Law Firm or the New Directors to cause the court to exercise its inherent jurisdiction to deny the Law Firm the right to recover payment of any of its charges incurred upon the instructions of the New Directors.

32 In order to avoid any potential misinterpretation of these Reasons, I should specifically state what is *not* in issue on this reference. There is no issue as to whether the Receiver-Manager or the receivership estate has any liability for the accounts of the Law Firm. The Law Firm is simply taking the position in this proceeding that it is entitled to be paid its legal accounts by American Bullion. It is not claiming that it has a lien on any of the assets of American Bullion or that the Receiver-Manager should have paid its accounts.

Discussion

33 The powers of directors while a company is in receivership are not well defined at common law. The issue usually arises when the directors of the company want to act on behalf of the company in defending the action commenced by the security holder which is applying to appoint a receiver or a receiver-manager or in making a claim against the security holder. A leading authority on this issue, which was relied upon heavily by counsel for the Law Firm, is *Newhart Developments Ltd. v. Cooperative Commercial Bank Ltd.*, [1978] Q.B. 814 (Eng. C.A.). In that case, the debenture holder had appointed a receiver of all of the company's assets, and the directors of the company wanted to sue the debenture holder for withdrawing financial support from the company's property development.

34 The Court of Appeal held that the directors of the company had the power to pursue the cause of action against the debenture holder. Shaw L.J. said the following about the powers of the directors:

> But the provisions in the debenture trust deed giving [the receiver the power to institute proceedings] is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject to the charge. (p. 819)
>
> .....
>
> If there is an asset which appears to be of value, although the directors cannot deal with it in the sense of disposing of it, they are under a duty to exploit it so as to bring it to a realisation which may be fruitful for all concerned. (p. 820)
>
> .....
>
> I see no principle of law or expediency which precludes the directors of a company, as a duly constituted board ... from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders. (p. 821)

Shaw L.J. went on to say that there was no possibility of a threat to the interests of the debenture holder because the company was not being called upon to finance the litigation and had been given an indemnity against any possible liability for costs. In a concurring judgment, Stephenson L.J. commented that it would put the receiver in an unenviable position if he was required to concur in the litigation because he would have to weigh the conflicting interests of the party who appointed him and the company.

35 *Newhart Developments Ltd.* has been followed in numerous decisions. Counsel for the Law Firm referred me to *Paramount Acceptance Co. v. Souster*, [1981] 2 N.Z.L.R. 38 (New Zealand C.A.), *First Investors Corp. v. Prince Royal Inn Ltd.* (1988), 60 Alta. L.R. (2d) 269 (Alta. C.A.), *Bank of Montreal v. Northguard Holdings Ltd.* (1989), 58 Man. R. (2d) 241 (Man. C.A.), *Société générale (Canada) v. 743823 Ontario Ltd.* (1989), 41 C.P.C. (2d) 286 (Ont. Master), *Carborundum Abrasives Ltd. v. Bank of New Zealand (No. 2)*, [1992] 3 N.Z.L.R. 757 (New Zealand H.C.) and *Sutton v. GE Captial Commercial Finance Limited* (Eng. C.A.).

36 Counsel for the Law Firm also brought my attention to a decision that was critical of the reasoning in *Newhart Developments Ltd.*, although the judge accepted that he was bound by it and his criticism was not mentioned in the subsequent decision of the English Court of Appeal in *Sutton*, which referred to *Newhart Developments Ltd.* without negative comment. In *Tudor Grange Holdings Ltd v. Citibank NA*, [1991] 4 All E.R. 1 (Eng. Ch. Div.), Browne-Wilkinson V.C. said the following at p. 10:

> I have substantial doubts whether the *Newhart* case was correctly decided in any event. That may have to be looked at again in the future. The decision seems to ignore the difficulty which arises if two different sets of people, the directors and the receivers, who may have widely differing views and interests, both have power to bring proceedings on the same cause of action ... Further, the Court of Appeal in the *Newhart* case does not seem to have had its attention drawn to the fact that the embarrassment of the receiver in deciding whether or not to sue can be met by an application to the court for directions as to what course should be taken ...

In the present case, difficulties similar to the one referred to by Browne-Wilkinson V.C. did arise. For example, the Receiver-Manager believed that it was in the best interests of American Bullion to preserve the Joint Venture Agreement, but the New Directors wanted it to be set aside.

37 In my opinion, the legislature of this province recognized the difficulty referred to by Browne-Wilkinson V.C. even before *Newhart Developments Ltd.* was decided. Section 98 of the *Company Act*, R.S.B.C. 1996, c. 62, which was in effect from the time the *Act* came into force in 1973 until it was replaced in March 2004 by the *Business Corporations Act*, S.B.C. 2002, c. 57, read as follows:

> If a receiver manager is appointed, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking for which the receiver manager is appointed until the receiver manager is discharged.

The corresponding section in the *Business Corporations Act*, s. 105, is to similar effect. I will refer only to s. 98 because almost all of the events in the receivership occurred prior to March 2004.

38 In my opinion, this statutory provision overrides the common law. A similar conclusion was reached in *Meadow Rue Holdings Ltd. v. Alberta* (1989), 76 C.B.R. (N.S.) 167 (Alta. Master), where it was held that s. 91 of the *Business Corporations Act*, S.A. 1981, c. B-15 (which is more specific than s. 105) altered the common law position as reflected in *Newhart Developments Ltd.* I do not agree with the submission of counsel for the Law Firm that nothing in s. 98 barred the New Directors from taking steps to fulfil the duty expressed in *Newhart Developments Ltd.* to exploit American Bullion's assets as long as there was no prejudice to the holder of the General Security Agreement. As a result of s. 98, the duty or power of the New Directors to deal with the assets ceased upon the appointment of the Receiver-Manager, which was given that power.

39 In my view, the intent of s. 98 is to take away from the directors such of their powers as are given to a receiver-manager (this intent is expressly stated in the more specific language of the Alberta provision quoted in *Meadow Rue Holdings Ltd.*). This interpretation addresses the difficulty mentioned in *Tudor Grange Holdings Ltd* of having two different sets of persons with the same powers.

40 A determination of the powers remaining in the directors must logically involve a consideration of the powers given to the receiver. If a power residing in the directors prior to the appointment of a receiver-manager is not given to the receiver manager, the Legislature could not have intended that neither would be able to exercise the power. This is why the powers remaining in the directors are commonly referred to as residual powers.

41 On a literal interpretation of s. 98, the powers of the directors to deal with the assets of the corporation over which the receiver-manager is appointed cease until the receiver-manager is discharged. However, directors have powers that do not involve dealings with the assets, and those powers remain with the directors despite the appointment of a receiver-manager.

42 When there is an interplay between the duties of the receiver-manager and the powers remaining with the directors, the duties of the receiver-manager will be paramount. For example, in a situation where, as in the present case, the receiver-manager is not given the power to attempt to sell the assets of the debtor corporation, the power to do so will remain with the directors. However, a power and duty universally given to receiver-managers is to preserve and protect the assets. As a result, the receiver-manager would have to concur in any sale arranged by the directors because the receiver-manager has the duty to preserve and protect the assets for the benefit of all interested parties. A receiver-manager would have a duty to withhold consent to a sale if the sale price was less than the fair market value of the assets because the worth of the corporation would be decreased by such a sale, to the prejudice of some or all of the creditors and shareholders of the corporation.

43 My interpretation of s. 98 does not mean, however, that the outcome of *Newhart Developments Ltd.* (as opposed to its reasoning) is inconsistent with the law in British Columbia. An issue similar to the one considered in *Newhart Developments Ltd.* was addressed three months later in *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) (but without the benefit of the reported decision in *Newhart Developments Ltd.*). At issue in *Fortin* was whether the directors of the company had the right to instruct counsel to defend the action brought by the debenture holder against the company following the instrument appointment of a receiver-manager. In holding that the directors did have that right, Anderson J. said the following at p. 113:

> If counsel for the plaintiff were correct, as soon as a receiver was appointed the board of directors would be precluded from filing a defence to the action and only the receiver would have the right to file a defence. In my view such matters are not the concern of the receiver, whose sole task is to preserve and get in the assets of the company for the protection of the debenture holder, the shareholders, other creditors and the company. He is not entitled to engage in adversary proceedings as between the debenture holder and the company. Such an entitlement would place the receiver in an uncomfortable and untenable position, and would preclude the company from its right to be represented by counsel of its own choosing on all matters in dispute in respect of the contract itself.

In other words, although a receiver-manager is generally given the power to prosecute and defend actions, it is in a conflict of interest position when the litigation is between the security holder and the company in respect of which the receiver-manager has been appointed. As a result of the conflict of interest, the receiver-manager does not have the ability to be involved in the litigation, and the power to either defend an action instituted by the security holder or to make a claim or counterclaim against the security holder on behalf of the company remains vested in the directors.

44 In the present case, it is necessary to consider the steps taken by the Law Firm on the instructions of the New Directors and to determine whether the Receiver-Manager or the New Directors had the power in connection with the subject matter of those steps. If the Receiver-Manager had the power and was not prevented from exercising that power as a result of a conflict of interest or some other reason, then the New Directors did not have the power to give instructions to the Law Firm on behalf of the Company. However, if the Receiver-Manager did not have the power to do something, it will not necessarily follow that the New Directors had the power to do it to the exclusion of the Receiver-Manager. There may have been situations where there was an interplay between the powers remaining in the New Directors and the duties of the Receiver-Manager.

45 I have grouped the events of the receivership into the following general categories:

(a) defending the Evanton action;

(b) the Joint Venture Agreement;

(c) the bankruptcy proceedings;

(d) the corporate existence of American Bullion;

(e) refinancing to redeem the General Security Agreement;

(f) the voluntary foreclosure proposal and the bcMetals financing proposal.

I appreciate that not all of the work done by the Law Firm will fall within these categories. I also appreciate that some of the work done by the Law Firm will fall within more than one category (for example, the appearance by the Law Firm before Mr. Justice Groberman on February 10, 2003 related to the defence of the Evanton action and the injunction relating to the Joint Venture Agreement). As a result, the registrar who conducts the review of the Law Firm's accounts may have to make some further determinations as to whether the New Directors had the power to instruct the Law Firm on behalf of American Bullion and the extent to which work done by the Law Firm related to a matter within the powers of the New Directors.

46 In determining what powers remain with the New Directors, it is first necessary to ascertain the powers of the Receiver-Manager. In *Bennett on Receiverships*, 2nd ed. (Toronto, Carswell 1999), the author commented at p. 177 that "the scope and the extent of the receiver's powers has yet to be resolved in case law". It may be the case that the courts have not commented extensively on the powers of receivers but, in my view, a receiver-manager's powers must be primarily derived from the instrument or court order appointing the receiver-manager. Those powers may be supplemented or clarified by the law relating to receiver-managers generally. Any powers granted to the receiver-manager under an instrument appointment are superceded by a subsequent court appointment.

(a) Defending Evanton Action

47 Based on *Fortin* and my interpretation of s. 98 of the *Company Act*, the New Directors had the power to defend the action commenced by Evanton. This power extended to the application for the appointment of the Receiver-Manager, the applications in the Court of Appeal heard by Madam Justice Ryan and Madam Justice Levine, and the efforts to oppose the anticipated application for judgment by Evanton.

(b) Joint Venture Agreement

48 The Order of Mr. Justice Groberman (the "Appointment Order") gave the Receiver-Manager the power to preserve and protect the assets of American Bullion and to prosecute and defend all proceedings for the proper protection and preservation of the assets. The Receiver-Manager determined that it was in the best interests of American Bullion to preserve the Joint Venture Agreement and, therefore, confirmed its validity. The New Directors did not have the authority on behalf of American Bullion to jeopardize the Joint Venture Agreement, even if they did not believe it to be in the best interests of American Bullion. Similarly, the New Directors did not have the power to instruct the Law Firm on behalf of American Bullion to oppose the application made by the Receiver-Manager in connection with the postponement of the payments under the Joint Venture Agreement.

49 In addition, the application made by the New Directors in connection with the Joint Venture Agreement was pursuant to s. 126 of the *Company Act*. Subsection (1) of s. 126 prohibits the directors of a company from disposing of the whole or substantially the whole of the undertaking of the company in the absence of a special resolution. If there has not been a special resolution, s. 126(2) empowers the court to set aside the disposition on application of "any member, director or creditor" of the company. Hence, the application heard by Mr. Justice Pitfield in June 2003 could not have been made on behalf of American Bullion and the legal accounts relating to the application cannot be properly charged to American Bullion.

50 Although I have made specific reference to the application heard by Mr. Justice Pitfield, the evidence indicates that the focus of the New Directors during the first six months of the receivership was to set aside the Joint Venture Agreement. In reviewing the Law Firm's accounts during this period, the registrar should bear this in mind and should be cautious in deciding whether to attribute the Law Firm's work to one of the other categories.

(c) Bankruptcy Proceedings

51 The authorization given to the Receiver-Manager by the Appointment Order to prosecute and defend litigation was limited to proceedings "for the proper protection and preservation of the Assets". The fact that American Bullion may have become bankrupt would not have affected American Bullion's assets in the absence of a special circumstance because the vesting of title in those assets in the trustee in bankruptcy would have been subject to the General Security Agreement. Therefore, in view of the limitation in the authority given to the Receiver-Manager to defend litigation and the absence of a special circumstance, it did not have the power to defend the two bankruptcy proceedings, and the power to do so remained with the New Directors.

52 In addition, the Receiver-Manager was in a conflict of interest with respect to the bankruptcy proceeding commenced by Evanton. There is also evidence to suggest that the Receiver-Manager may have been in a conflict of interest position with respect to the bankruptcy proceeding commenced by Hunterbrooke Capital Corp. because its principal was the person who first approached D. Manning & Associates Inc. to act as the Receiver-Manager.

(d) Corporate Existence

53 D. Manning & Associates Inc. was appointed as the Receiver-Manager of all of the assets of American Bullion. Although it is common for a receiver-manager to be referred to as the "Receiver-Manager of XYZ Company Ltd.", the appointment of a receiver-manager is limited to assets owned by the debtor company, and does not extend to the corporate shell. The Receiver-Manager had no power or duty to maintain American Bullion's corporate existence. This is a residual power that remained with the New Directors.

54 It follows that the New Directors had the authority to instruct the Law Firm to take the steps necessary to preserve the corporate existence of American Bullion. This included the work done by the Law Firm in connection with the calling and holding of American Bullion's annual general meeting of June 30, 2003.

(e) Redemption Refinancing

55 Counsel for American Bullion concedes that the New Directors had the power to arrange for the redemption of the General Security Agreement and discharge of the Receiver-Manager by tendering the funds required to pay the secured indebtedness and costs of the receivership. However, counsel does not concede that the New Directors had the power to arrange for the redemption by utilizing the assets under the control of the Receiver-Manager. Under the Quest financing proposal, it was necessary for security to be granted over all of the assets of American Bullion.

56 In the present case, the Appointment Order did not give the Receiver-Manager the general power to sell or otherwise dispose of the assets of American Bullion. The Appointment Order did not grant judgment in favour of Evanton and, as pointed out in *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145 (B.C. C.A.), the remedy of sale should only be granted before judgment in special circumstances. However, the absence of the power of sale in the Receiver-Manager does not mean that the New Directors had the power to sell or otherwise dispose of American Bullion's assets without the concurrence of the Receiver-Manager.

57 The inability of directors to sell the assets when the debtor company is in receivership was acknowledged in *Newhart Developments Ltd.* at p. 821:

> What, of course, the directors cannot do, and to this extent their powers are inhibited, is to dispose of the assets within

> the debenture charge without the assent or concurrence of the receiver, for it is his function to deal with the assets in the first place so as to provide the means of paying off the debenture holders' claims.

Although the Receiver-Manager was not given a power of sale by the Appointment Order, it was given the power and duty to preserve and protect the assets of American Bullion. As a result, the New Directors did not have the power to sell or otherwise dispose of the assets unless the Receiver-Manager concurred.

58 It may be argued in the case of an instrument appointed receiver that as long as a refinancing arranged by the directors of the company is sufficient to pay off the indebtedness owing under the security and the receivership costs, the terms of the refinancing and the security granted for the refinancing are of no relevance to the receiver because the security holder which appointed the receiver will have been paid in full. However, duties of a receiver are significantly broader when it has been appointed by the court.

59 The duties of a court appointed receiver are described in the following passage at p. 180 of *Bennett on Receiverships*:

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation.

60 The Receiver-Manager had the duty to preserve and protect American Bullion's assets for the benefit of all interested parties. As a result, the Receiver-Manager had the duty to ensure that any refinancing involving a disposition of American Bullion's assets by way of the granting of security against them was in the best interests of all stakeholders. The Receiver-Manager was not restricted in the exercise of this power to only ensure that the indebtedness secured by the General Security Agreement and the receivership costs were paid. It follows that the New Directors did not have the power to obtain refinancing involving the granting of security without obtaining the concurrence of the Receiver-Manager, which they never sought.

61 The application to the court in connection with the Quest financing proposal is illustrative on this topic in two ways. First, it was necessary for the New Directors to apply for the authority to execute the documents required to implement the financing. The application to court was necessary because the New Directors did not have the power to proceed with the Quest financing without the assistance of the court (or the Receiver-Manager). The second illustrative point is that the Receiver-Manager took an active role in the application. The Receiver-Manager did not believe that the Quest financing proposal was in the best interests of American Bullion because there was another, more favourable, financing proposal. In supporting the other proposal, the Receiver-Manager was fulfilling its duty to preserve and protect American Bullion's assets for the benefit of all stakeholders, not just the holder of the General Security Agreement.

62 I conclude that, in the absence of the concurrence of the Receiver-Manager or prior authorization from the court, the New Directors did not have the power to arrange the Quest financing proposal and did not have the power to give instructions to the Law Firm on behalf of American Bullion in connection with the Quest financing proposal.

(f) Other Proposals

63 Similarly, it was the Receiver-Manager which had the power on behalf of American Bullion to decide whether the voluntary foreclosure proposal or the bcMetals financing proposal was in the best interests of American Bullion, and to make a recommendation to the court when bcMetals made its application for approval of one of those two proposals. As the Receiver-Manager had the power on behalf of American Bullion, the New Directors did not have the power to instruct the Law Firm to appear at the hearing on behalf of American Bullion or to apply for leave to appeal the order of Mr. Justice Masuhara.

64 I appreciate that the party making the application to court was bcMetals, the holder of the General Security Agreement. In many instances, a receiver could be regarded to be in a conflict of interest position when the holder of the security is the party making the application to court. In this case, however, I am satisfied that the Receiver-Manager was not in a conflict of interest position. bcMetals became the holder of the General Security Agreement subsequent to the appointment of the Receiver-Manager. The Receiver-Manager and bcMetals had acted at arm's length earlier in the receivership before bcMetals bought out the position of Evanton. The Receiver-Manager had independent legal counsel.

65 The final issue requiring consideration is the second part of Master Groves' question. As I have stated, I prefer to view the question in terms of whether there was anything in the conduct of the Law Firm or the New Directors to cause the court to exercise its inherent jurisdiction to deny payment to the Law Firm of any of its charges incurred upon the instructions of the New Directors (provided, of course, that the New Directors had the power to give those instructions on behalf of American Bullion).

66 I can appreciate the frustration of the current management of American Bullion. The New Directors were regarded as the adversaries during the receivership. They were creating difficulties for the joint venture to move forward with the exploration and development of the Red Chris claim. Their actions undoubtedly increased the costs of the receivership. Those matters may have given rise to claims against the New Directors and American Bullion (indeed, bcMetals obtained leave to commence action against American Bullion and threats of litigation were apparently made to the New Directors). However, those matters do not disentitle the Law Firm from being paid for its reasonable fees and disbursements incurred on the instructions of persons entitled to give those instructions on behalf of American Bullion.

67 There is no evidence that the New Directors lacked honesty or a genuine belief that their actions were in the best interests of American Bullion. While the New Directors obviously had a different perspective than the Receiver-Manager of what constituted the best interests of American Bullion, it was an honestly held view. The Law Firm believed that the steps which it took on the instructions of the New Directors had a reasonable prospect of success. There is no suggestion that the Law Firm took any steps for an improper purpose. Accordingly, there is no basis to deny the Law Firm its reasonable fees and disbursements in connection with the services it provided on authorized instructions from American Bullion.

Conclusion

68 I answer the question posed by Master Groves as follows:

> (a) the New Directors had the ability during the receivership to agree on behalf of American Bullion to pay for the Law Firm's legal services to the extent that those services related to (i) defending the Evanton action; (ii) defending the bankruptcy proceedings, and (iii) preserving the corporate existence of American Bullion;
>
> (b) the New Directors did not have the ability during the receivership to agree on behalf of American Bullion to pay for the Law Firm's legal services to the extent that those services related to (i) the Joint Venture Agreement, (ii) the Quest financing proposal, and (iii) the voluntary foreclosure proposal and the bcMetals financing proposal;
>
> (c) the Law Firm is not prevented from claiming the fees for the services referred to in clause (a) above as a result of the conduct of the New Directors or the Law Firm during the receivership.

69 Neither counsel made submissions with respect to the costs of this reference. The costs of a review proceeding are governed by s. 72 of the *Legal Profession Act* and, hence, I need not make any order as to the costs of this reference.

Order accordingly.

End of Document

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Cheema v. 894287 Alberta Ltd. | 2007 CarswellAlta 1901 | (Alta. Q.B., May 23, 2007)

2007 NLCA 7
Newfoundland and Labrador Court of Appeal

Maple Leaf Foods Inc. v. Markland Seafoods Ltd.

2007 CarswellNfld 83, 2007 NLCA 7, [2007] N.J. No. 22, 154 A.C.W.S. (3d) 853, 264 Nfld. & P.E.I.R. 126, 279 D.L.R. (4th) 682, 27 B.L.R. (4th) 1, 29 C.B.R. (5th) 270, 801 A.P.R. 126

Maple Leaf Foods Inc. (Appellant) and Markland Seafoods Ltd. (Respondent)

M.A. Cameron, M. Rowe, K.J. Mercer JJ.A.

Heard: October 12, 2006
Judgment: January 22, 2007
Docket: 05/85

Counsel: Philip Buckingham for Appellant
Wayne White for Respondent

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

Table of Authorities

Cases considered by *K.J. Mercer J.A.*:

ABC Color & Sound Ltd. v. Royal Bank (1990), 1990 CarswellAlta 257, 43 C.P.C. (2d) 92, 80 C.B.R. (N.S.) 141, 109 A.R. 156, 76 Alta. L.R. (2d) 73 (Alta. C.A.) — referred to

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

Clarkson Co. v. Credit foncier franco canadien (1984), 37 Sask. R. 295, 55 C.B.R. (N.S.) 206, 1984 CarswellSask 42 (Sask. Q.B.) — considered

Clarkson Co. v. Credit foncier franco canadien (1985), 57 C.B.R. (N.S.) 283, 44 Sask. R. 151, 1985 CarswellSask 61 (Sask. C.A.) — referred to

Del Zotto v. International Chemalloy Corp. (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268, 2 C.P.C. 198, 1976 CarswellOnt 75 (Ont. H.C.) — referred to

Federal Business Development Bank v. Shearwater Marine Ltd. (1979), [1979] 6 W.W.R. 426, 15 B.C.L.R. 106, 102 D.L.R. (3d) 257, 1979 CarswellBC 284 (B.C. C.A.) — considered

First Investors Corp. v. Prince Royal Inn Ltd. (1988), 60 Alta. L.R. (2d) 269, 1988 CarswellAlta 294, [1988] 5 W.W.R. 375, 69 C.B.R. (N.S.) 50, (sub nom. *Dworkin, Heumann v. Prince Royal Inn Ltd.)* 88 A.R. 372 (Alta. C.A.) — considered

Golden West Restaurants Ltd. v. Canadian Imperial Bank of Commerce (1989), 1989 CarswellSask 40, [1989] 5 W.W.R. 471, 77 Sask. R. 304, 75 C.B.R. (N.S.) 170 (Sask. Q.B.) — considered

Golden West Restaurants Ltd. v. Canadian Imperial Bank of Commerce (1990), 81 Sask. R. 312, 77 C.B.R. (N.S.) xxviii, [1990] 3 W.W.R. 287, 1990 CarswellSask 551 (Sask. C.A.) — referred to

Lang Michener v. American Bullion Minerals Ltd. (2006), 2006 BCSC 504, 2006 CarswellBC 753, 267 D.L.R. (4th) 553, 17 B.L.R. (4th) 113, 53 B.C.L.R. (4th) 380, 21 C.B.R. (5th) 118 (B.C. S.C.) — considered

Maple Leaf Foods Inc. v. North Atlantic Sea Farms Corp. (2005), 2005 NLTD 36, 245 Nfld. & P.E.I.R. 291, 730 A.P.R. 291, 2005 CarswellNfld 42 (N.L. T.D.) — considered

Newhart Developments Ltd. v. Cooperative Commercial Bank Ltd. (1978), [1978] Q.B. 814, [1978] 2 All E.R. 896 (Eng. C.A.) — considered

Paramount Acceptance Co. v. Souster (1981), [1981] 2 N.Z.L.R. 38 (New Zealand C.A.) — considered

Royal Bank v. Tower Aircraft Hardware Inc. (1991), 1991 CarswellAlta 302, 3 C.B.R. (3d) 60, 78 Alta. L.R. (2d) 271, 118 A.R. 86 (Alta. Q.B.) — considered

Toronto Dominion Bank v. Fortin (1978), [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111, 1978 CarswellBC 273 (B.C. S.C.) — considered

Statutes considered:

Business Corporations Act, R.S.S. 1978, c. B-10
s. 91 — considered

Companies Act, S.B.C. 1973, c. 18
s. 108 — considered

s. 109 — considered

Corporations Act, R.S.N. 1990, c. C-36
Generally — referred to

s. 161 — considered

s. 162 — considered

s. 163 — considered

s. 164 — considered

s. 165(e) — considered

s. 166(b) — considered

s. 167 — referred to

Personal Property Security Act, S.N. 1998, c. P-7.1
Generally — referred to

s. 65(1) — considered

s. 65(2)(a) — considered

s. 66 — referred to

s. 66(2) — considered

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D
R. 14 — referred to

R. 14.24 — referred to

R. 21 — referred to

APPEAL by creditor from decision dismissing application to strike action.

***K.J. Mercer J.A.*:**

1 This appeal considers whether the directors of a company in receivership may continue to control litigation against the secured creditor that placed the company into receivership, or whether control of such litigation rests with the privately appointed receiver-manager.

Background

2 The respondent (Markland) is incorporated under the *Corporations Act*, RSNL 1990, c. C-36. Its business had been the

farming of steelhead trout from its facilities at Conne River, Bay d'Espoir.

3 Beginning in the spring of 2001 Markland obtained the feed for its fish farms from the appellant (Maple Leaf) pursuant to a credit arrangement. That arrangement was evidenced by three documents of May 2, 2001 namely a Promissory Note, a Feed Supply and Credit Agreement, and a General Security Agreement registered under the *Personal Property Security Act*, SNL 1998, c. P-7.1 (the PPSA). On March 20, 2003 Markland and Maple Leaf renewed their arrangement with the execution of a further Promissory Note, Feed Supply and Credit Agreement, and a General Security Agreement likewise registered under the PPSA. That renewal extended the credit arrangement to March 20, 2004.

4 Subsequently Markland alleged that the feed supplied by Maple Leaf was of poor quality and caused the fish to regurgitate with resultant high mortality rates and poor growth. In affidavit evidence Markland stated that in November/December 2003 it sent samples of the feed to laboratories in Europe for testing and, by early January 2004, it refused to make any further direct payments to Maple Leaf on the credit account. According to Maple Leaf as of January 29, 2004 Markland was in default on its payment obligations and was then indebted to Maple Leaf in the amount of $2,584,732.17.

5 On February 2, 2004 Markland received the results of the laboratory testing. It considered those results to support its previous contention that the feed supplied by Maple Leaf was of poor quality and unfit for its intended purpose. On February 12, 2004 Markland commenced the legal action out of which this appeal arises (the action). The action, based in contract and tort, alleged that Maple Leaf breached its obligations by its provision of feed that was unfit for Markland's fish-farming operation. Markland claimed special damages exceeding six million dollars and general damages. The statement of claim filed by Markland did not challenge the validity of the General Security Agreement between the parties.

6 On March 8, 2004 Maple Leaf appointed Ernst & Young Inc. Receiver and Manager (Receiver-Manager) under the General Security Agreement. On March 12, 2004 the Receiver-Manager instructed the solicitor acting for Markland in the action to cease his representation and to return to the Receiver-Manager the Markland files in his possession. The solicitor did not comply with that instruction then or when it was subsequently reiterated. The directors of Markland continued to retain and instruct that solicitor to proceed with the action on behalf of Markland.

7 Following the sale of Markland's operating assets there remained, according to the Receiver-Manager, an outstanding deficiency in the debt owed Maple Leaf in the amount of $2,140,434.75 as of August 31, 2004. Sums totaling $1,180,000 were also owed to various unsecured creditors by Markland.

8 In February 2005 Maple Leaf brought an interlocutory application pursuant to rule 14.24 of the *Rules of the Supreme Court, 1986* (the Rules) seeking to have the action struck due to the lack of capacity of the Markland directors to carry the matter forward in the absence of the consent of the Receiver-Manager. Maple Leaf also filed a concurrent application that Markland post security for costs pursuant to Rule 21 of the Rules.

9 In support of the application to strike Maple Leaf filed an affidavit from a vice-president of the Receiver-Manager which stated, among other things, that Markland was insolvent, that its operations had ceased as of the date of the receivership, and that Markland had no assets available. The affidavit advised that the Receiver-Manager was not prepared to pursue the action against Maple Leaf and that Markland could not meet any order for costs arising from the action. The affidavit further stated:

> THAT as Receiver I have reviewed Markland's documents in order for the Receiver to be able to assess the Receiver's rights and any further opportunities for any justifiable and practical recoveries with respect to any accounts receivable or causes of action of Markland and to complete its administration of the Receivership. That I have found no justifiable basis for the claim that is the basis of this action and at no time has the Receiver consented to the issuance or the prosecution of this matter.
>
> para. 15 of Affidavit of Richard Cullen

10 In response to the above, Markland filed an affidavit from one of its directors which cited the laboratory test results,

and related documentation, in support of the assertion that Markland had a *bona fide* claim against Maple Leaf arising out of the supply of fish feed. The affidavit further suggested that the Receiver-Manager was in a conflict of interest in respect of decisions concerning the action as it was "appointed and acting primarily for the secured creditor ... which is the Defendant in this litigation" - Affidavit of Clyde Collier dated May 5, 2005 at para. 35.

11 The two applications brought by Maple Leaf were heard together. In his decision of June 30, 2005 the chambers judge dismissed the Rule 14 application to strike but ordered that Markland post $100,000 within ninety days under the Rule 21 application as security for costs. The chambers judge dismissed the Rule 14 application as he considered the law to be unclear whether the Markland directors could continue the action against Maple Leaf contrary to the instructions of the Receiver-Manager. In so doing he queried whether it was relevant that the action had been commenced prior to the appointment of the Receiver-Manager.

12 Maple Leaf appeals the disposition of the Rule 14 application to strike.

Issue

13 The sole issue for determination is whether the directors of Markland are entitled to control litigation against Maple Leaf following the appointment of the Receiver-Manager by Maple Leaf, and contrary to the instructions of the Receiver-Manager.

Applicable Statutory Provisions

14 The following statutory provisions were considered:

> **Corporations Act**
>
> **161.** Where a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
>
> **162.** A receiver or receiver-manager appointed by a court shall act in accordance with the directions of the court.
>
> **163.** A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and a direction of a court made under section 165.
>
> **164.** A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> > (a) act honesty and in good faith; and
> >
> > (b) deal with property of the corporation in his or her possession or control in a commercially reasonable manner.
>
> **165.** Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by an interested person, a court may make an order it thinks appropriate including
>
> .....
>
> > (e) an order giving directions on a matter relating to the duties of the receiver or receiver-manager.

166. A receiver or receiver-manager shall

. . . . .

(b) take into his or her custody and control the property of the corporation in accordance with the court order or instrument under which the receiver or receiver-manager is appointed;

. . . . .

Personal Property Security Act

65.(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or another Act, may provide for the receiver's rights and duties.

(2) A receiver shall

(a) take custody and control of the collateral in accordance with the security agreement or order under which the receiver was appointed, but unless appointed a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor;

. . . . .

66.(1) . . .

(2) All rights and obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised and discharged in good faith and in a commercially reasonable manner.

. . . . .

General Security Agreement

15 Maple Leaf's appointment of the Receiver-Manager was made pursuant to the General Security Agreement of March 20, 2003. The collateral charged under the General Security Agreement and the rights and duties of a receiver appointed thereunder are stated in the following Articles of that agreement:

1.1 *Definitions*. In this Agreement, unless something in the subject matter or context is inconsistent therewith:

. . . . .

(c) "Collateral" means, subject to Section 2.4, any and all of the undertaking, property and assets of the Borrower which are now or at any time hereafter owned by the Borrower or in which the Borrower now has or at any time hereafter acquires any interest of any nature whatsoever, including without in any way limiting the generality of the foregoing:

. . . . .

(iii) all present and future debts, accounts, claims, demands and amounts now or at any time hereafter due or accruing due or owing to or owned by the Borrower whether or not earned by performance, including without limitation its book debts, accounts receivable and claims under policies of insurance, all contracts, security interests and other rights and benefits in respect thereof, and all books, records, documents, papers and electronically recorded data, recording, evidencing, securing or otherwise relating to such debts, accounts, claims, demands and amounts or any part or parts thereof (herein collectively called the "Accounts"),

(iv) all present and future intangible personal property of the Borrower, including all contract rights, goodwill, patents, trade marks, trade names, business styles, copyrights and other industrial property, and all other choses in action of the Borrower of every kind, whether due at the present time or hereafter to become due or owing,

. . . . .

(x) all other books, accounts, invoices, letters, papers, documents and other records in any form evidencing or relating to the undertaking, property and assets of the Borrower which are subject to the Security Interest,

. . . . .

(l) "Receiver" means a receiver, receiver and manager or any similar person appointed in accordance with Subsection 4.1(n);

. . . . .

4.1 *Enforcement of Security*. Upon the occurrence of any Event of Default, the Security Interest hereby granted shall immediately become enforceable and the Lender may, forthwith or at any time thereafter and without notice to the Borrower, except as provided by applicable law or this agreement, take one or more of the following actions:

. . . . .

(n) appoint, by an instrument in writing delivered to the Borrower, a Receiver of the Collateral, and remove any Receiver so appointed and appoint another or others in its stead, or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver, it being understood and agreed that:

(i) the Lender may appoint any person, firm or corporation as Receiver,

(ii) such appointment may be made at any time, either before or after the Lender has taken possession of the Collateral,

(iii) the Lender may from time to time fix the reasonable remuneration of the Receiver and direct the payment thereof out of the Collateral or any proceeds derived from a sale or other disposition or dealing thereof or therewith, and

(iv) the Receiver shall be deemed to be the agent of the Borrower for all purposes and, for greater certainty, the Lender shall not be in any way responsible for any actions, whether willful, negligent or otherwise, of any Receiver or for any tax liabilities arising from the use, sale or other disposition of the Collateral by the Receiver (unless all rights of ownership in the Collateral have been transferred to and vested in the Lender prior to the use, sale or other disposition thereof by the Receiver), and the Borrower hereby agrees to indemnify and save harmless the Lender from and against any and all claims, demands, actions, costs, damages, expenses or payments which the Lender may hereafter suffer, incur or be required to pay as a result of, in whole or in part, any action taken by the Receiver or any failure of the Receiver to do any act or thing;

. . . . .

(p) exercise all of the rights under all contracts, notes, debentures or other instruments in writing comprising the Collateral as fully and effectually as if the Lender was the absolute owner thereof;

(q) commence legal proceedings for and on behalf of and in the name of either the Lender or the Borrower or both and at the expense of the Borrower in order to enforce the rights of the Borrower under any contracts, agreements, indentures or other instruments in writing which may form part of the Collateral; and

(r) take any other action, suit, remedy or proceeding authorized or permitted by this Agreement, the Credit Agreement, the *Act* or by law or equity.

. . . . .

4.4 *Lender to Mean Receiver.* For the purposes of Sections 4.1, 4.2 and 4.3, a reference to "Lender" shall, where the context permits, include any Receiver appointed in accordance with Subsection 4.1(n).

. . . . .

Analysis

16 Maple Leaf contends that the General Security Agreement reflected the clear contractual intention of the parties that:

> ... in exchange for advancing feed to the Respondent, feed ultimately of a value of in excess of 2 millions of dollars, the Appellant was to have the right to security for same as set out in the agreement of the parties. That security included the agreement of the Respondent that upon default a Receiver-Manager could be appointed, and that upon such appointment, that Receiver-Manager would have the right to take control of the entire collateral of the Respondent corporation, including outstanding legal actions, without interference by the Respondent or directors purporting to act on its behalf. ...
>
> Appellant's Factum, para. 18

Maple Leaf cites a leading text for the proposition that a privately appointed receiver is *prima facie* entitled to possession of all the debtor's assets to the extent charged under the security instrument — *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) (*Bennett*) at p. 186. Maple Leaf submits that by virtue of the General Security Agreement, the above noted statutory provisions, and the referenced law respecting private receiverships the Markland directors had neither capacity nor status to continue with the action following the appointment of the Receiver-Manager. It argues that the continuance of the action clearly constitutes an abuse of process.

17 In response Markland emphasizes the difference between duties of a court appointed receiver and a privately appointed receiver. It cites *Bennett* which states that the former has a fiduciary duty to all interested parties, including the debtor and its shareholders. Though the court appointment is initiated by the security holder the receiver, as a court officer, is neither an agent of the security holder nor of the debtor. In contrast the duties of a privately appointed receiver are primarily owed to the security holder who made the appointment. Such receiver does not have a fiduciary duty to the debtor. *Bennett* further observes that the common law and statutes now impose upon receivers, however appointed, the duty to act honestly and in good faith and to deal with receivership assets in a commercially reasonable manner. *Bennett*, pp. 24-28.

18 The authorities reviewed below analyze the factors to be considered when a receiver-manager and the directors of a debtor company contest the control of litigation. In so doing they acknowledge the importance of enabling the effective enforcement of security obligations while avoiding a formalistic approach to the interpretation of commercial contracts and

applicable legislation.

19 The legal position in the absence of legislation was addressed in *Newhart Developments Ltd. v. Cooperative Commercial Bank Ltd.*, [1978] 2 All E.R. 896 (Eng. C.A.), in which there was a private appointment of a receiver by a debenture holder. Subsequently the debtor company, without the consent of the receiver, sued the debenture holder alleging breach of the financing agreement for which the debenture was security. The debenture holder sought to have the writ set aside on the ground of irregularity as it was issued without the consent or knowledge of the receiver. The Court of Appeal upheld the right of the directors to bring the action on behalf of the debtor company, Shaw L.J. stating:

> But the provision in the debenture trust deed giving [the receiver the power to institute proceedings] is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.
>
> . . . . .
>
> If there is an asset which appears to be of value, although the directors cannot deal with it in the sense of disposing of it, they are under a duty to exploit it so as to bring it to a realisation which may be fruitful for all concerned.
>
> . . . . .
>
> I see no principle of law or expediency which precludes the directors of a company, as a duly constituted board ... from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders.
>
> pp. 900-901

20 He further noted that the receiver may be faced with a conflict of interest:

> In this particular case it does so happen that the receiver finds himself in a very curious and unenviable position because the action is directed against the very people who appointed him as receiver for the debenture holders. One can quite understand that a receiver so appointed, and let me say at once that the receiver appointed in this case is a member of a very distinguished firm of accountants, would find himself faced with a very great conflict of interest.
>
> p. 901

21 *Newhart* did not involve a statutory provision affecting the power of the directors upon the appointment of a receiver or receiver-manager. In Canada such provisions are prevalent and their effect has been considered in numerous cases. In *Toronto Dominion Bank v. Fortin*, [1978] 2 W.W.R. 761 (B.C. S.C.) a receiver-manager was appointed by the court in a debenture holder's action. The companies in receivership filed a defence in that action alleging, *inter alia*, that the receiver-manager, upon the direction of the debenture holder, had so misconducted himself as to impair the ability of the companies to redeem the assets charged. The debenture holder submitted that the directors lacked the power to instruct counsel to defend the action, arguing that the appointment of the receiver-manager had stripped the directors of their power to deal with all the affairs of the company. The Court referred to provisions of the *Companies Act*, S.B.C. 1973, c. 18 including:

> 108. Where a receiver-manager is appointed, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking for which he is appointed until he is discharged.
>
> 109. Every receiver-manager appointed by the Court is an officer of the Court and not of the corporation and he shall act in accordance with the directions of the Court.
>
> . . . . .

22 Anderson J. reasoned that:

> It seems to me, in the absence of authority, that the proper approach is to ascertain just what happens in fact when a receiver-manager is appointed:
>
> > The receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced.
> >
> > The company continues to exist and the board of directors remains in office.
>
> From the above it will be seen that, while the receiver is given exclusive powers over the assets and affairs of the company, including the right to bring and defend actions relating to the assets and affairs of the company, he is not given the power to interpret or in any manner concern himself with the contract made between the debenture holder and the company. It is for the court to interpret the contract between the parties and to determine, upon the whole of the evidence, including the conduct of the receiver, the rights and liabilities of the parties.
>
> If counsel for the plaintiff were correct, as soon as a receiver was appointed the board of directors would be precluded from filing a defence to the action and only the receiver would have the right to file a defence. In my view such matters are not the concern of the receiver, whose sole task is to preserve and get in the assets of the company for the protection of the debenture holder, the shareholders, and other creditors and the company. He is not entitled to engage in adversary proceedings as between the debenture holder and the company. Such an entitlement would place the receiver in an uncomfortable and untenable position, and would preclude the company from its right to be represented by counsel of its own choosing on all matters in dispute in respect of the contract itself.
>
> pp. 764-765
>
> . . . .
>
> I also hold that when the receiver took over "the undertaking of the Companies" he did not take over the contract made between the plaintiff and the companies. The contract retained a separate existence from "the undertaking" of the companies and the board of directors continued to have the power to instruct counsel in respect of the contract.
>
> p. 766

23 *Newhart* was not cited in *Fortin*. Nevertheless Anderson J. reached the same conclusion as the English Court of Appeal, though in the context of a court appointment of the receiver-manager and statutory provisions suspending directors' powers during receivership.

24 A different result was reached in *Federal Business Development Bank v. Shearwater Marine Ltd.* (1979), 102 D.L.R. (3d) 257 (B.C. C.A.). In *Shearwater* there had been a court appointment of a receiver-manager in a debenture holder's action. The debtor company filed a counterclaim against the debenture holder. The Court, without reference to *Fortin*, cited ss. 108 and 109 of the *Companies Act* — see para. 21 above, and stated:

> In the face of that legislation the question arises: What powers were left to anybody, other than the receiver-manager, to bring any action? And, of course, this counterclaim is the equivalent of bringing a new action. In my opinion, no powers were reserved to the directors, or to anybody else, to instruct counsel to bring that counterclaim.
>
> p. 259

The Court, citing *Del Zotto v. International Chemalloy Corp.* (1976), 14 O.R. (2d) 72 (Ont. H.C.), held that a counterclaim could only be pursued with prior leave of the Court and, as prior leave had not been obtained, the counterclaim was struck. The disposition in *Shearwater* appears, however, to differ from that in the majority of recent Canadian cases.

25 *Fortin* and in particular the passage on p. 766 quoted above was applied by the Saskatchewan Court of Appeal in *Bank of Nova Scotia v. Saskatoon Salvage Co. (1954)* (1983), 51 C.B.R. (N.S.) 167 (Sask. C.A.). *Saskatoon Salvage* also involved the court appointment of a receiver-manager following a debenture holder's application and consideration of the *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 91 which reads:

> 91. If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

26 The powers of a receiver-manager and directors of a debtor company were again considered by the Saskatchewan courts in *Clarkson Co. v. Credit foncier franco canadien* (1984), 55 C.B.R. (N.S.) 206 (Sask. Q.B.), affirmed (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.) and in *Golden West Restaurants Ltd. v. Canadian Imperial Bank of Commerce*, [1989] 5 W.W.R. 471 (Sask. Q.B.), affirmed [1990] 3 W.W.R. 287 (Sask. C.A.). In the latter case the debtor company commenced legal action against the debenture holder and receiver-manager. Gerein J. referred to s. 91 of the *Business Corporations Act* — see para. 25 above — and observed that it made no distinction between a court or instrument appointment of a receiver-manager. The debenture holder and receiver-manager contended that s. 91 and the court order vested all authority for the entirety of the debtor's affairs in the receiver-manager and divested its directors completely of their powers. Gerein J. rejected the contention, stating:

> In my opinion, the section itself contains a qualification. The powers of the directors are restricted only to the extent that a receiver-manager is "authorized" to exercise those powers. Thus, if certain powers are not conferred upon a receiver-manager, then those powers remain in the directors.
>
> In the instant case, neither the debenture agreement nor the court order prohibit the debtor corporation from seeking relief by way of action from the creditor or the receiver-manager on the basis of unlawful conduct or mismanagement. Section 91 of itself has meaning only by reference to the court order or the debenture. It does not operate in a vacuum or on its own so as to remove or restrict powers of directors when it has not been done by a court or instrument.
>
> In the instant case, the receiver-manager is empowered to initiate and defend suits and actions. However, that power is only in respect to suits and actions relative to the property and assets of the debtor corporation. Section 91 cannot be read as granting to a receiver-manager a form of immunity for unlawful conduct. Nor can it be said that the court order or debenture does this.
>
> p. 475

27 *First Investors Corp. v. Prince Royal Inn Ltd.*, [1988] 5 W.W.R. 375 (Alta. C.A.) followed *Newhart* and *Fortin* in holding that the appointment of a receiver-manager did not divest the directors of a debtor company of their power to instruct counsel to act for the company where their actions did not prejudice the position of the debenture holder. That position was reiterated in *ABC Color & Sound Ltd. v. Royal Bank* (1990), 80 C.B.R. (N.S.) 141 (Alta. C.A.). In *First Investors* the Court cited with approval a decision of the New Zealand Court of Appeal — *Paramount Acceptance Co. v. Souster*, [1981] 2 N.Z.L.R. 38 (New Zealand C.A.). In that case a receiver sought to strike out an action brought by the directors of a company in receivership against the receiver and the debenture holder. Davison C.J. stated:

> Now the appellant was in receivership and where as here a receiver and manager is appointed over the whole of the undertaking, the directors will for most practical purposes become functus officio. *Moss Steamship Co Ltd v Whinney*, [1912] AC 254, 263, per Lord Atkinson:
>
> > This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants

> annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

But the directors still retain residual powers, and if the receiver does not wish to cause the company to bring an action then the directors may do so without his consent so long as the company is indemnified against any liability for costs. *Newhart Developments Ltd v Co-op Commercial Bank Ltd* [1978] QB 814, 819; [1978] 2 All ER 896, 900.

pp. 42-43

28 In *Royal Bank v. Tower Aircraft Hardware Inc.* (1991), 3 C.B.R. (3d) 60 (Alta. Q.B.), a receiver-manager was appointed by the court upon application of a debenture holder. The debtor company filed a defence and counterclaim against the debenture holder. The court had to address whether the counterclaim should be funded from the assets of the debtor corporation. Forsyth J. observed:

> 20 ... The receiver-manager takes the position that under these circumstances, notwithstanding his duty to all creditors as well as to the bank which retained him as a result of being a court-appointed receiver, he should not become involved in litigation between the creditor at whose behest the receiver was appointed and the shareholders and officers of the debtor corporation, who wish to bring action against the appointing creditor. The receiver cites as authority for that proposition a decision of Van Camp J. of the Supreme Court of Ontario in *Del Zotto v. International Chemalloy Corp.* (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268 (H.C.). Similarly, in the decision of *Toronto-Dominion Bank v. Fortin*, 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111, at p. 172 [C.B.R.], Anderson J. of the British Columbia Supreme Court stated [page 765 of Fortin].
>
> 21 I am in accord that in the circumstances of this case, the receiver should not become involved as a party in the action involving the claim by the plaintiff and the defendants by counterclaim.
>
> 22 Turning now to the issue whether the counterclaim should be funded from the sale and assets of the undertaking of the corporate defendants, I would note that the directors of those corporations, notwithstanding the status of the companies, retain the legal authority to pursue such action against the plaintiff on behalf of the corporate defendants.

29 Following consideration of *Newhart* and *First Investors* he concluded that the counterclaim should not be funded from the receivership as it did not dispute the debenture holder's right to enforce its security.

30 *Maple Leaf Foods Inc. v. North Atlantic Sea Farms Corp.*, 2005 NLTD 36, 245 Nfld. & P.E.I.R. 291 (N.L. T.D.) (cited as *Maple Leaf Foods Inc. v. North Atlantic Sea Farms Corp.*), involved the same litigant, Maple Leaf, and the same form of General Security Agreement as in this action. In that case the debtor company, following the private appointment of a receiver by Maple Leaf pursuant to the General Security Agreement, commenced legal action against Maple Leaf alleging a breach of that agreement and other security documents. Maple Leaf, as in this case, brought an application under Rule 14.24 to strike out the statement of claim, contending that the debtor company lacked the capacity to bring the action. Faour J., having referenced ss. 161 and 164 of the *Corporations Act*, s. 66 of the PPSA and the General Security Agreement, stated:

> [12] ... Those provisions charge the receiver, once appointed, with all of the powers of the directors, subject to the provisions of the security document, and prohibit the directors from undertaking any action for which power is given the receiver under the security document.
>
> [13] I agree that the power to sue or defend against being sued is reserved to the receiver. The respondents had entered into an agreement which had very specific terms which would be invoked once a receiver was appointed. The result is that if the security document reserves the powers to the receiver, then the directors may not exercise those powers: **FBDB v. Shearwater Marine...**

> [14] It brings us to the core question of whether the power to commence an action on the security document itself was included in the broad scope of the security document. ...

31 Following a review of various authorities including *Golden West, Fortin, Clarkson* and *Del Zotto* he concluded:

> [19] In my view, an action based on the contract between the parties is of a different character, *vis a vis* the security document, than actions or other proceedings which arise from the undertaking of the enterprise. An attempt to prevent the respondent from seeking an interpretation from the court, in the absence of very specific language in the security document, would be unreasonable. It would provide absolutely no mechanism to address the case of a lender which acted with impunity. And to give such a power to a receiver appointed under a security document would give rise to an unreasonable result. How could a receiver, who by its appointment must act to protect the interest of the lender, be put into a position adversarial to that lender, should there be a disagreement over the actions of the lender under the document.
>
> [20] I am satisfied that the security agreement between the parties did not purport to transfer the right to commence an action on the agreement itself to the receiver. In any event, the court must have the power to adjudicate disagreements on such agreements. If the borrower is to be taken to have contracted out of its right to litigate the contract itself, then the wording would have to be very explicit, and in my view, would have to be interpreted quite strictly against the party seeking to prevent such an action.

32 Accordingly the debtor corporation was permitted to pursue its claim against *Maple Leaf.* He granted the alternate application for security for costs, citing *Newhart* and other authorities for the proposition that:

> [36] ... Debenture-holders should be protected from the negative consequences of litigation on the security document itself. Where, as in this case, the costs of any action are likely to diminish the value of the security, the courts will attempt to ensure the litigation does not proceed on the backs of the debenture holders: ...Generally it would be considered as a condition for allowing the action to continue that the directors, or the guiding minds of the respondent, put up security. [The last sentence of this paragraph was omitted in error from the report in the Nfld. & P.E.I.R.].

33 More recently *Lang Michener v. American Bullion Minerals Ltd.* (2006), 267 D.L.R. (4th) 553 (B.C. S.C.) discussed the residual powers of the directors of a corporation in receivership. In that case Tysoe J. stated that *Newhart* articulated the common law position which had been overridden by statute. The statutory provision cited was the current version of that discussed in *Fortin* — see para. 21 — above. He continued:

> [39] In my view, the intent of s. 98 is to take away from the directors such of their powers as are given to a receiver-manager ....
>
> [40] A determination of the powers remaining in the directors must logically involve a consideration of the powers given to the receiver. If a power residing in the directors prior to the appointment of a receiver-manager is not given to the receiver manager, the Legislature could not have intended that neither would be able to exercise the power. This is why the powers remaining in the directors are commonly referred to as residual powers.
>
> [41] On a literal interpretation of s. 98, the powers of the directors to deal with the assets of the corporation over which the receiver-manager is appointed cease until the receiver-manager is discharged. However, directors have powers that do not involve dealings with the assets, and those powers remain with the directors despite the appointment of a receiver-manager.

34 Tysoe J. considered that *Fortin* at p. 765 correctly stated the basis for resolving whether the receiver-manager has exclusive control of litigation. He concluded:

> [43] ... In other words, although a receiver-manager is generally given the power to prosecute and defend actions, it is in a conflict of interest position when the litigation is between the security holder and the company in respect of which the receiver-manager has been appointed. As a result of the conflict of interest, the receiver-manager does not have the ability to be involved in the litigation, and the power to either defend an action instituted by the security holder or to make a claim or counterclaim against the security holder on behalf of the company remains vested in the directors.

35 Consideration of these authorities and the applicable statutory provisions leads me to conclude that the proper approach to the resolution of this appeal is as stated in the following paragraphs.

36 Prior to receivership the directors of a company exercise the powers of the company and direct the management of the business and affairs of the corporation. *Corporations Act*, s. 167.

37 Upon the appointment of a receiver-manager by the court or under an instrument, the powers of the directors that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged: *Corporations Act*, s. 161. Section 161 is to the same effect as the statutory provision in *Fortin*, *Saskatoon Salvage* and *Lang Michener*. Upon a receivership the directors retain residual powers. Through they are displaced in respect of powers exercisable by the receiver-manager, they remain in office and can exercise limited functions. *Fortin*, p. 764.

38 The powers of the receiver-manager are stated in the court order of appointment or in the private appointment as authorized by the security instrument (see para. 41 below). Powers which the receiver-manager is not authorized to exercise remain vested in the directors. *Golden West* at p. 475; *Lang Michener* at para. 40.

39 A privately appointed receiver-manager has a fiduciary duty to the security holder which appointed it. Accordingly it is in a conflict of interest position in respect of potential litigation by the debtor company against that security holder. As a result of that conflict of interest the receiver-manager is not authorized to be involved in such litigation. Control of such litigation is one of the residual powers remaining in the directors. *Newhart*, p. 901; *Lang Michener*, para. 43; *Maple Leaf Foods*, para. 19.

40 Though a court appointed receiver-manager owes a fiduciary duty to all parties, including the debtor company, its position respecting litigation against the secured creditor, at whose behest it was appointed, is the same as that of the privately appointed receiver. *Fortin*, p. 765; *Royal Bank*, paras. 20-21.

41 The foregoing conclusion that the receiver-manager lacks authorization respecting litigation against the secured creditor is based upon broad legal principles respecting potential conflicts in receiverships. It is also clearly supported by the proper interpretation of standard debentures, and other security documents, as to whether the debenture or security document is part of the undertaking of the debtor company. *Fortin*, p. 766. *Saskatoon Salvage*, p. 171. In view of the broad principles involved it cannot be assumed, in my opinion, that a re-drafting of security documents can easily eliminate the residual power of directors over litigation against the secured creditor which initiated a receivership. There are public policy concerns which argue strongly against a debtor's access to the courts being eliminated. See *Fortin*, p. 765 and *Maple Leaf Foods*, para. 20. The legal position could doubtless be altered by legislation or by the specific terms in the court appointment of a receiver-manager though it is difficult to readily conceive that receiverships generally or in a specific situation should require the elimination of the directors' residual power over such litigation.

42 The directors' residual power is subject to the restriction that the litigation should not threaten the interests of the secured creditor — *Newhart*; *First Investors*. The "interests of the secured creditor" in this context refers to the risk of dissipation of the assets of the debtor company. Accordingly the directors who wish to direct litigation will generally be required to post security for costs — see, for example, *ABC Colour & Sound* at p. 144; *Maple Leaf Foods* at para. 36.

43 In this appeal Maple Leaf emphasized that Markland was not disputing the validity of the General Security Agreement under which the Receiver-Manager was appointed. It argued that the principles articulated in *Fortin* and subsequent cases were therefore inapplicable. I reject that submission. The authorities establish that the directors' power over litigation involving the secured creditor is not restricted to that challenging the security document under which the receiver-manager is appointed — see *Newhart*; *First Investors*. The concern over conflict of interest remains whether the challenged litigation involving the secured creditor arises from the security document or other contracts or alleged tortious conduct.

44 As stated above s. 161 of the *Corporations Act* leaves the directors of Markland, upon the receivership, with those powers not conferred upon the Receiver-Manager. The Receiver-Manager by operation of law lacks the authority to conduct litigation against Maple Leaf, the secured creditor which appointed it. The directors are therefore entitled to continue to direct the litigation.

45 Accordingly the appeal is dismissed. The respondent shall have its costs on a party and party basis.

Appeal dismissed.

End of Document

TAB 7

2017 ONCA 301
Ontario Court of Appeal

Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.

2017 CarswellOnt 5333, 2017 ONCA 301

In the Matter of section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended, and section 68 of the Construction Lien Act, R.S.O. 1990, C.30, as amended

Romspen Investment Corporation (Applicant) andCourtice Auto Wreckers Limited, Northwood Recycling & Energy Inc., 800619 Ontario Limited, Power Grow Systems Inc., Courtice Energy Corp., Les Rebuts De Pates et Papiers De L'Outaouais Ltee.,Les Amenagements Guirard Inc., Courtice Industries Inc., 2254066 Ontario Inc., and Lakes Terminals & Warehousing Ltd. (Respondents)

Doherty J.A., J.C. MacPherson J.A., P. Lauwers J.A.

Heard: December 6, 2016
Judgment: April 13, 2017
Docket: CA C62103

Proceedings: reversing *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.* (2016), 36 C.B.R. (6th) 141, 2016 CarswellOnt 5634, 2016 ONSC 1808 (Ont. S.C.J.)

Counsel: Mark Zigler, James Harnum, for Appellant, International Union of Operating Engineers, Local 793
Lisa S. Corne, David P. Preger, for Respondent, Rosen Goldberg Inc., in its capacity as court-appointed Receiver

Subject: Civil Practice and Procedure; Insolvency; Public; Labour

Table of Authorities

Cases considered by *J.C. MacPherson J.A.*:

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — followed

Enroute Imports Inc., Re (2016), 2016 ONCA 247, 2016 CarswellOnt 5045, 35 C.B.R. (6th) 1 (Ont. C.A.) — followed

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — followed

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community (2012), 2012 ONSC 7319, 2012 CarswellOnt 16827, 97 C.B.R. (5th) 303, 19 C.L.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered

Cases considered by *P. Lauwers J.A.* (dissenting):

AbitibiBowater inc., Re (2010), 2010 QCCS 1065, 2010 CarswellQue 2332 (C.S. Que.) — refered to in a minority or dissenting opinion

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — considered in a minority or dissenting opinion

Canwest Global Communications Corp., Re (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 2004 CSC 3, 70 O.R. (3d) 254 (S.C.C.) — considered in a minority or dissenting opinion

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — considered in a minority or dissenting opinion

Essar Steel Algoma Inc., Re (2016), 2016 ONSC 1802, 2016 CarswellOnt 4103, 35 C.B.R. (6th) 89 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Essar Steel Algoma Inc., Re (2016), 2016 ONCA 274, 2016 CarswellOnt 5758, 36 C.B.R. (6th) 56 (Ont. C.A.) — refered to in a minority or dissenting opinion

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — considered in a minority or dissenting opinion

Gordon v. Canada (Attorney General) (2016), 2016 ONCA 625, 2016 CarswellOnt 13037, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 351 O.A.C. 44, 2016 C.L.L.C. 220-058, 404 D.L.R. (4th) 590, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 364 C.R.R. (2d) 164 (Ont. C.A.) — refered to in a minority or dissenting opinion

Gordon v. Canada (Attorney General) (2017), 2017 CarswellOnt 2265, 2017 CarswellOnt 2266 (S.C.C.) — refered to in a minority or dissenting opinion

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — refered to in a minority or dissenting opinion

Hawkair Aviation Services Ltd., Re (2006), 2006 BCSC 669, 2006 CarswellBC 1007, 22 C.B.R. (5th) 11, 18 B.L.R. (4th) 294 (B.C. S.C. [In Chambers]) — refered to in a minority or dissenting opinion

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered in a minority or dissenting opinion

Ma, Re (2001), 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68, 143 O.A.C. 52 (Ont. C.A.) — considered in a minority or dissenting opinion

Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General) (2015), 2015 SCC 1, 2015 CSC 1, 2015 CarswellOnt 210, 2015 CarswellOnt 211, 380 D.L.R. (4th) 1, 249 L.A.C. (4th) 1, 2015 C.L.L.C. 220-010, 466 N.R. 199, 328 O.A.C. 1, (sub nom. *Mounted Police Association of Ontario v. Canada (Attorney General))* [2015] 1 S.C.R. 3, 325 C.R.R. (2d) 300, 129 O.R. (3d) 559 (note) (S.C.C.) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3583, 75 C.C.P.B. 233, 55 C.B.R. (5th) 68 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2009), 2009 ONCA 833, 2009 CarswellOnt 7383, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, 256 O.A.C. 131, (sub nom. *Sproule v. Nortel Networks Corp.)* 99 O.R. (3d) 708 (Ont. C.A.) — considered in a minority or dissenting opinion

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1760, 2010 CarswellOnt 1761, 406 N.R. 390 (note), 270 O.A.C. 400 (note) (S.C.C.) — refered to in a minority or dissenting opinion

PIPSC v. Canada (Attorney General) (2017), 2017 CarswellOnt 2263, 2017 CarswellOnt 2264 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Fitzgibbon (1990), [1990] 1 S.C.R. 1005, 107 N.R. 281, 40 O.A.C. 81, 78 C.B.R. (N.S.) 193, 55 C.C.C. (3d) 449, 76 C.R. (3d) 378, 1990 CarswellOnt 172, 1990 CarswellOnt 996 (S.C.C.) — refered to in a minority or dissenting opinion

Royal Canadian Mounted Police v. Canada (Attorney General) (2015), 2015 SCC 2, 2015 CSC 2, 2015 CarswellNat 16, 2015 CarswellNat 17, 380 D.L.R. (4th) 92, 249 L.A.C. (4th) 98, (sub nom. *Meredith v. Canada (Attorney General))* 2015 C.L.L.C. 220-011, (sub nom. *Meredith v. Canada (Attorney General))* 466 N.R. 338, (sub nom. *Meredith v. Canada (Attorney General))* [2015] 1 S.C.R. 125, (sub nom. *Meredith v. Canada (Attorney General))* 325 C.R.R. (2d) 278 (S.C.C.) — refered to in a minority or dissenting opinion

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 190, 46 C.B.R. (4th) 126, (sub nom. *Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 & 2225-12 v. Ernst & Young Inc. (as trustee for Royal Crest Lifecare Group Inc.))* 2004 C.L.L.C. 220-014, 181 O.A.C. 115, (sub nom. *C.U.P.E., Locals 1712, 3009, 2225-05, 2225-06, 22512 v. Royal Crest Lifecare Group Inc. (Trustee of))* 98 C.L.R.B.R. (2d) 210 (Ont. C.A.) — refered to in a minority or dissenting opinion

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 2984, 2004 CarswellOnt 2985, (sub nom. *C.U.P.E., Locals 1712 v. Royalcrest Lifecare Group)* 332 N.R. 399 (note) (S.C.C.) — refered to in a minority or dissenting opinion

SFL v. Saskatchewan (2015), 2015 SCC 4, 2015 CSC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, [2015] 3 W.W.R. 1, D.T.E. 2015T-88, 248 L.A.C. (4th) 271, 380 D.L.R. (4th) 577, 2015 C.L.L.C. 220-014, 467 N.R. 3, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 451 Sask. R. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 628 W.A.C. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* [2015] 1 S.C.R. 245, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 328 C.R.R. (2d) 1, 281 C.L.R.B.R. (2d) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered in a minority or dissenting opinion

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — refered to in a minority or dissenting opinion

White Birch Paper Holding Co., Re (2010), 2010 QCCS 2590, 2010 CarswellQue 6229, D.T.E. 2010T-443, 82 C.C.P.B. 192, 65 C.B.R. (5th) 186, [2010] R.J.Q. 1518, [2010] R.J.D.T. 887, 2010 CarswellQue 14255 (C.S. Que.) — refered to in a minority or dissenting opinion

407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy) (2015), 2015 SCC 52, 2015 CSC 52, 2015 CarswellOnt 17183, 2015 CarswellOnt 17184, 85 M.V.R. (6th) 1, 30 C.B.R. (6th) 207, 391 D.L.R. (4th) 248, (sub nom. *Moore (Bankrupt), Re)* 340 O.A.C. 1, (sub nom. *Moore (Bankrupt), Re)* 477 N.R. 1, [2015] 3 S.C.R. 397 (S.C.C.) — considered in a minority or dissenting opinion

Statutes considered by *J.C. MacPherson J.A.*:

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

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 72(1) — considered

s. 193(a) — considered

s. 193(a)-193(c) — referred to

s. 193(c) — considered

s. 193(e) — considered

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

Statutes considered by *P. Lauwers J.A.* (dissenting):

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

s. 37 — referred to

s. 43 — considered

s. 49 — considered

s. 50 — considered

s. 57 — considered

ss. 69-69.3 — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 72 — considered

s. 72(1) — considered

s. 141 — considered

s. 215 — referred to

s. 243 — considered

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

s. 1 — considered

s. 2(d) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 et seq. — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 33 — considered

s. 33(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 101 — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

s. 43 — referred to

APPEAL by union from judgment reported at *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.* (2016), 2016 ONSC 1808, 2016 CarswellOnt 5634, 36 C.B.R. (6th) 141 (Ont. S.C.J.), dismissing its motion seeking leave to proceed with matters relating to certification and unfair labour practices before Ontario Labour Relations Board.

J.C. MacPherson J.A.:

A. INTRODUCTION

1 The appellant International Union of Operating Engineers, Local 793 (the "union") appeals from the decision of Wilton-Siegel J. (the "motion judge") of the Superior Court of Justice (Commercial List). The motion judge dismissed the union's motion seeking leave to proceed with matters relating to certification and unfair labour practices before the Ontario Labour Relations Board (the "OLRB"). The issue on the appeal is whether the motion judge erred in so doing.

B. FACTS

(1) The parties and events

2 On the application of Romspen Investment Corporation as secured creditor, and pursuant to an order of Penny J. of the Superior Court of Justice on October 19, 2015, Rosen Goldberg Inc. (the "Receiver") was appointed Receiver of several corporations (together, the "Ambrose Group"). One of those corporations is Courtice Auto Wreckers Limited (the "employer"). Paragraphs 7 and 8 of the receivership order provide that no proceeding can be commenced or continued in any court or tribunal against the Receiver or the debtors except with the consent of the Receiver or with leave of the court.

3 On December 9, 2015, the union applied to the OLRB for certification, seeking to represent a bargaining unit comprised of six employees at the employer's Harmony Road location in Oshawa (also known as Ontario Disposal).

4 The union asserts that two days later, on December 11, the Receiver dismissed four of the six employees in the proposed bargaining unit and, on December 14, hired new workers to perform duties substantially similar to those performed by the dismissed employees. The Receiver offers business reasons for the dismissals and denies hiring replacement workers.

5 On December 14, the OLRB stayed the union's certification application, holding that the stay imposed by the receivership order applied.

6 On December 18, the union filed an unfair labour practice ("ULP") complaint with the OLRB, alleging that the Receiver dismissed the employees at least in part as a result of anti-union animus.

7 In light of the OLRB's decision on December 14, the union sought leave of the court to proceed with its certification application and ULP complaint at the OLRB.

(2) The motion judge's decision

8 The motion judge dismissed the union's motion in its entirety.

9 The motion judge framed the inquiry in this fashion:

> [23] The Union's motion raises two separate, but related, issues. The Union seeks an order lifting the stay of proceedings under paragraphs 8 and 9 of the Receivership Order to allow it to proceed with the Certification Application against the Debtor. In addition, as the ULP Complaint will also require an inquiry into the conduct of the Receiver, the Union seeks an order lifting the stay of proceedings under paragraph 7 of the Receivership Order, as well as an order granting leave to proceed against the Receiver under section 215 of the *BIA*, in respect of the ULP Complaint.

10 With respect to the first issue — the certification issue — the motion judge considered whether he should make an order validating the commencement of the certification application on a *nunc pro tunc* basis. He framed the issue in this fashion:

> [43] In considering the Union's request for an order lifting the stay of proceedings in respect of the Certification Application on a *nunc pro tunc* basis, the Court must first address whether such an order would have been granted if it had been sought prior to commencement of the Certification Application.

11 The motion judge concluded that the court would not have granted leave at the relevant time. He offered four reasons in support of this conclusion:

- The effect of the certification application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group. This would be contrary to the policy and purpose of the stay of proceedings, which effectively freezes the rights and remedies of all creditors of the debtor as of the date of the receivership order.

- Recognition of the proposed bargaining unit could impact the sale of Ontario Disposal and the proceeds that can be realized therefrom. It is inequitable to require creditors to accept a potential diminution in the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen.

- The fact that there may be purchasers who are willing to take Ontario Disposal assets subject to the proposed bargaining unit does not support the case for lifting the stay. In such circumstances, the union will be able to pursue the certification application against the purchaser as soon as a sale is completed. Accordingly, the union is not prejudiced by the stay.

• There is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets. There is no guarantee what form the sale of Ontario Disposal assets will take.

12 Turning to the question of whether leave should be granted to permit the union to proceed with its ULP complaint, the motion judge again provided a negative answer. The core of his reasoning on this issue was:

> [57] [U]nless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action. Therefore, unless the Certification Application was validly commenced, there can be no ULP Complaint. Given the determinations above that the Certification Application is null and void, and that there is no basis for an order lifting the stay in respect of the Certification Application on a *nunc pro tunc* basis, it follows that there is no basis for the ULP Complaint.

13 The union appeals from the motions judge's order.

14 The Receiver moves to quash the appeal on the basis that the motion judge's order does not fall within the meaning of s. 193(a) through (c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Accordingly, the appeal cannot proceed without leave of a judge of this court. The union did not seek the required leave when it filed its notice of appeal.

15 The union resists the Receiver's motion to quash. The union asserts that there is an automatic right of appeal under s. 193(a) and (c) for appeals involving "future rights" and property in excess of $10,000 and that its appeal implicates these categories.

16 In the alternative, if this court determines that s. 193(a) and (c) of the *BIA* do not support its direct appeal, the union makes a cross-motion seeking leave to appeal pursuant to s. 193(e) of the *BIA*.

C. ISSUES

Preliminary issues

(1) Is the appeal as of right pursuant to ss. 193(a) or 193(c) of the *BIA*?

(2) If the answer to (1) is 'No', should the union be granted leave to appeal pursuant to s. 193(e) of the *BIA*?

The appeal

(3) Did the motion judge err by not granting the union leave to continue its certification application at the OLRB?

(4) Did the motion judge err by not granting the union leave to continue its ULP complaint at the OLRB?

D. ANALYSIS

***Preliminary issues*[1]**

(1) Motion to quash

17 The union says that its appeal is as of right under either s. 193(a) or (c) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> . . . . .
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

(a) BIA s. 193(a)

18 The union asserts that in this case there are legal rights at issue that qualify as inchoate future rights. These future rights include the union's right to bargain collectively for its members (which only exists if the certification application is successful) and the employees' right to be represented by a union of their choice in their dealings with their employer.

19 I do not accept this submission. The leading case dealing with the interpretation of s. 193(a) of the *BIA* is *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.) ("*Pine Tree Resorts*"), where Blair J.A. defined "future rights", at para. 15:

> "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future. [Citations omitted.]

20 In this proceeding, the right at issue before the motion judge was the union's existing right to apply for certification at a time when a stay is in place. Accordingly, it cannot reasonably be said that the union's right to apply for certification depended on a future event that had not yet occurred.

(b) BIA s. 193(c)

21 The union contends that the rights at issue in its ULP complaint exceed $10,000. In addition to reinstatement of the four terminated employees, the union will seek back pay and damages that will exceed $10,000.

22 I am not persuaded by this submission. The right of appeal without leave under s. 193(c) must be narrowly construed and limited to cases where the appeal directly involves property exceeding $10,000 in value: *Enroute Imports Inc., Re*, 2016 ONCA 247, 35 C.B.R. (6th) 1 (Ont. C.A.), at para. 5. In my view, the union's proposed appeal involves a procedural matter — can the union proceed at this time with its certification application and ULP complaint at the OLRB? The appeal does not involve directly any quantum of money.

(c) Conclusion

23 The union cannot appeal as of right from the motion judge's decision. The Receiver's motion to quash the appeal is *prima facie* valid.

(2) Cross-motion for leave to appeal

24 In order to avoid its appeal being quashed, the union brings a cross-motion seeking leave to appeal pursuant to s. 193(e) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> .....
>
> (e) in any other case by leave of a judge of the Court of Appeal.

25 The test for granting leave to appeal under this provision was set out by Blair J.A. in *Pine Tree Resorts*, at para. 29:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,
>
> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

26 The central issue in this appeal is the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law. The factual context for the intersection of these laws in this case is the Receiver's legitimate attempt to sell a large failing company and the important labour rights of some of the company's employees, including their right to seek to join a union and their right not to be fired unfairly. In my view, it is obvious that this issue is one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally.

27 The resolution of this appeal requires careful consideration of whether the motion judge's decision is consistent with the leading case in this domain involving the intersection of the *BIA* and provincial labour law, namely, the Supreme Court of Canada's decision in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) ("*GMAC* "). I cannot say that the proposed appeal appears to be unmeritorious.

28 Finally, I am satisfied that this appeal will not unduly hinder the progress of these insolvency proceedings. The issues on appeal are narrow and the record is modest. Moreover, the Receiver did not move to quash the appeal until almost six months after the union filed its notice of appeal and three months after the hearing date was set. As a result, the Receiver's motion to quash and the union's cross-motion for leave were argued as part of the appeal proper. It cannot be said that granting leave in these circumstances would unduly hinder the progress of these proceedings.

29 For these reasons, I would grant the union leave to appeal from the motion judge's order.

The appeal

(3) The certification application

30 In determining whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides: *Peoples Trust Co. v. Rose of Sharon (Ontario)*

Retirement Community, 2012 ONSC 7319, 97 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), at para. 5. While not strictly applicable, a court may take guidance from the jurisprudence addressing the lifting of stays under s. 69.4 of the *BIA*: see *Peoples Trust Co.* , at para. 5 and Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2016-2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016), at p. 1085. While the motion judge correctly identified these principles, in my view each of the four reasons he relied on to support his decision not to lift the stay presents problems. I will address those reasons in turn.

31 First, the motion judge reasoned that leave ought to be refused because the certification application would in effect increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group.

32 In my view, this reasoning rests on supposition. A successful certification application does not guarantee employees better wages; it simply allows employees to combine their bargaining power and rely on the union's assistance in negotiating their terms and conditions of employment. While it is true that upon certification certain rights and obligations crystallize that would not otherwise (e.g. the employer's duty to recognize the union and bargain with it in good faith), certification does not have the effect of automatically increasing the rights employees have *as creditors*, thereby prejudicing other creditors. It is simply conjecture at this point to assume that the union will be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, at this juncture, allowing the union's certification application to proceed merely entitles the union to a representation vote, not to certification.

33 The motion judge next reasoned that recognition of the proposed bargaining unit could negatively impact a sale of Ontario Disposal and that, in the circumstances, it would be inequitable to require creditors to accept such an outcome.

34 In my view, this line of reasoning is speculative. While some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with its clarity of terms, would be attractive to a prospective purchaser. The union, on behalf of its members, has an interest in the business being sold as a going concern and therefore has an incentive to act in a manner that would promote such an outcome.

35 More fundamentally, however, there is simply no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale. The Receiver's statement in its first report that it has 'serious concerns' that certification could negatively impact a sale amounts to little more than self-serving speculation. Without having concrete evidence before him to ground the Receiver's apparent concern, the motion judge erred in denying the union leave to proceed with its certification application on this basis. Further, even if there was some evidence to substantiate the Receiver's concern, the union has indicated its willingness to delay bargaining a collective agreement for up to a year should the Receiver produce such evidence.

36 The motion judge also reasoned that the union will be able to pursue its certification application against the purchaser as soon as a sale is completed and that, therefore, the union faces no prejudice as a result of the continuation of the stay.

37 I am not persuaded by this point. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. The right to form and join a union of one's choosing is a fundamental right under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A (the "*LRA*"). While flexibility is required to address the challenges in any particular insolvency proceeding, courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process: *GMAC* , at paras. 50-51.

38 Further, maintaining the stay and delaying the representation vote risks undermining the legitimacy of the vote. As the Board itself noted in this case, "the scheme of the [*LRA*] is premised on quick votes". Quick votes at once minimize the possibility of undue influence and maximize the validity of the vote as a reflection of employee wishes. Delaying the vote prejudices these important objectives.

39 Moreover, at present, there is nothing on the record that suggests that a suspension of these employees' labour rights will be a short-lived, stop-gap measure. On the motion, the Receiver offered no specifics of a planned sale or prospective purchaser. As of the appeal hearing, the Receiver had been running the business for over a year with no definite end in sight. In my view, it is unreasonable to characterize as entirely non-prejudicial what amounts to an indefinite suspension of the

union's and employees' ability to exercise labour rights they otherwise enjoy at law, especially where, as here, employees have allegedly faced retribution for so doing.

40 Finally, the motion judge reasoned that leave ought to be refused given that there is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets.

41 Again, this is speculative. Whatever the results of the sale, the employees' have presently existing rights, established under the *LRA*, to organize themselves and select a collective bargaining agent. The fact that a court may speculate as to the ultimate efficacy of their decision to organize in this manner does not diminish the prejudice suffered now by preventing employees from exercising those rights.

42 In light of the above, I am of the view that the motion judge erred in refusing to lift the stay. It therefore falls to this court to determine afresh whether the union ought to be granted leave to proceed with its certification application.

43 I turn, then, to consider the relative prejudice to both sides.

44 On the one hand, the Receiver can point to little material prejudice should the stay be lifted. For the reasons discussed above, I do not accept that a sale will be prevented or that sale proceeds will be diminished should the union be granted leave to proceed with its certification application. And while I am willing to accept that certification proceedings inevitably involve some legal costs, I do not accept that these costs would be significant in this case. The union's certification application is an especially simple one. There are six employees in the proposed bargaining unit. The union applied for a unit at a specific street address (rather than a municipal-wide unit) and it appears from the record that there is only one classification of employees on-site. As the union's in-house counsel, a labour lawyer who has been involved in many certification applications, swore in her affidavit in support of the union's motion, "this [certification application] is as straightforward as any I have seen." It is also important to recognize that the employer is only one of a number of corporations within the Ambrose Group and that the the Ontario Disposal location, for which the union seeks certification, represents only one of the employer's two operations (the other operation has been unionized for some time). In these circumstances, I am simply not persuaded that allowing the union's certification application to proceed would cause any more than *de minimis* prejudice to Ambrose Group creditors.

45 On the other hand, a lot is at stake for the union and the employees. Maintaining the stay prejudices the important objectives 'quick votes' are designed to serve, unduly interferes with employees' ability to exercise their statutory labour rights, and, particularly where employees have allegedly been dismissed for exercising those rights, undermines employee confidence in the efficacy of core labour rights and protections.

46 Labour rights do not end when insolvency proceedings begin. Indeed, s. 72(1) of the *BIA* provides:

> 72 (1) <u>The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act</u>, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> [Emphasis added.]

47 As the Supreme Court of Canada explained in *GMAC* , at para. 47: "[t]he effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*." There is no such conflict here.

48 In light of the above, on weighing the relative prejudice to both sides, I am satisfied that there are sound reasons in this case to lift the stay and allow the union to proceed with its certification application.

(4) The unfair labour practice complaint

49 The threshold for granting leave to proceed against a receiver is not a high one and is designed to protect a receiver against only frivolous or vexatious actions or actions that have no basis in fact: *GMAC* , at para. 55. Given the timing of the dismissals, the *prima facie* merit of the ULP complaint is, in my view, obvious.

50 The motion judge, however, reasoned that, given that the commencement of the certification application forms the core factual basis for the ULP complaint, "[i]n this particular case, there can be no ULP complaint independent of the prior commencement of the certification application."

51 The union argues that the motion judge erred in holding that the union was not entitled to bring a ULP complaint without a valid prior commencement of a certification application.

52 I do not accept this argument. On my reading of his reasons, the motion judge was not holding that, as a matter of law, ULP complaints cannot exist independently of certification applications. He was simply of the opinion that, in the particular circumstances of this case, given its factual basis, the ULP complaint could not stand independently of the certification application.

53 Even on this more narrow interpretation, however, the motion judge's reasoning is flawed. The fact that the certification application may be an irregularity (unless and until leave is granted *nunc pro tunc*) does not erase the fact that the application was filed. I see no sound basis upon which to preclude the union from relying on this fact to establish how and when the employer became aware of the union's organizing campaign. It would not only be unfair but also a triumph of form over substance to prevent individuals who have lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in a legally distinct proceeding. In any event, I would hold that the certification application ought to proceed and, as such, so too should the ULP complaint.

E. DISPOSITION

54 I would grant the appellant leave to appeal, allow the appeal, set aside the order of the motion judge, and grant the appellant leave to proceed with its certification application and unfair labour practice complaint before the Ontario Labour Relations Board.

55 The appellant is entitled to its costs of the appeal which I would fix at $12,000, inclusive of disbursements and HST.

Doherty J.A.:
I agree.

P. Lauwers J.A. **(Dissenting):**

56 Like my colleague, and for the reasons he gives, I would grant leave to appeal from the bankruptcy judge's order. The issues raised are undoubtedly important to the practice of insolvency law.

57 However, I would dismiss the appeal of the bankruptcy judge's refusal to lift the stay with respect to both the union certification process, and the unfair labour practice complaint.

58 The bankruptcy judge is owed deference regarding the exercise of his discretion, and I am not persuaded that he erred in law or in principle, as I will explain.

A. THE ORGANIZATION OF THESE REASONS

59 I begin with an overview of the insolvency system, make several preliminary observations, and then turn to describe the governing principles for this appeal. After setting out the bankruptcy judge's reasoning, I apply the governing principles to the facts as he found them, taking into account my colleague's reasoning.

B. AN OVERVIEW OF THE INSOLVENCY REGIME

60 The insolvency regime in Canada is intricate and the way it addresses the interests of debtors, creditors and others is carefully calibrated. The regime includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). See generally the decision of Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at paras.12-24.

C. PRELIMINARY OBSERVATIONS

61 There is no doubt that "creditors include unionized employees", as Abella J. states in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) , at para. 2. Indeed, creditors include all of the debtor's employees, unionized or not.

62 The intersection of insolvency law and labour relations law has occupied much judicial time in recent years. Judges have struggled to find the right balance between the interests of employees on the one hand, including the importance of maintaining an effective mechanism for rescuing distressed companies if possible, and, on the other hand, for efficiently and fairly liquidating them in the interests of all the creditors including the employees, if it is not possible.

63 Some instructive contextual comments are made in the paper delivered in a 2017 National Judicial Institute program entitled "From Deterrence to Detente: Overview of the Intersection of Labour Law and the CCAA", authored by Massimo Starnino, Debra McKenna, Lauren Pearce and Glynnis Hawe, members of the Paliare Roland Rosenberg Rothstein LLP law firm. The authors begin the discussion with this observation, at p. 2:

> Experience tells us that in practice the singular focus of creditors is to use leverage in the CCAA process, and sometimes to manufacture leverage through the CCAA process, to extract the biggest piece of an economic pie that, no matter how expanded, is inevitably perceived to be inadequate.

64 The authors note that increasingly "the battle for value ... has often been between lenders ... on the one side, and organized labour on the other" (at p. 2). The complaint is made, at p. 3, that the court is inclined to accept "arguments that the rights and obligations created by provincial labour legislation are in conflict with the restructuring objective of the CCAA and therefore subordinate to the broad discretionary authority afforded to the court." As union counsel did in this case, they urge bankruptcy and CCAA judges to take into account how their jurisdiction might be affected by s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

65 The effort in this case to certify the union after the receiver's appointment represents a new front in the "battle" the authors describe between employees and the other creditors of an insolvent business, and requires careful scrutiny. Even if the effect is limited in this particular case because some of the other units in the debtor's business are unionized already, my colleague's decision would be a critical precedent of broader application. It is necessary to step back and consider the larger context.

D. THE GOVERNING PRINCIPLES

66 There are several avenues into the insolvency regime. An insolvent person's creditor can apply for a bankruptcy order (*BIA*, s. 43), or the insolvent person can make an assignment (*BIA*, s. 49). An insolvent person can make a proposal (*BIA*, s. 50) and if it fails, the result is bankruptcy (*BIA*, s. 57). As in this case, a secured creditor can apply to the court for the appointment of a receiver (*BIA*, s. 243). A qualified debtor corporation can make an application under the *CCAA*, which aims at restoring the health of the debtor company, if possible, as a going concern. However, if the company cannot be restored as a going concern, then the *CCAA* or the *BIA* can be used to liquidate the company and, once ordered into bankruptcy, the priorities of the creditors are determined under the *BIA*: see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.).

67 While each of these avenues into the insolvency regime has unique features, they also have several interlocking common elements that reflect important underlying principles.

68 First, the root principle is that creditors in the same class, including employees, are to be treated equally in relation to the distribution of the remaining assets of the estate. This is also known as the *pari passu* principle. It is reflected in s. 141 of the *BIA* and elsewhere: see *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.) ; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, [1990] S.C.J. No. 45 (S.C.C.), at para. 22.

69 Second, the date on which the respective rights of creditors are to be determined is the effective date of the bankruptcy, or the date of the appointment of the receiver, or the making of a *CCAA* order. As an incident of the *pari passu* principle, after the effective date no creditor is to be permitted to advance its position over that of similarly situated creditors.

70 Third, the administration of the debtor's assets is to be orderly. Central to the court's insolvency work is the ability to impose order on what would otherwise be a fractious and expensive free-for-all among the creditors intent on taking as much of the debtor's assets as soon as they could through self-help or litigation. To this end, the trustee or receiver is responsible for establishing a summary procedure for determining the validity and the value of the creditors' interests. This is to avoid exhausting a debtor's assets in defending a multiplicity of lawsuits, and to avoid distracting the trustee or receiver from the orderly administration of the estate. Hence, the "single proceeding model" for administrating claims expeditiously: see *Century Services* , at para. 22; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 33-34. In bankruptcy there is a "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse", as Binnie J. noted in *Eagle River International Ltd., Re*, 2001 SCC 92, [2001] 3 S.C.R. 978 (S.C.C.) , at para. 27.

71 For example, in *Essar Steel Algoma Inc., Re*, 2016 ONSC 1802, 35 C.B.R. (6th) 89 (Ont. S.C.J. [Commercial List]), the *CCAA* judge approved an expedited grievance arbitration process that was substantively the same as, but procedurally different from, the grievance arbitration process in the collective agreement. He did this over the objection of the union, relying on several cases including *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 68 (Ont. S.C.J. [Commercial List]) per Morawetz J., *White Birch Paper Holding Co., Re*, 2010 QCCS 2590, 65 C.B.R. (5th) 186 (C.S. Que.), *AbitibiBowater inc., Re*, 2010 QCCS 1065 (C.S. Que.) , per Gascon J., as he then was, and *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) per Pepall J., as she then was, at paragraph 33. The union sought leave to appeal to this court in *Essar Steel*, which was rejected by Gillese J.A.: *Essar Steel Algoma Inc., Re*, 2016 ONCA 274, 36 C.B.R. (6th) 56 (Ont. C.A.). She considered the bankruptcy court's ability to expedite the grievance process to be well-settled law (at para. 33). I return to this case below in discussing the lurking constitutional issues.

72 The imposition of a stay of proceedings against the debtor is the insolvency regime's primary tool for establishing order. The stay is intended to preserve the status quo; it is "crucial to the orderly administration of the estate and ensures that a creditor will not benefit or improve his or her position at the expense of other creditors": F. Bennett, *Bennett on Bankruptcy*, 19th ed. (Toronto: LexisNexis Canada Inc., 2016), at p. 377. See also R. J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at p. 152; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 57.

73 A stay is imposed directly by ss. 69-69.3 of the *BIA* in defined circumstances, or by court order in conjunction with a receivership order under s. 243 of the *BIA* and s. 101 of the *CJA*, as in this case: see Wood, at p. 334. In *CCAA* proceedings, the stay is court-imposed under s. 11 *et seq.* of the *CCAA*: see e.g. *Nortel Networks Corp., Re*, 2009 ONCA 833, 99 O.R. (3d) 708 (Ont. C.A.), leave to appeal refused, (2010), [2009] S.C.C.A. No. 531 (S.C.C.), at para. 16; *Nortel Networks Corp., Re* , at para. 47; Wood, at pp. 333-34; Sarra, at pp. 51-52.

74 Order is also ensured by the court's ongoing supervision of the insolvency. Receivers appointed by court order under s. 243 of the *BIA*, and monitors appointed under s. 11.7 of the *CCAA*, are also supervised by the court in accordance with the terms of the appointing order: *Ma, Re* (2001), 143 O.A.C. 52 (Ont. C.A.) . Finally, order is ensured by the prospect of lawsuits for misconduct, with leave of the court, against the trustee specifically under s. 37, and against the trustee or interim receiver under s. 215 of the *BIA*.

75 The fourth common element to each of the avenues into the insolvency regime is the existence of a process for managing exceptions. The court has discretion to lift the stay in circumstances where it is necessary. This is provided for in s. 69.4 and in s. 215 of the *BIA*. There is a difference in approach. Under s. 69.4 of the *BIA*, a person seeking leave need not prove a *prima facie* case, only that there are sound reasons, consistent with the scheme of the *BIA* to relieve against the automatic stay, whereas under s. 215 of the *BIA* the applicant must establish a *prima facie* case: Contrast *Ma*, at paras. 2-3, with *GMAC*, at para. 59.

76 With respect to receivers appointed by court order under the *BIA*, and monitors appointed under the *CCAA*, since the stay flows from the court's order, the court must be persuaded to lift the stay, and applies the same principles.

77 In discussing the appropriate analysis under s. 215 of the *BIA*, the Supreme Court noted in *GMAC* that the test involves a balancing of "the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver" (at para. 61).

78 Whatever the applicable test, "lifting the automatic stay is far from a routine matter", as this court noted in *Ma*, at para. 3. I point out that the insolvency regime does not contemplate that each creditor will proceed by separate litigation after getting leave of the court. Indeed, even if a creditor, suing with leave, succeeds in getting judgment, it is still caught by the stay in respect of recovery. It must be kept in mind that the lifting of a stay is exceptional, in view of the expectation that most creditors' claims will be resolved through the summary procedure, and not through ongoing court or administrative law proceedings: see e.g. *Moloney*, at paras. 33-34; Bennett, at p. 378; *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 71.

79 These governing principles have a role to play in the exercise of a bankruptcy judge's discretion and in the proper disposition of this appeal.

E. THE APPLICATION JUDGE'S REASONS

80 Drawing on the principles set out above, the bankruptcy judge correctly sets the normative context in his decision, at para. 44:

> A receiver is a court-appointed officer whose role ideally is to take possession of the property of a debtor, to put the business of the debtor on a viable financial basis with a view to maintaining it in the short term, and to sell the business on a basis which maximizes the proceeds of sale available to satisfy the liabilities of the debtor to its creditors. To this end, a receiver is typically granted extensive powers, including the power to terminate the employment of employees who the receiver determines are not reasonably necessary for the conduct of the business to be sold. <u>The stay of proceedings typically granted is designed to prevent particular creditors from improving their position relative to other creditors.</u> It is also intended to permit the receiver to concentrate on its principal functions, all without the time and expense of litigation outside of any court-ordered claims process that is required within the receivership proceedings. <u>In a broader sense, the stay therefore freezes the rights and remedies of creditors as they existed as of the date of the receivership order.</u> Any motion to lift a stay of proceedings should be assessed in relation to the extent that it furthers the purposes of receivership proceedings.
>
> [Emphasis added.]

81 In explaining why he refused leave to the union to commence the certification application before the Ontario Labour Relations Board, the bankruptcy judge states, at para. 46, that the debtor's creditors must not be able to improve their relative positions, and reiterates that the date for determining the relative positions of the creditors is the date the receiver is appointed:

> First, <u>the effect of the Certification Application is to increase the rights of the members of the proposed bargaining unit</u>

> relative to other creditors of the Debtor. I accept that, if the Certification Application were granted, the Union has agreed, subject to its discretion, to postpone negotiation of a collective agreement under certain conditions for a certain period of time. Nevertheless, the effect of the Certification Application is to create rights in favour of employees that did not exist at the date of the Receivership Order. As the proposed bargaining unit had not been certified by the OLRB, the employees of the Ontario Disposal division did not have the right to bargain for a collective agreement. Commencement of the Certification Application would therefore be contrary to the policy and purpose of the stay of proceedings, which, as mentioned, effectively freezes the rights and remedies of all creditors of the Debtor as of the date of the Receivership Order.
>
> [Emphasis added.]

82 The bankruptcy judge also refers to a practical reason for refusing to lift the stay "based in the purpose and policy of receivership proceedings" (at para. 47). He points out that recognition of the proposed bargaining unit by the Labour Relations Board "could impact the sales proceeds" (at para. 48). In his view: "it is inequitable to require creditors to accept a potential diminution of the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen" (at para. 48).

83 Finally, with respect to the union's unfair labour practice claim, the bankruptcy judge finds, at para. 57: "unless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action." Since he would not have lifted the stay to permit the certification application to proceed *nunc pro tunc*, there was no factual basis for the unfair labour practice claim.

F. THE PRINCIPLES APPLIED

84 As a commercial list judge with long experience in insolvency, the bankruptcy judge would be fully alive to the relevant law and to the business realities faced by the debtor, the creditors and the receiver. Moreover, he would be intimately familiar with the particular facts of the case. That is why it is important for this court, from the viewpoint of the standard of review, to defer to the bankruptcy judge in the exercise of his discretion under s. 215 of the *BIA* or the terms of the receivership order: see e.g. *Royal Crest Lifecare Group Inc., Re* (2004), 181 O.A.C. 115 (Ont. C.A.) , leave to appeal refused, [2004] S.C.C.A. No. 104 (S.C.C.), at para. 23; *Grant Forest* , at paras. 97-99.

85 Did the bankruptcy judge err in principle or exercise his discretion unreasonably? My colleague says that he did. I disagree.

86 In this part of my reasons I begin with the *Charter* issue, continue with the doctrine of paramountcy, and then attend to the reconciliation of the *BIA* and labour law, specifically the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A ("*LRA*"), the *pari passu* principle, the effect of certification on sale proceeds, and the issue of prejudice.

(1) The Charter Issue

87 More atmospherically than substantively, in aid of its argument that s. 72 of the *BIA* obliges the bankruptcy court to give full effect to the *LRA* bargaining rights and process, the union enlists the 2015 labour trilogy of the Supreme Court of Canada: *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.) ("*MPAO*"); *Royal Canadian Mounted Police v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125 (S.C.C.) ; *SFL v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (S.C.C.) . The appellant quotes para. 58 of *MPAO* in which the court states that the purpose of the *Charter* s. 2(d) guarantee of associational rights is: "to protect individuals against more powerful entities." The court stated: "By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires." The court added: "In this way, the guarantee of freedom of association empowers vulnerable groups," including employees, "and helps them work to right imbalances in society."

88 The appellant's factum simply asserts that: "Given the constitutional protection afforded to this process, the court

should be wary of allowing the existence of a receivership to frustrate the certification application." Fair enough, but the union had the entire life of the business before insolvency within which to pursue certification.

89 In oral argument, counsel for the union expanded on this brief allusion. He asserted that the *MPAO* decision constitutionalized bargaining rights, and argued that the right of employees to unionize should "supersede" any concern in relation to the sale of the business. He added that there is no empirical evidence that unionization will reduce the sale value of the asset, but even if that were to be the outcome of the employees' exercise of their rights under the labour legislation: "So be it."

90 However, counsel for the union did not take the position that the constitutionalization of labour rights takes away entirely the bankruptcy court's discretion under s. 215 of the *BIA* or the order appointing the receiver to refuse to lift the stay where labour rights are in issue. He acknowledged that "sometimes the discretion must be exercised" and cited *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11 (B.C. S.C. [In Chambers]).

91 In *Hawkair*, the union sought to certify just before the company was to bring forward its reorganization plan under the *CCAA*. The *CCAA* court concluded that in the context the prejudice to the union was minimal while the prejudice to the creditors was great. By contrast, the union points out that in this case there is no imminent reorganization and there is no empirical evidence of prejudice.

92 In my view, this constitutional issue was not properly joined before the bankruptcy judge, nor before this court. It is not sufficient to simply allude to associational rights under s. 2(d) of the *Charter* and to the 2015 labour trilogy and assert they are dispositive. A similar argument was made in *Essar Steel* to the effect that the grievance provisions of the collective agreement were not subject to the *CCAA* stay. The constitutional argument was more fully developed in that case, and the *CCAA* court's rejection of it was approved by this court.

93 In my view, giving unions carte blanche to begin certification efforts for insolvent enterprises after the date of the appointment of a trustee or receiver or the date of an order under the *CCAA* would effect a sea change in insolvency law; it would profoundly alter the economic dynamics of insolvency, and whether the *CCAA* route is preferable to outright bankruptcy. The consensus is that the *CCAA* has been effective in salvaging businesses and jobs, including union jobs. It would be unwise for this court to sanction such a profound change in the absence of full evidence and argument addressing both whether the s. 2(d) *Charter* right of employees has been substantially limited in the insolvency context, and whether any such limit is demonstrably justified under s. 1 of the *Charter*: see *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590 (Ont. C.A.), leave to appeal refused, (2017), [2016] S.C.C.A. No. 444 (S.C.C.); (2017), [2016] S.C.C.A. No. 445 (S.C.C.). The issue is too important to the insolvency regime and too complex for the drive-by analysis the union proposes.

94 In the article "From Deterrence to Détente", the authors specifically refer to "the acquisition of collective bargaining rights", as one of the new fronts in the "battle" they describe between employees and the other creditors of an insolvent business.

(2) The Role of Paramountcy

95 In support of his view that the *Labour Relations Act* must be given full operational scope in this case, my colleague relies on the underlined words in s. 72 of the *BIA*, which provides:

> 72 (1) <u>The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act</u>, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> [Emphasis added.]

96 He draws support from the words of Abella J. who said in *GMAC* that s. 72 of the *BIA* "is not intended to extinguish legally protected rights unless those rights are in conflict" with the *BIA* (at para. 47). The appellant also points to para. 51 of *GMAC* , where Abella J. quoted *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.) , at para. 43:

> [E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at law ... So long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

97 My colleague concludes that there must be an operative conflict before the principle of paramountcy can give the *BIA* priority over the *LRA*, and asserts there is no such conflict here.

98 I disagree with his construal of paramountcy and his assessment that no conflict exists on the facts of this case. Neither *Crystalline* nor *GMAC* is the latest word from the Supreme Court on paramountcy.

99 The doctrine of paramountcy must be sensitive to the context in which it operates. There are two distinct branches to the test, as explained by Gascon J. in *Moloney* , which he echoed in the companion case *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.) . At para. 18 of *Moloney* , Gascon J stated:

> A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

100 He explained, at para. 25:

> In Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": Western Bank, [*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. at para. 73.

101 Justice Gascon noted, at para. 29, that "if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict." He added: "Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law (citations omitted)." In remedial terms, he stated: "In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists."

(3) Reconciling the BIA and the Labour Relations Act

102 In this case, two distinct regulatory regimes come into contact: the Ontario labour relations regime, and the federal insolvency regime. There is no operative incompatibility or conflicting language on the facts of this case to engage the first branch of the paramountcy analysis. However, in my view the second branch is engaged, under which the bankruptcy judge is obliged to consider the exigencies of each regime and reconcile them if possible.

103 The court's task here is not to reconcile statutory language, but to reconcile different policies. This is a nuanced, difficult and delicate task informed by the bankruptcy judge's knowledge both of the law and the operation of the marketplace in the context of the specific matter before him, drawing also on his experience and wisdom, and his sense of what is commercially reasonable. The bankruptcy judge brought just that perspective to this case, as I will explain.

104 Bankruptcy judges have proven to be adept at managing the interface between the two regulatory regimes. A good example is *Essar Steel*, where the *CCAA* judge found a way to reconcile grievance arbitration required by the collective agreement with the restructuring need for speed, expediency and reduced process costs.

105 It is worth pointing out that s. 33 of the *CCAA*, which came into force in 2009, directly addresses collective agreements. Subsection 33(1) provides:

> 33.(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> [Emphasis added.]

106 Can anything be drawn from this provision? It plainly assumes a collective agreement is in existence at the date proceedings are commenced and does not contemplate a new certification. This is a reasonable assumption for insolvency proceedings in general, built as they are to preserve the status quo.

(4) The Pari Passu Principle

107 In my view, the policy contest presented in this case is precisely the kind of conflict between provincial regulatory regime for labour relations and the federal insolvency regime that the paramountcy doctrine is intended to recognize and accommodate.

108 My colleague relies on the Supreme Court's decision in *GMAC* . In that case the issue was whether leave should be granted to the union under s. 215 of the *BIA* so that the Labour Relations Board could determine "successor employer" status.

109 However, there is a crucial distinction between this case and *GMAC* . The union had long been certified in *GMAC* . By contrast, in this case, the certification effort followed the appointment of the receiver by several months. This distinction is important because it engages one of the fundamental policy principles in insolvency law, which is to preserve the status quo among the creditors as of the date the receiver was appointed. The bankruptcy judge accurately identified that this principle would be violated if the debtor could be forced to accept union certification post-bankruptcy. In my view, my colleague does not give due weight to this critical principle.

110 In particular, my colleague says the bankruptcy judge was wrong to refuse leave on the basis that the certification application would effectively increase the rights of the members of the post bargaining unit relative to the other creditors. He takes the view that "certification does not have the effect of automatically increasing the rights employees have as creditors, thereby prejudicing other creditors."

111 I take a different view. It seems quite plain that neither the employees nor the union would be pursuing certification if it did not provide an advantage in the bankruptcy process. While a successful certification application does not guarantee employees better wages or working conditions, their enhanced bargaining power is surely what unionization is all about: see *MPAO*, at para. 70.

112 The union's offer, as the bankruptcy judge notes, is this: "*subject to its discretion*, to postpone negotiation of a collective agreement *under certain conditions for a certain period of time*" (my emphasis), in effect to delay bargaining the first collective agreement for up to a year. This offer is plainly tactical, and the fact it was made at all simply underlines the force of the point that the union expects enhanced bargaining power to be effective in the insolvency.

113 In addition to the operation of successor rights, and access to unfair labour practice remedies, the court must take cognizance of the significant protections given to a union seeking to negotiate a first collective agreement, which may include the imposition of such an agreement through arbitration ordered by the Labour Board under s. 43 of the *Labour Relations*

Act. This is distinct from the more limited protections provided to the union in subsequent negotiations.

(5) The Effect of Certification on the Sale Proceeds

114 In its first report to the court, the receiver advised:

> The Receiver has no long-term business goals or strategic plans for the Debtors' assets. Given the temporary nature of its appointment and its mandate to maximize realizations for the benefit of all stakeholders by, ideally, selling the Debtors' businesses as going concerns, the Receiver (unlike an ultimate purchaser) is fundamentally ill-equipped to evaluate the certification application properly nor to bargain collectively. Moreover, the Receiver is seriously concerned that any decision it makes or agreement it enters into with the Union will be unacceptable to prospective purchasers and will suppress realizations.
>
> The collective bargaining process, if permitted to proceed, will also add significant professional costs to the Receiver's administration. The cost of a labour negotiation will, in effect, be a super-priority expense that will ultimately be absorbed by and materially prejudice other creditors through reduced realizations and distributions.

115 My colleague disputes the application judge's reasoning that certification of the bargaining unit could negatively impact a sale of the Harmony Road depot to the prejudice of all the creditors, on the basis that "this line of reasoning is speculative". He asserts that "while some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with the clarity of terms, would be attractive to the perspective purchaser", and adds that: "the receiver's statement in its first report that it has 'serious concerns' that certification could negatively impact a sale amounts a little more than self-serving speculation".

116 In my view, the bankruptcy judge's statement that certification could negatively impact the sale of the Harmony Road depot is self-evidently true and falls well within the margin of appreciation that is his due, given his knowledge of the commercial realities. I would be most reluctant to disparage the advice of the court-appointed receiver as mere "self-serving speculation". Such an officer has no self-interest and owes duties to all the parties and to the court. In my view, it was open to the bankruptcy judge to accept the receiver's advice.

117 If the union achieves certification and the Harmony Road depot is sold in such a way as to attract successor labour rights, then any prospective purchaser of the depot will be faced with the obligation to immediately embark on first collective agreement negotiations. This is not a small additional burden on what would otherwise be the terms and conditions of the depot's sale. It will plainly discourage some potential bidders and therefore negatively affect the depot's market price by reducing the number of buyers who would be willing to engage. Any cooling of the interests of potential purchasers in the debtor's assets would reduce the proceeds of sale to the prejudice of all the creditors. With respect, this is more than a mere "inconvenience to the receivership process."

118 If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their leverage over the other creditors.

(6) The Role of Prejudice

119 I agree with my colleague that the bankruptcy judge's decision does prejudice the employees and the union, at least measured by how certification would work if there were no insolvency. But that is not the right measure under the *BIA*.

120 While it was possible in *GMAC* and *Essar Steel* to give considerable scope to the operation of the labour relations regime in relation to *existing collective agreements*, the bankruptcy judge concluded it was not desirable in this case because so many essential insolvency principles would be violated. This is a valid consideration, as the Supreme Court noted in *Moloney* and in *407 ETR* .

121 There is limited scope for accommodating a certification effort after the receiver's appointment, because doing so would contradict bedrock insolvency principles. In his reasons, the bankruptcy judge identifies the central question as whether "unions have a right to commence certification applications during receiverships" (at para. 41). The bankruptcy judge's implicit response is that there is no universal answer; it is a case-specific issue for the judge to determine based on the facts. I agree. I would defer to the bankruptcy judge's judgment in the context of this case.

(7) The Unfair Labour Practice Complaint

122 The bankruptcy judge showed that the unfair labour practice allegation was linked to the certification effort. In a factual sense there is no doubt that had the certification effort not started, there would have been no basis for an unfair labour practice allegation. If the certification effort was misguided, as he found, then there is no basis whatever for the complaint. Again, I would defer to the bankruptcy's judge's decision.

G. DISPOSITION

123 I would dismiss the appeal respecting the bankruptcy judge's refusal to lift the stay both with respect to the union certification process, and the unfair labour practice complaint.

Appeal allowed.

Footnotes

1 At the appeal hearing, the court heard argument on the two preliminary issues. The court determined that the union could not bring its appeal as of right under s. 193(a) or (c) of the *BIA*. However, the court granted the union leave to appeal pursuant to s. 193(e) of the *BIA*. The court announced that reasons supporting these two conclusions would follow in the judgment on the main appeal.

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Peterborough (City) v. Kawartha Native Housing Society Inc. | 2009 CarswellOnt 3478, 178 A.C.W.S. (3d) 116 | (Ont. S.C.J., Jun 17, 2009)

1990 CarswellAlta 239
Alberta Court of Queen's Bench

Royal Bank v. West-Can Resource Finance Corp.

1990 CarswellAlta 239, [1990] A.W.L.D. 813, 25 A.C.W.S. (3d) 1248, 3 C.B.R. (3d) 55, 77 Alta. L.R. (2d) 43

ROYAL BANK OF CANADA v. WEST-CAN RESOURCE FINANCE CORPORATION; WEST-CAN RESOURCE FINANCE CORPORATION v. ROYAL BANK OF CANADA

MacPherson J.

Judgment: June 19, 1990
Docket: Doc. Calgary 9001-06330

Counsel: *R.C. Dixon* and *J.S. Shortt*, for defendant (plaintiff-by-counterclaim).
B.P. O'Leary and *B.R. Crump*, for plaintiff (defendant-by-counterclaim).

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

Table of Authorities

Cases considered:

Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd. (1990), 105 A.R. 161 (Q.B.) — *referred to*

King Petroleum Ltd., Re (1973), 18 C.B.R. (N.S.) 270 (Ont. S.C.) — *considered*

Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd., [1978] Q.B. 814, [1978] 2 All E.R. 896 (C.A.) — *considered*

Toronto-Dominion Bank v. Fortin, 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111 (B.C. S.C.) — *referred to*

Statutes considered:

Interest Act, R.S.C. 1985, c. I-15.

APPLICATION to settle terms of order appointing receiver.

MacPHERSON J.:

1 This is an application to settle one of the terms of an order that I have made in these proceedings.

2 The debtor was of the view that the Court should authorize the receiver to pay the legal fees incurred by the debtor in defending this action and prosecuting the counterclaim. The bank was of an opposite view.

3 It is important to recall the whole of the unique facts in this case to understand the equities involved that require consideration and need be addressed in the order.

4 The bank's debenture had no power to appoint a receiver and crystallize the floating charge. The debenture provided that the bank's remedy in the event of default was to apply to the Court for the appointment of a receiver. The bank issued a statement of claim and applied to the Court for the appointment of that receiver. The debtor defended the action and counterclaimed on the basis of the decision in *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (26 March 1990), Docs. Calgary 8201-14168, 8201-32649, 8201-32646 and 8801-03015, Power J. (Alta. Q.B.) [now reported at (1990), 105 A.R. 161], in which a defence based on the *Interest Act*, R.S.C. 1985, c. I-15, and miscalculation of, or misstatement of, interest was successful as against the bank.

5 The debtor says on a proper calculation of interest there remains no indebtedness to the bank. The bank says our books show a substantial outstanding indebtedness. The issue requires determination at trial.

6 On the motion the bank asked the Court to appoint a receiver, and the debtor asked that the bank be enjoined from enforcing its securities until the issue between the parties was resolved.

7 It is important to the whole of the deliberation that it be recognized that the bank chose to ask the Court to intervene rather than enforcing its various securities against the debtor's property. The Court must move in matters such as this in an impartial way, seeking to preserve the various rights and property of the litigants pending determination of the issues between them.

8 The order sought in this hearing is an integral part of the balancing of the competing equities sought to be achieved by the recent order that was made. It is only because this aspect of the order required careful argument and review that it was set down as a special application.

9 The argument of the bank is based on the decision in *Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.*, [1978] Q.B. 814, [1978] 2 All E.R. 896 (C.A.). Essentially, the bank says funding the defence and counterclaim out of the debtor's cash flow is taking that which is secured to the debenture holder. Further, the bank argues that it is unfair in that, if the bank loses at trial, the debtor can be compensated in damages and no one has any doubt that the bank has the ability to pay. If the debtor loses, the bank will simply have a greater shortfall in the recovery of the debt due to it.

10 The debtor says that the bank is in error. The *Newhart* decision is clearly distinguishable on its facts. In *Newhart*, the bank had put its receiver into possession by "private" appointment. Two years after the realization process was begun, the debtor company issued a writ suing the bank for breach of contract. The ratio of the case is that the debtor can sue as long as it does not take away from, or interfere with, the receiver's property in possession. One real distinction is that the receiver was a contractual receiver appointed by the bank to realize for the bank.

11 Another substantial distinction is that in *Newhart* the receiver was in possession, and the Court said you cannot take away that which he has, by contract, in his possession. In the case at Bar the shoe is on the other foot. The debenture provides there can be a receiver appointed, with the concomitant perfecting of the floating charge, but only if the Court orders it. The allegedly secured creditor is seeking to take away from the debtor that which it has in its lawful possession without the secured creditor showing that it has the right so to do. Whatever else may be attributed to the drafters of this debenture agreement, the knowledge that the Court would not take away one's property until the right to do so had been proven must be

considered to be at least within the reasonable expectation of the parties.

12 In the case at Bar, the order is a preservation custodial-type order appointing a receiver. That receiver has a different duty than the realizing contractually appointed receiver.

13 *Kerr on Receivers* [Raymond Walton, *Kerr on the Law and Practice as to Receivers*], 15th ed. (London: Sweet & Maxwell, 1978), at p. 7, where the learned author states:

> The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all of the materials necessary for a determination, shall think it properly belongs.

14 The debtor relies heavily on the much referred to judgment of Anderson J. of the British Columbia Supreme Court in *Toronto-Dominion Bank v. Fortin*, 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111. While that judgment points out that the company has the right to raise its defences, and it is not for the receiver to decide whether or not the defences should be raised, the case does not say who will pay for those defences.

15 The debtor says that if the right to raise the defences lies with the company, surely it is a necessary ancillary to this principle that the debtor be allowed to pay for the defences, otherwise it will have no right at all.

16 The debtor suggests that this principle is enunciated in *Re King Petroleum Ltd.* (1973), 18 C.B.R. (N.S.) 270 (Ont. S.C.). The case is to some degree analogous, but not on all fours. In that case, an interim receiver was appointed at the behest of a petitioning creditor. The debtor disputed the petition in bankruptcy and asked the interim receiver to pay its lawyers to appear on the return of the petition to present the debtor's position on the dispute. The contest was not between a secured creditor and the debtor, but between the creditors who were claiming the funds and the debtor. In that case, the learned Registrar, after pointing out that every case was dependent on its own particular facts, found [at p. 272] that "the interim receiver should make funds available to counsel for the debtor, so that the debtor can put forth its defence as may be advised."

17 That case and cases that followed it provided that it would be an empty right to raise a defence if effective presentation of the defence could not be paid for in a practical way from the debtor's resources.

18 Here, the funds required are for a defence known at law. I have held that it is not a frivolous or vexatious defence and counterclaim. It is not the function of a judge on an application such as this to say anything more about the merits of the action or the defences. That is a matter for the trial Judge.

19 The practical problem that faces the Court and the parties is that the issue of whether or not there is a debt underlying the debenture must be resolved before the receiver can be authorized to proceed with realization of the assets. The Court cannot supervise this company indefinitely through the efforts of a receiver. The action must proceed to resolution in a prompt and efficient manner. The Court will be responsive to any abuse of process or delay.

20 It is obvious that the bank will suffer a further diminution in recovery if the bank's suit proves successful. But this inequity is as a result of the contract that the bank entered into with the debtor, and the potential for unfairness and inequity or injustice occurring is less apparent than to require the debtor to go to trial of the issue between the parties without the benefit of counsel.

21 The order will go that the receiver is at liberty to pay to counsel for the debtor reasonable amounts from time to time on account of its fees incurred in connection with the defence of this action and prosecution of the counterclaim. These moneys shall come from the cash flow received by the receiver and shall only be payable after a proper reserve for the receiver's fees and out-of-pockets, and payment of the day-to-day expenses of the operation of the defendant's business have been provided. Counsel may speak to the requirement of any particular terms required to ensure there is no abuse of this procedure, and generally as counsel may advise.

Order accordingly.

End of Document

TAB 9

2008 ABQB 398
Alberta Court of Queen's Bench

Stone Sapphire Ltd. v. Transglobal Communications Group Inc.

2008 CarswellAlta 896, 2008 ABQB 398, [2008] A.W.L.D. 3027, 169 A.C.W.S. (3d) 250, 44 C.B.R. (5th) 124

Stone Sapphire Ltd. (Plaintiff) and Transglobal Communications Group Inc. and Steven Prescott (Defendants)

D. Lee J.

Judgment: June 27, 2008
Docket: Edmonton 0503-00170

Counsel: Kenneth W. Fitz for Plaintiff
Alex Kotkas for Defendants

Subject: Civil Practice and Procedure; Insolvency

Table of Authorities

Cases considered by *D. Lee J.*:

Advocate Mines Ltd., Re (1984), 52 C.B.R. (N.S.) 277, 1984 CarswellOnt 156 (Ont. S.C.) — referred to

Stone Sapphire Ltd. v. Transglobal Communications Group Inc. (2007), 2007 ABQB 236, 78 Alta. L.R. (4th) 103, 32 B.L.R. (4th) 35, 416 A.R. 289, 2007 CarswellAlta 1107 (Alta. Q.B.) — referred to

Stone Sapphire Ltd. v. Transglobal Communications Group Inc. (2007), 2007 ABQB 238, 2007 CarswellAlta 476, 416 A.R. 306 (Alta. Q.B.) — referred to

Stone Sapphire Ltd. v. Transglobal Communications Group Inc. (2008), 2008 CarswellAlta 895, 2008 ABQB 397 (Alta. Q.B.) — referred to

Statutes considered:

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

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 69 — referred to

s. 69.1(1)(a) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 121(1) — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 8 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 322 — referred to

R. 322(2) — referred to

MOTION by plaintiff to lift stay of judgment.

***D. Lee J.*:**

Background

1 Transglobal has not paid for products, sourced from Stone Sapphire in 2004. The invoices and amounts in question were detailed in paragraph 10 of the Statement of Claim as follows: —

Transglobal PO#	Invoice Date	Invoice No.	Description of Goods	Invoice Amount
TG1 195	28/Jun/04	SSL-1 57	4255DG1 Jumbo core gift bag / TGI I 95&1 14-04	US$14,424.48
TG1194	28/Jun/04	SSL-158	4248DG4 Petite gift bag /TG1194&98.04	US$4,165.56
	# 31/Aug/04	SSL-254	Pedex courier charge of Jul,2004	US$618.80
	# 06/Sep/04	SSL-278	Customs duty forfilm	US$128.90
TG1 150	10/Jun/04	SSL-161	SM 3PK gift bag / TGI 150&86-04	US$35,308.22
TGI 180	04/Jul/04	SSL-175	4286DT1 LG Bday popup I TG1 180&87-04	US$23,981.58
TG1168	10/Jul/04	SSL-184	1093D 3x3 angled book /TG1168&75-04	US$32,631.98
	# 15/Sep/04	SSL-305	Fedex courier charge of Aug.2004	US$79486
TG1202	10/Jul/04	SSL-180	3015DG 4PK everyday CD box / TG1202&1 13-04	US$24,413.77
TG1 175	24/Aug/04	SSL-246	227pcs Xmas asst / TGI 1 75&82-04	US$42.41 7.38
TG 1184	30/Jul/04	SSL-20 I	2258DG1 8pk Xmas bags / TG1 1 84&1 04-04	US$168,588.80
TG1 196	14/Jul/04	SSL-176	4284DG5 Petite gift bag I TGI 196&99-04	US$4,013.68
TG 1179	14/Jul/04	SSL-1 77	4284DG4 Petite gift bag / TGI 1 79&1 42-04	US$7.61 8.59
TG1203	20/Jul/04	SSL-193	4449DG med vellum bag /TG1203&119-04	US$26,983.65
TGI 171	18/Aug/04	SSL-236A	Set of 20 children's books with carry case I TGI 171 & 84-04	US$9,069.93
TG1204	18/Jul/04	SSL-192A	Gift bag / TG1204&120-04	US$22,154.06
TG1 204	18/Jul/04	SSL-192B	Gift bag! TG1204&120-04	US$19,133.98
TG1205	21/Jul/04	SSL-196	8ctTarun tissue/TG1205&123-04	US$1,413.72
TG1 212	21/Jul/04	SSL-1 97	Wrap kale santa on green / TG1212&125-04	US$3,677.86
TGI 197	25/Jul/04	SSL-1 99	Tuscan journal / TG1 1 97&1 35-04	US$14,561.06
TG1 213	23/Jul/04	SSL-200A	4238 stripe & dots bag set / TG121 3&140-04	US$46,917.38
TG1 170	18/Aug/04	SSL-235	Set of 20 children's books with carry case / TG1 1	US$17006.13

			70&83-04	
TG1 171	25/Aug/04	SSL-236B	Set of 20 children's books with carry case / TG1 171 &84-04	US$17,006.13
TG1213	23/Jul/04	SSL-200B	4238 stripe & dots bag set /TG1213&140-04	US$5,770.27
TG1214	04/Aug/04	SSL-203	4255DG2 Jumbo core gift bag set /TG1214&138-04	US$15,594.46
TG1 190	30/Jul/04	SSL-204	4460DG sm occ bag set / TG1 1 99&1 28-04	US$23,842.69
#	15/Oct/04	SSL-348	TG sampling	US$50,085.00
TG1 167	07/Aug/04	SSL-224	CMA story books/ TGI 1 67&74-04	US$51,420.60
TG1185	17/Aug/04	SSL-208	2258DG1 8pk Xmas bags/TG1185&105-04	US$80,840.78
TG1216	09/Aug/04	SSL-205	4248DG6 petite core gift bag /TG1216&139-04	US$9,288.14
TG1 215	08/Aug/04	SSL-21 6	IN1 KT7 Finger poppet books / TGI 215&1 43-04	US$31,752.00
TGI 198	13/Aug/04	SSL-228	Tuscan journal / TG1 1 98&1 36-04	US$11,109.42
TGI2I 7	17/Aug/04	SSL-214	2534DG SM Xmas glitter bag / TG1217&1 57-04	US$109,846.04
TG1238	31/Aug/04	SSL-245	42480G7 petite core gift bag /TG1238&180-04	US$4,823.35
TG1234	31/Aug/04	SSL-252	4255DG2 Jumbo gift bag set / TG1234&173-04	US$15,594.46
TGI 149	18/Aug/04	SSL-237	Scrapbook / TG1 149&46-04	US$334,939.75
TG1 193	07/Sep/04	SSL-266	Set of 21 children's books / TG1 1 93&95(A)-04	US$31,468.50
TG1218	07/Sep/04	SSL-269	SM DG 2004 mixed GB asst/TG1218&158(A)-04	US$89,588.72
TG1188	07/Sep/04	SSL-270	Holographic wrap asst/TG1188&124-04	US$76,521.06
TG1236	11/Sep/04	SSL-281	4248DG8 Petite gift bag set /TG1236&178-04	US$4,823.35
TGI 237	11/Sep/04	SSL-282	4255DG4 Jumbo gift bag set / TG1 237&1 79-04	US$15,594.46
TG1232	23/Sep/04	SSL-232	Hans Med Xmas gift bag asst / TG1232&201-04	US$14,326.04
TG1264	13/Sep/04	SSL-299-1	Xmas bag asst/TG1264&229-04	US$12,917.23
TG1 251	15/Sep/04	SSL-298-1	Xmas gift bag asst / TG1251&257-04	US$8,156.59
TG1225	14/Sep/04	SSL-286	SM DG 2004 Halo GB asst/TG1225&160-04	US$53,925.73
TG1219	14/Sep/04	SSL-288	SM D/C hot stamp bag /TG1219&159-04	US$22,831.20
TG1264	15/Sep/04	SSL-299-2	Xmas bag asst/TG1264&229-04	US$29,190.37
TGI 186	14/Sep/04	SSL-285	DG Xmas 2004 8-PK gft bag set / TG11 86 &1 06-04	US$160,157.91
TGI 187	28/Sep/04	SSL-321	DG Xmas 2004 8-PK gft bag set / TG 11 87& 107-04	US$103,594.03
TG1227	03/Sep/04	SSL-260	QVC book/TG 1227 & 195-04	US$4,463.55
TG1250	22/Sep/04	SSL-297	Xmas bag asst/TG 1250 & 254-04	US$31,470.92
TG1251	22/Sep/04	SSL-298-2	Xmas gift bag asst/TG1251 & 257-04	US$21,998.59
TG 1183	15/Sep/04	SSL-258	Small 3-pk asst gift bags / TG11 83 & 88-04	US$35,308.22
TG1241	18/Sep/04	SSL-275	CMA sea life / TG1241 & 202-04	US$45,045.00
TG 1240	10/Sep/04	SSL-276	Pop up W/ padded cover / TGI 240&227-04	US$49.1 03.15
TGI2O1	14/Sep/04	SSL-287	4445DG Med matte ant floral bag / TG12OI&126-04	US$41,838.93
TG1248	3D!Sep/04	SSL-31 I	Bible finger poppet book / TG1248&220-04	US$52,057.41
TG1246	22/Sep/04	SSL-314	DG Petite core 9#/TG1246&205-04	US$4,823.35
TG1226	21/Sep/04	SSL-320	SM DG 2004 Halo GB asstITGI226&161-04	US$24,825.28
TG1251	04/Oct/04	SSL-298-3	Xmas gift bag asst I TG1251&257-04	US$19,213.28
TG1245	16/Oct/04	SSL-312	My first book I TG1245&222-04	US$45,645.60
			TOTAL RECEIVABLES	**US$2,280,825.93**

2 After examinations for Discovery, Stone Sapphire brought a partial Summary Judgment application. The Summary Judgment application dealt only with the "Undisputed Invoices", as was defined at paragraph 10 of my April 12, 2007 Reasons for Judgment now reported at 2007 ABQB 236 (Alta. Q.B.) which reads: —

10 Proceeding on the basis that the Charge-backs all relate to the items claimed for in this summary judgment

Application, the net amount owing to Stone Sapphire for which there is no genuine issue for trial (having been ordered, inspected, delivered and sold by Transglobal at a profit to its retail customers) is USD $1,533,352.62 (the "Undisputed Invoices").

3 I found judgment in Stone Sapphire's favour in the amount of USD $1,533,352.62. Pursuant to my June 5, 2007 Order, the entry of the Order arising from the April 12, 2007 Reasons for Judgment was stayed pending Transglobal's intended Motion to vary the Summary Judgment decision. A number of conditions were imposed on Transglobal in this regard.

4 These conditions included the requirement that the judgment amount of USD $1,533,352.62 be paid into Court by Transglobal before Transglobal's application to vary the Summary Judgment decision would be heard.

5 After numerous difficulties in having Transglobal comply with the Court's direction, these funds were eventually paid into Court where they currently remain earning interest.

6 The Summary Judgment variation application by Transglobal was dismissed in written Reasons dated April 12, 2007 now reported at 2007 ABQB 238 (Alta. Q.B.).

7 On May 20, 2008, Transglobal filed a Notice of Intention to Make Proposal (the "Notice of Intention") pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3.

8 The Notice of Intention lists secured creditors with outstanding amounts totaling $2,000,005.00. With respect to unsecured creditors, the amounts listed on the Notice of Intention total $6,079,594.60.

9 A secured creditor of Transglobal HSBC Canada Bank has, without notice to Stone Sapphire made an application that seeks to access the monies paid into Court arising from the Summary Judgment application.

10 As a result, an application to determine the entitlement to the Judgment Amount funds paid into Court is being arranged by counsel for the secured creditor before a Judge on the Commercial List of this Court, and is tentatively scheduled to take place August 15, 2008 (the "Entitlement Application").

11 Transglobal is also currently involved in litigation with its Controller and more recently General Manager of Transglobal's Edmonton Office. Mr. Kulbaba was a Transglobal employee from November, 2002 until he resigned on April 30, 2008.

12 Stone Sapphire submits that Affidavit evidence in that proceeding touches on issues already before the Court in this Action, in particular Stone Sapphire's present application to confirm Stone Sapphire's legal position resulting from my Summary Judgment decision given the present Notice of Intention and pending Entitlement Application.

The Kulbaba Affidavit

13 On June 12, 2008 Mr. Kulbaba's counsel caused to be filed an Affidavit sworn by Mr. Kulbaba in the Court of Queen's Bench of Alberta Judicial District of Calgary Action No. 0801 04948.

14 It is submitted that Mr. Kulbaba's Affidavit is germane to the issues before the Court in the present Stone Sapphire matter in the following respects:

(a) Evidence with respect to the Stone Sapphire claim at paras. 86 to 89 which read as follows: —

86. Over the time I was with Transglobal, I observed Prescott quite closely. In those observations, I saw

him take very aggressive and very unfair stances towards those he had disputes with. I witnessed him lie to others in an effort to benefit himself and Transglobal.

87. For instance, one of Tranglobabl's suppliers was a company called Stone Sapphire. In 2004, Transglobal owed Stone Sapphire a lot of money for goods supplied to Transglobal. Prescott told me he did not intend to pay the amount owing. Notwithstanding such decision, he continued to receive more goods from Stone Sapphire. When questioned about payment for goods sent, I observed Mr. Prescott lie to Stone Sapphire. Specifically, attached hereto and marked as Exhibit "O" is an email chain between Mr. Prescott and Mr. Rana of Stone Sapphire from August 2004. As can be seen from Exhibit "O", Mr. Rana has asked Mr. Prescott about payment on invoices as Stone Sapphire has apparently committed to pay factories with the funds Transglobal owed. Mr. Prescott responds by referencing an apparent cheque from Dollar Tree for $2.7 million that he says he will use part of, once it clears the bank. That was a lie. That cheque never existed. Transglobal never received such funds from Dollar Tree. Indeed, I don't ever recall Transglobal ever receiving a cheque from anybody in such a large amount. That is what I reference in my reply on Exhibit "O" where I say "That's a nice check". Prescott's final response to me acknowledges, I believe, the lie where he says:

> Now if only my guy that handle my banking could cash the damn thing!

88. Attached hereto and marked as Exhibit "P" is the Statement of Calim in a lawsuit commenced by Stone Sapphire against Transglobabl and Mr. Prescott.

89. I am aware that in 2007, Justice Lee of the Alberta Court of Queen's Bench awarded summary judgment to Stone Sapphire on its claim against Transglobal and that, as a result therefore, Transglobal had to pay approximately USD $1.5 million into court. It took some time to pay this amount, due to Transglobabl's poor cash flow. At that time the funds were being paid, Prescott did not tell me that it was in respect of a judgment.

(b) Evidence with respect to Mr. Prescott's approach in dealing with business related matters at paragraphs 82, 83, 90, 92 and 93 which read as follows: —

82. From almost the outset, Prescott told me that he disliked Ms. Cowles. Prescott said this was partly as a result of her being too talkative with the designers at Transglobal. Prescott did not think this was proper for the receptionist to do. Leading into late 2004, Prescott began to pressure me to fire Ms. Cowles. I resisted such pressure.

83. In late November 2004, Ms. Cowles' boyfriend had some serious health issues (as I recall, some organ failure) and was hospitalized. A week or two later, Prescott called me and told me that I had to fire Ms. Cowles. I protested that her boyfriend was in the hospital and it was just before Christmas. Over the next several days, Prescott continued to pressure me until, ultimately, I gave in and terminated Ms. Cowles. She did not take it well and was very upset with me.

90. Likewise, Transglobabl used to us a salesperson in the United States named Tim Quinn. In 2006, Mr. Prescott was attempting to force Mr. Quinn to change his sales agreement to one less favourable to Mr. Quinn. As part of this, Mr. Prescott was withholding payment of sales commissions to Mr. Quinn. In June 2006, Mr. Prescott, however, made a few payments to Mr. Quinn. Attached hereto and marked as Exhibit "Q" is a copy of the subsequent email exchange between Prescott and I over those payments. As can be seen, Mr. Prescott's final answer summarizes his approach:

> ... Quinn has no representation now that his lawyer quit, you know the drill feed him some carrot

then club him over the head with a stick and leave him like a baby seal.

92. Finally, Transglobal's former Executive Vice President of International Operations was Mr. Robert Raschke. Mr. Raschke, like me, carried many corporate expenses on his personal card and then sought reimbursement from the company. Mr. Prescott fired Mr. Raschke on March 31 or April 1, 2008. As of that time, I understand from Mr. Raschke and believe to be true that he was owed approximately USD $18,000 as reimbursement for corporate expenses. I understand from Mr. Prescott that on Mr.Raschke's last day at Transglobabl, Mr. Prescott gave Mr. Raschke a cheque for the USD $18,000 or so in expenses he was owed. Very shortly thereafter, Mr. Prescott called me and told me to put a stop payment on the cheque. I followed his direction.

93. Similarly, when Andrew Dyakon was leaving, Prescott told me repeatedly that he was going to "fuck him over".

(c) Mr. Prescott's lack of honesty at paragraphs 2, 3, 11, 13, 20, 24, 34, 38, 39, 47, 48, 50, 54, 58, 66, 69, 76, 81, 86, 87, 95 and 98 which read as follows: —

2. In his April 29, 2008 Affidavit ("April 29 Affidavit") Prescott swears that he relied upon me respecting Transglobal's accounting and financial affairs and to manage Transglobal's books and finances. Likewise, both Mr. Prescott's April 29 Affidavit and his May 30, 2008 Affidavit ("May 30 Affidavit") suggest a portrait that Mr. Prescott was relatively uninvolved in and unaware of Transglobal's financial and accounting affairs. As set out throughout the rest of this Affidavit, such statements and suggestions by Mr. Prescott are untrue and misleading. The truth is that Mr. Prescott was extremely involved in Transglobal's day to day accounting affairs, including in particular the incurring of expenses charged to Transglobal and the salary of Transglobal'5 employees, including me.

3. As set out in detail below, I believe that Mr. Prescott has initiated this litigation against me because Transglobal is in serious financial difficulty and I am a convenient scapegoat for Mr. Such conduct is, unfortunately, something that I have witnessed previously from Mr. Prescott in relation to other former Transglobal employees as well as some of Transglobal's business partners.

11. I note from my review of the April 29 Affidavit and May 30 Affidavit that Prescott alleges that various records are missing from Transglobal's offices; the explicit or implicit implication from such allegations is that I was somehow involved in destroying such records. I specifically deny all such implications or statements; they are false.

13. Included in the items that were thrown out were a large number of file folder boxes. While I do not specifically know what records were in those boxes, I do know that several of them came from Transglobal's filing room. I was present during Prescott's cross-examination on his Affidavits on June 5, 2008 and I heard him testify that he only threw out approximately one four foot by four foot pallet of records. That is not true; I personally witnessed many more records than that being thrown out. I would estimate there two to three pallets of records stacked five feet tall. From what I observed, the records thrown out were selected indiscriminately. As mentioned above, the process was very rushed. There was no time to go through each box and file to see precisely what was being thrown out. Since this incident, however, I know that many of Transglobal's records for matters such as payroll for prior years have been missing.

20. I believe that the records that Prescott alleges are missing from Transglobal's files are not in fact missing. So far as I knew when I left Transglobal on April 29, 2008, my credit card statements, credit card receipts, expense reports, backup for such reports and payroll (other than as might have been thrown out by Prescott in 2006 or otherwise) were still present at Transglobal's offices. I do not know why

Prescott is not presenting those records to the Court, but fear that it could be because those records are inconsistent with the allegations that he makes against my wife and I.

24. At paragraph 36 of his April 29 Affidavit, Prescott alleges that I endorsed and cashed cheques made out to Transglobal for my own personal benefit. This is not true. Rather, cheques petty cash were often cashed at the Royal Bank and the Royal Bank did not like to cash cheques made "To Cash", but rather wanted them made out to a person, and, as such, petty cash reimbursement cheques were frequently made payable to "Transglobal" or a Transglobal employee including myself or the accounting assistant. I told Prescott this, and it is for that that he signed and approved the cheques made out to "Transglobal", "Tracy Desjarlais" or (on a couple of occasions) "Josh Kulbaba" for petty cash reimbursement. When cashed, the banker would make me sign the back of the cheque in order to obtain cash. The cheques attached to Prescott's April 29 Affidavit at Exhibit "P" and at least two of the cheques attached to Prescott's April 29 Affidavit at Exhibit "Q" are examples of cheques for the reimbursement of petty cash expenses.

34. Indeed, contrary to the evidence he gave during his cross-examination, Prescott scrutinized and approved employee expense claims (regardless of whether by payroll or cheque reimbursement) throughout the time I was with Transglobal, not just in the recent past. As an example, attached hereto and marked collectively as Exhibit "F" are a bundle of emails to, from or relating to Prescott and his scrutiny and review of employee expense claims.

38. At paragraphs 8 and 9 of Prescott's April 29 Affidavit, Prescott suggests that I removed the company credit card statements from Transglobal's Edmonton office. That is not true. I did not remove any records from Transglobal's Edmonton office. So far as I know, they were all present at Transglobal's offices when I left on April 29, 2008.

39. Prescott's description of what happened on April 18, 2008 is also false and misleading. In the late afternoon on Friday, April 18, 2008, Prescott advised me that he wanted to go over Transglobal's expenses in detail. I told Prescott that my father in law was visiting from Calgary and because I had plans to meet him and my family for dinner and plans over the weekend, I could not review Transglobal's expenses with him until the following week. Prescott indicated that that would be fine as he would be there the entire next week and so I left Transglobal's office at around 4:00 p.m. Prescott did not, however, raise any questions about the expenses with mc the following week.

47. It was not just my personal expenses that were billed to the company; Prescott himself charged many, many personal expenses to the company. For instance, he purchased a $65,000 diamond ring for his wife that he asked me to record on the books as "commission expense". Likewise, while the company bought several Dodge Vipers that were recorded as company assets, the company also purchased several others that were expensed and not listed as assets.

48. Prescott instructed me to book those assets in other expense categories such as "travel" or "commission" Likewise, the company leased a Hummer; when the lease was up, Prescott purchased the Hummer with corporate funds and wrote the cost off to commission or travel expense. The company did not list the Hummer as an asset, In booking these purchases, I only ever did so at Prescott's specific instruction. As examples of Prescott's direction and involvement in characterizing such expenses, attached hereto and marked as Exhibit "F" is an email relating to Prescott's involvement in directing how to book personal expenses charged to the company.

48. Likewise, though I do not recall ever seeing y backup for Prescott or his wife's company credit cards, I know from my discussions with him and seeing the statements for those cards that they put many, many of their personal expenses, such as meals and travel, on the company account. Frankly, it was simply part of the culture of working with Mr. Prescott that this is how some personal expenses were paid.

50. At paragraph 17 of the April 28 Affidavit Prescott alleges that he reviewed Transglobal's online expense report summaries and discovered that the expenses on my Transglobal credit card are different than the expenses listed on my expense reports for the same period. As explained above, expense reports were only submitted in respect of expenses that I incurred on my personal credit card or that were

otherwise paid out of my pocket. Expense reports were not submitted with respect to charges to my Transglobal credit card because Transglobal received the statements for that card which set out all of the charges to the card and with the approval of Prescott, the balance of that card was always paid out of Transglobal's accounts. As he admitted in cross-examination, Prescott knows that these are different processes. Given Prescott's very personal knowledge of the expenses and processes at Transglobal, I believe that the allegations in paragraph 17 of Prescott's April 29 Affidavit were deliberately misleading.

54. As shown at Exhibit "D" of Prescott's April 29 Affidavit, and specifically at page 82, I used my Transglobal credit card in Toronto and Edmonton in the same day. Prescott did not disclose to the Court that those charges involve the Toronto and Edmonton Airports. He is well aware that I traveled to Toronto in January 2007 for Transglobal business and returned to Edmonton the same day. Likewise, at page 88 the charge in Coquitlam related to a same-day trip I made to Vancouver from Edmonton for Transglobal in July. Attached hereto and marked as Exhibit "C" is a copy of the itinerary for such trip. I believe this record should be included with the backup records that I left at Transglobal's offices that Prescott has not produced in this litigation.

58. Finally, and perhaps most seriously, I believe Prescott was fully aware on April 29, 2008 that I could not have had a second card issued for Julia. When we obtained a card for his wife, Prescott — as the only person with authority at Transglobal — had to personally sign application forms to have the second card issued. Attached hereto and marked as Exhibit "L" is a copy of an email from me to Prescott forwarding the "new card" forms for his wife in June 2006.

66. From paragraph 23 to paragraph 32 of his April 29 Affidavit Prescott alleges that I had unfettered access to payroll and that I fraudulently paid myself more than I was contractually entitled to. Those allegations are not true.

69. While I heard Prescott in his cross-examination deny that I was entitled to bank pay, that evidence was not true. Attached hereto and marked as Exhibit "M" is an email from Transglobal's then-accounting assistant to me and other Transglobal employees confirming our bank hours as of December 7, 2004.

76. With particular respect to paragraph 35 and Exhibit "0", Mr. Prescott has completely misrepresented this exchange. In late March 2008, I sent Prescott some financial statements. A few weeks later Mr. Prescott requested that I send him a listing of employee wages that matched these financial statements. Because at the time I sent the original financial statements the March 2008 payroll had not been run yet, it did not have the final figures, which would have included the extra pay run for me. I advised Prescott that that statement would reflect that I was paid $20,000.00 in March 2008 because of the 13th Month Bonus that I was paid. Prescott requested that I revise the statement to show only the usual and recurring monthly salary payments. As a result, I sent Exhibit "0" to his April 29 Affidavit.

81. At paragraphs 17 through 19 of the May 30 Affidavit, Mr. Prescott gives incorrect and misleading information about Ms. Cowles. Ms. Cowles was hired around April 2004. She had no accounting experience. She was originally hired to be a receptionist, but I told Prescott I believed I could help her become an accounting assistant.

86. Over the time I was with Transglobal, I observed Prescott quite closely. In those observations, I saw him take very aggressive and very unfair stances towards those he had disputes with. I witnessed him lie to others in an effort to benefit himself and Transglobal.

87. For instance, one of Transglobal's suppliers was a company called Stone Sapphire. In 2004, Transglobal owed Stone Sapphire a lot of money for goods supplied to Transglobal. Prescott told me he did not intend to pay the amount owing. Notwithstanding such decision, he continued to receive more goods from Stone Sapphire. When questioned about payment for goods sent, I observed Mr. Prescott lie to Stone Sapphire. Specifically, attached hereto and marked as Exhibit "0" is an email chain between Mr. Prescott and Mr. Rana of Stone Sapphire from August 2004. As can be seen from Exhibit "0", Mr. Rana has asked Mr. Prescott about payment on invoices as Stone Sapphire has apparently committed to pay factories with the funds Transglobal owed. Mr. Prescott responds by referencing an apparent cheque from

> Dollar Tree for $2.7 million that he says he will use part of, once it clears the bank. That was a lie. That cheque never existed. Transglobal never received such funds from Dollar Tree. Indeed, I don't ever recall Transglobal ever receiving a cheque from anyhpy in such a large amount. That is what I reference in my reply on Exhibit "0" where I say "That's a nice check". Prescott's final response to me acknowledges, I believe, the lie where he says:
>
> > Now if only my guy that handle my banking could cash the damn thing!
>
> 95. In Mr. Prescott's April 29 Affidavit, I see (at para. 56) that Mr. Prescott swore that Transglobal would undertake to pay damages should the Court later determine it should as a result of seeking the ex parte Attachment Order. I know that as of April 29 2008 such undertaking was worthless. The company was effectively insolvent.
>
> 98. Set off against those claims, Transglobal has little in the way of assets. Most of its equipment is leased. Attached hereto and marked as Exhibit "T" are the latest draft of the December 31, 2007 financial statements for Transglobal that were available to me upon my departure (these date from April 21, 2008). As can be seen, the company only had $4.4 million in assets. A significant part of those assets is the "$1,249,627 Cash in trust". That cash is part of the USD $1.5 million that Transglobal had paid into Court in the Stone Sapphire lawsuit. Given his intimate familiarity with Transglobal's finances, I believe that Prescott was fully aware of Transglobal's insolvency and inability to meet the undertaking when it applied for the *ex parte* Order on April 29, 2008.

15 The Court's attention is drawn to the financial statements of Transglobal for 2007 which are appended as Exhibit "T" to the Kulbaba affidavit. It is submitted that Transglobal's alleged cash flow and gross margin difficulties in 2007 (see Prescott Affidavit filed September 11, 2007 at paragraphs 16 to 18) stated in support of the order to extend payment terms for the Summary Judgment Amount into Court represented a further fraud by Mr. Prescott on the Court. Mr. Prescott's cash flow difficulties were attributable to: —

> (a) Management salaries of $463,000.00;
>
> (b) Legal fees of $578,810.00; and
>
> (c) Extraordinary foreign exchange loss of $421,988.

16 It is submitted that Transglobal's gross sales increased in 2007 and cost of goods sold declined.

The Desjarlais Affidavit

17 On June 12, 2008 a Transglobal employee filed an affidavit in support of Mr. Kulbaba. Ms. Desjarlais' affidavit also calls into question Mr. Prescott's honesty at paragraphs 10, 11, and 12 which read as follows: —

> 10. I understand from Mr. Prescott's Affidavits that his evidence is that certain accounting records relating to payroll and expenses have gone missing from Transglobabl's offices. I have some information that contrasts with such evidence.

> 11. First, with respect to credit card statements, I see from Mr. Prescott's Affidavit that he alleges that all of Mr. Kulbaba's company credit card statements went missing from Mr. Kulbaba's office on April 18, 2008. I know that is not so. Specifically, on April 29, 2008 I recall that I had at my desk the most recent credit card bill for Mr. Kulbaba (covering the month of March, 2008). At the end of the day, I put that statement back in Mr. Kulbaba's office in the same place that credit card statements were always filed. It did not appear to me that anything was missing from this file at that time; the previous month's statement was there and what seemed like the normal number of statements before that for Mr. Kulbaba's credit card were also there.
>
> 12. Second, respecting the receipts for Mr. Kulbaba's company credit card that I mentioned above, those too were still at Transglobal's office well into the month of May 2008. Indeed, at one point I handed the file containing those receipts to Mr. Prescott and Transglobabl's attorney. After the receipts were reviewed, I was told that these were "only the business receipts" and "not the personal ones". I understood from such comments that the receipts I provided were not what Mr. Prescott was looking for. I have reviewed Exhibit "G" to Mr. Prescott's May 30, 2008 Affidavit. While some of the pages are difficult to read, as seems to be implied by paragraph 16 of Mr. Prescott's May 30, 2008 Affidavit, I can confirm that I handed more receipts to Mr. Prescott than are shown on Exhibit "G".

The Lutomsky Affidavit

18 On June 12, 2008 a former Transglobal employee filed an affidavit in support of Mr. Kulbaba. It is submitted that Mr. Lutomsky's affidavit also calls in to question Mr. Prescott's honesty at paragraphs 11, 13, and 14 which read as follows: —

> 11. From Mr. Prescott's Affidavit sworn May 30, 2008 I understand that Mr. Prescott alleges that Mr. Kulbaba "orchestrated" the termination of Ms. Crystal O'Hara Cowles, a former Transglobal employee. I have evidence that I believe contradicts that allegation.
>
> 13. I specifically deny that I <u>ever</u> suggested to anyone, including Mr. Prescott, Mr.Ursulak or anyone else, that Mr. Kulbaba was worried or had "nightmares" about being charged for sexual harassment regarding Ms. Cowles. Any evidence to the contrary is untrue.
>
> 14. From Mr. Prescott's Affidavits, it appears to me that he is taking the position that he was relatively uninvolved in the day-to-day affairs at Transglobal's Edmonton office. I do not believe that is an accurate reflection. Specifically, I recall that Mr. Prescott, with the assistance of his relative Dean Ursulak, an IT employee at Transglobal, would regularly monitor employees. For instance, I personally observed Mr. Ursulak reviewing employee "ichat" logs. These were logs of employee-to-employee electronic communications. I understood at the time that the employees did not know their conversations were being monitored. At the end of each day, Mr. Ursulak and Mr. Prescott would go over what Mr. Ursulak had monitored. Finally, I recall thatMr. Ursulak discovered several internet websites created by some employees about themselves — these were also monitored by Mr. Ursulak and Mr. Prescott so that they could review employee communications. Given the foregoing, it is my belief that Mr. Prescott was very much involved and aware of what was happening at Transglobal on a daily basis. Given the lengths he went to in order to monitor frivolous matters like employee conversations, I do not believe that he could have been unaware about expenses being incurred by employees such as Mr. Kulbaba.

Analysis

19 In a decision rendered on April 12, 2007 I granted summary judgment to the Plaintiff in the amount of USD $1,533,352.62.

20 Following my colleague Justice Graesser's decision of March 4, 2008 to allow Transglobal to adduce fresh evidence

with respect to the Summary Judgment, Transglobal's application for reconsideration and for consideration of the new evidence was argued before me on April 2, 2008.

21 In the interim Transglobal's secured creditor, HSBC, issued a 10 day demand. Transglobal filed a Notice of Intention under the *BIA* order to allow it to obtain alternate financing.

22 In the course of the *BIA* proceedings Transglobal argued that this Court ought to be provided with sufficient time to decide the reconsideration motion. HSBC then agreed refrain from immediately applying to have the $1.5 million in this action paid to it as the secured creditor of Transglobal.

23 The Plaintiff Stone Sapphire applies for an Order that judgment be entered against the Defendant Transglobal Communications Group Inc. ("Transglobal"), and for an Order lifting the stay of proceedings which arises under s. 69 of the *Bankruptcy and Insolvency Act* ("*BIA*",). Transglobal is not a bankrupt, but has filed a Notice of Intention to make a proposal to its creditors.

24 In this hearing, the Plaintiff has submitted extensive materials from another action involving Transglobal's former employees.

25 An Attachment Order in respect of Mr. Kulbaba's assets has been granted by this Court ex parte. Cross-examinations of Mr. Kulbaba and others has yet to occur, but are expected to occur within the next couple of weeks. While the elements of Kulbaba's affidavit which refer to matters involving Stone Sapphire apparently are or will be refuted by Mr. Prescott in his evidence, Mr. Kulbaba has also apparently retained Bennett Jones to address the continuation of the Attachment Order which is scheduled to be heard shortly before my colleague Clark, J.

26 I dismissed the Transglobal reconsideration application in written Reasons dated June 27, 2008, now reported at 2008 ABQB 397 (Alta. Q.B.).

27 A hearing in the *BIA* proceedings to determine the question of whether the Plaintiff or HSBC has priority to the funds held in court in this action has been scheduled for August 15, 2008.

28 The general jurisdiction of the Court is well known from s. 8 of the *Judicature Act*, R.S.A. 2000, c. J-2: —

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

29 Judgments of the Court take effect from the date of pronouncement, *Alberta Rules of Court* s. 322: —

> 322(1) Every judgment and order is to be dated as of the day on which it is pronounced.
>
> (2) Every judgment and order takes effect from
>
> (a) the date of pronouncement, or
>
> (b) if the Court gives leave for the judgment or order to come into force before or after the date of pronouncement, the judgment or order takes effect from the date so ordered.
>
> (3) This Rule applies whether or not the judgment or order has been entered in accordance with these Rules.

30 In this case, the Summary Judgment decision takes effect from April 12, 2007 being the date that my Reasons for Judgment were issued.

31 Stone Sapphire argues that the actions of Transglobal over the last year culminating in the filing of the Notice of Intention have the potential effect of "clouding" Stone Sapphire's position *vis a vis* the monies paid into Court. Stone Sapphire wishes to ensure there is no ambiguity arising with respect to the Summary Judgment decision of April 12, 2007.

32 Accordingly if Transglobal's application to vary the Summary Judgment decision is denied, then it is Stone Sapphire's position relative to the funds paid into Court be finalized, that is, Stone Sapphire's position arising from the Summary Judgment decision must be finalized as it would have been in April, 2007 but for the procedural steps and irregularities occasioned by Transglobal thereafter.

33 Stone Sapphire says that it is not seeking a Judgment of the Court that would in anyway address the relative rights of Transglobal's creditors, including Stone Sapphire, to the Summary Judgment funds presently paid into Court.

34 Stone Sapphire acknowledges that it's legal entitlement, and that of the secured creditor HSBC or any other Transglobal creditor to those monies paid into Court will be the subject of the separate Entitlement Application tentatively scheduled to be argued August 15, 2008.

35 Stone Sapphire merely seeks through this application to ensure that:

(a) the order arising Summary Judgment already issued by the Court on April 12, 2007 is entered; and

(b) that no stay of proceedings arising from the Notice of Intention affects finalization of Stone Sapphire's position.

36 It is submitted that this will ensure that whatever rights that Stone Sapphire has in the monies paid into Court are preserved, and will allow those rights to be presented as fairly and strongly as possible. However Stone Sapphire acknowledges that the substantive issues as to the respective entitlement of Stone Sapphire, HSBC and other creditors will be addressed on August 15, 2008 at the Entitlement Application.

37 In summary Stone Sapphire says that the theatrics of Transglobal over the past year have the potential of clouding the entitlement issue. Stone Sapphire submits that there should be no ambiguity with respect to it's position at the time the Entitlement Application is heard.

38 Stone Sapphire seeks:

(a) An Order entering Judgment in the form of the Order of April 12, 2007;

(b) An Order lifting the Stay provided for in paragraphs 2 and 11 of my Order granted on June 5, 2007;

(c) An Order lifting the stay of proceedings which came into effect pursuant to s. 69 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 upon the Defendant filing a Proposal.

39 Transglobal submits that Stone Sapphire has failed to lead any evidence to support it's application to enter Judgment against Transglobal, and to lift the stay of proceedings under s. 69 of the *BIA* is appropriate in the circumstances. There is no evidence that Stone Sapphire is being materially prejudiced by the stay of proceedings under the *BIA*, and that there is an equitable ground to justify the stay being lifted.

Conclusion

40 One of the objects of the *BIA* is to provide that all creditors of the same class are treated equally, and that an "orderly distribution" is made, with creditors ranking *pari passu*. The statutory stay of proceedings achieves that by preventing one creditor from taking proceedings or steps which may give it an unfair advantage relative to the other creditors: *Holden & Moawetz, Annotated Bankruptcy and Insolvency Law of Canada* (3d) Vol. II.

41 Further the stay of proceedings allows a debtor such as Transglobal the breathing room necessary to focus its efforts to the reorganization of its debts and the making of a proposal for the benefit of all creditors, rather than expending its time and efforts to respond to formal court proceedings of one particular creditor, to the detriment of its other stakeholders.

42 In particular, s.69.1 of the *BIA* provides for an automatic stay of any remedy as against a party filing a proposal, such that a person shall not commence or continue any action, execution or other proceedings for the recovery of a "claim provable in bankruptcy".

> 69.1 Subject to subsections (2) to (6) and sections 69,4 and 69.5, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,
>
> > (a) No creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

43 The definition of provable claim is quite broad, and appears to include Stone Sapphire's claims, whether reduced to a formal judgment or not:

> 121(1) **Claims Provable** — All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt, or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

44 While s. 69.4 does give the court the discretion to lift the stay, the creditor must establish that it is materially prejudiced by the stay that it is equitable on other grounds to do so.

> 69.4 A creditor who is affected by the operation of section 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> > (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; and
> >
> > (b) that it is equitable on other grounds to make such a declaration.

45 Stone Sapphire has failed to adequately lead evidence as to why the automatic stay of proceedings should be lifted in respect of this claim, or in respect of the judgment should it be entered. The onus is on Stone Sapphire to establish that it is being materially prejudiced by the stay.

46 Generally, Courts will consider lifting a stay when the action is one that would survive the *BIA* proceedings, that the matter is an unliquidated debt that is so complex that the summary process under the *BIA* is inappropriate, if the insolvent person's involvement is necessary in respect of other parties, if the action is necessary to recover under an available policy of insurance, or that the action has progressed to a point where logic dictates that the action continue to judgment. However the Courts have stated that even if the stay is lifted to prosecute an action, execution on any Judgment will invariably be stayed: *Advocate Mines Ltd., Re*, [1984] O.J. No. 2330 (Ont. S.C.).

47 In the case at bar, Stone Sapphire purpose has failed to explain for what purpose that the stay be lifted to ensure that "no stay of proceedings arising from the Notice of Intention affects finalization of Stone Sapphire's position".

48 At the very least, regardless of the purpose, and the statement by Stone Sapphire that it is not "seeking a judgment of the Court that would in anyway address the relative rights of Transglobal's creditors" to the court funds, the effect of lifting the stay is that Transglobal's focus and efforts will be taken away from working with the Proposal Trustee and developing a proposal for the benefit of all of its creditors.

49 To allow an unsecured creditor to either proceed with an action that is ultimately compromised under the *BIA*, or to enforce on a judgment while a company attempts to reorganize its affairs for the purpose of filing a proposal, usurps the intent and purpose of the *BIA*.

50 I conclude that Stone Sapphire has failed to meet the onus upon it, and has failed to show any or sufficient circumstances that would justify the stay being lifted. The interests of the creditors as a whole must be considered, and without any evidence that there is material prejudice and that there are equitable grounds to support an order, Stone Sapphire's application to lift the stay must fail, particularly where it can point to no specific purpose for the lifting of the stay.

51 I do however reconfirm that no stay of proceedings arising from the Notice of Intention will affect the entry of the Order arising from Stone Sapphire's Summary Judgment already issued by the Court on April 12, 2007. My Summary Judgment decision takes effect from the date of its pronouncement on April 12, 2007 pursuant to Rule 322(2).

52 In my opinion the non-entry of the Summary Judgment Order, and the Court's recent rehearing application now dismissed, does not mean that Stone Sapphire's position relative to the funds now paid into Court has been compromised.

53 I conclude with or without a stay, that Stone Sapphire may be an unsecured creditor whose rights in the court funds rank subordinate to any creditor that holds a security interest in those funds. This issue however must still be determined at the motion of HSBC Bank of Canada who asserts a first ranking security interest in the funds.

54 Stone Sapphire argues that it has judgment and that the funds presently paid into Court are Stone Sapphire's monies that cannot be released because Stone Sapphire is an off-shore company, unless and until Transglobal's Counterclaim has been addressed. Stone Sapphire argues since there was no right of legal or equitable set off, the monies paid into Court are Stone Sapphire's funds, and therefore Stone Sapphire is not an unsecured creditor with respect to the Judgment amount.

55 Without fully assessing Stone Sapphire's specific purpose for lifting the stay, the court simply cannot know if the circumstances warrant it, or if an unfair advantage results from it.

56 I conclude that in any event Stone Sapphire's rights relative to the secured creditor will be fully argued and considered when the entitlement application proceeds on August 15, 2008.

Motion dismissed.

End of Document

TAB 10

2013 ABQB 670
Alberta Court of Queen's Bench

Thompson Bros. (Constr.) Ltd. v. Jay Vee Sandblasting Ltd.

2013 CarswellAlta 2408, 2013 ABQB 670, [2014] A.W.L.D. 305, [2014] A.W.L.D. 306, 235 A.C.W.S. (3d) 600, 7 C.B.R. (6th) 258

Thompson Bros. (Constr.) Ltd. Plaintiff/Respondent and Jay Vee Sandblasting Ltd., Defendant and BDO Canada Limited, Receiver and MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd. Applicants

B.R. Burrows J.

Heard: October 25, 2013
Judgment: November 15, 2013
Docket: Edmonton 1303-03149

Counsel: Greg Heinrichs, Q.C., Deborah Szatylo for Applicants
Sigurd Delblanc for Plaintiff / Respondent
Russell A. Rimer for Receiver
No one for Jay Vee Sandblasting Ltd.

Subject: Insolvency; Civil Practice and Procedure

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

Bankruptcy and insolvency

III Bankruptcy petitions for receiving orders
III.4 Stay of petition
III.4.a Pending outcome of other proceedings

Bankruptcy and insolvency

V Bankruptcy and receiving orders
V.4 Rescission or stay of order

Headnote

Bankruptcy and insolvency — Bankruptcy petitions for receiving orders — Stay of petition — Pending outcome of other proceedings

Respondent T Ltd. was secured creditor of J Ltd. and was applicant for receivership order which had been imposed — Secured debt claimed by T Ltd. was $11.75 million; however, there were debts to other priority creditors exceeding $600,000 — Applicants had unsecured claims against J Ltd. exceeding $1.6 million; additionally, were other unsecured creditors whose claims totalled $1.9 million — Since receivership order, receiver had proceeded with sale of assets of J Ltd. — Applicants brought application for order lifting stay of proceedings imposed in receivership order in respect of J Ltd. — Application granted — Proceeds of sale of assets of J Ltd. exceed undisputed amount of secured debt by significant amount — After eight months neither receivership nor court applications have advanced very far toward resolution of disputes between creditors — Bankruptcy trustee would have rights and powers which would potentially bring disputes to determination more quickly and probably more efficiently than current proceedings — There would seem to be little basis for concern that bankruptcy trustee would be required to duplicate work already done by receiver — Lifting stay of proceedings should be granted to permit applicants to bring bankruptcy application.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

Respondent T Ltd. was secured creditor of J Ltd. and was applicant for receivership order which had been imposed — Secured debt claimed by T Ltd. was $11.75 million; however, there were debts to other priority creditors exceeding $600,000 — Applicants had unsecured claims against J Ltd. exceeding $1.6 million; additionally, were other unsecured creditors whose claims totalled $1.9 million — Since receivership order, receiver had proceeded with sale of assets of J Ltd. — Applicants brought application for order lifting stay of proceedings imposed in receivership order in respect of J Ltd. — Application granted — Proceeds of sale of assets of J Ltd. exceed undisputed amount of secured debt by significant amount — After eight months neither receivership nor court applications have advanced very far toward resolution of disputes between creditors — Bankruptcy trustee would have rights and powers which would potentially bring disputes to determination more quickly and probably more efficiently than current proceedings — There would seem to be little basis for concern that bankruptcy trustee would be required to duplicate work already done by receiver — Lifting stay of proceedings should be granted to permit applicants to bring bankruptcy application.

Table of Authorities

Cases considered by *B.R. Burrows J.*:

Haunert-Faga v. Faga (2013), 2013 CarswellOnt 11104, 2013 ONSC 5161, 4 C.B.R. (6th) 118 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 38 — considered

s. 43 — pursuant to

APPLICATION by applicants for order lifting stay of proceedings imposed in receivership order in respect of J Ltd.

***B.R. Burrows J.*:**

1 MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd., who I will refer to collectively as the Kirkup Group, seek an order lifting the stay of proceedings imposed in a Receivership Order in respect of Jay Vee Sandblasting Ltd. granted by Thomas J. on March 7, 2013. They seek the lifting of the stay so they can bring a bankruptcy application under *BIA* s. 43 with respect to Jay Vee of which each of them is an unsecured creditor.

2 Thompson Bros. is a secured creditor of Jay Vee and was the applicant for the Receivership Order. The order appointed BDO Canada Ltd. as Receiver.

3 The secured debt claimed by Thompson Bros. is $11.75 million. Of this, $8.15 million was originally owed to the Canadian Western Bank whose security held first priority. Thompson Bros.' secured debt (the amount of which is in issue but which Thompson Bros. claims to be $3.6 million) held second priority. The Bank assigned its debt to Thompson Bros.

4 The First Report of the Receiver dated May 10, 2013 indicates debt to the Canada Revenue Agency and other priority creditors exceeding $600,000.

5 The Kirkup Group has unsecured claims against Jay Vee exceeding $1.6 million. Actions had been commenced in respect of these debts against Jay Vee prior to the receivership. There are other unsecured creditors whose claims total $1.9 million.

6 Since the receivership was ordered there have been two main streams of activity. First, the Receiver has proceeded with the sale of Jay Vee's assets. Second, the Kirkup Group has made a number of applications inspired by its principals' concerns that there was significant pre-receivership dissipation and unremunerated use of the assets of Jay Vee, and that the proper credit has not been made for payments made by Jay Vee in respect of the Thompson Bros.' debt. I will describe these concerns more specifically below.

7 The first stream of activity reached the point on October 25, 2013 of the Court approving the sale of the assets of Jay Vee to Thompson Bros. subject to terms which, among other things, attempted to preserve the rights of the Kirkup Group to pursue the concerns they have raised in the second stream of activity.

8 The second stream of activity consists of the following applications brought by the Kirkup Group:

a. June 21, 2013 - Application for an order determining:

1. the amount of the debt owed by Jay Vee to Thompson Bros.,

2. the validity of the security taken by Thompson Bros. against Jay Vee,

3. the validity of the security taken by Canadian Western Bank against Jay Vee which was subsequently assigned to Thompson Bros.

In this application the Kirkup Group alleged that Thompson Bros. might not have been a legitimate arms-length creditor of Jay Vee and may have been a mortgagee in possession.

b. July 25, 2013 - Application for an order setting aside the Receivership Order of March 7, 2013, or alternatively, replacing BDO Canada Limited as Receiver with a new Court appointed receiver and other relief.

c. July 29, 2013 - Application for an order directing Paul Sturt, deponent of an affidavit filed by Thompson Bros. in response to the previously filed applications, to provide answers to undertakings, and to questions refused to be answered at Questioning on the affidavit.

d. August 12, 2013 - Application for an order directing Earl Northcott to answer undertakings and questions he refused to answer at Questioning on an affidavit.

e. August 12, 2013 - Application that the first two applications be determined at a trial involving *viva voce* evidence.

9 On September 4, 2013 I granted an order declaring that all security granted by Jay Vee to the Canadian Western Bank was valid and that the amount of the debt it secured was $8,105,776.64. The order was expressed to be without prejudice to the Kirkup Group's right to seek a setoff against the total debt owed to Thompson Bros. by Jay Vee of any amount the Kirkup Group might prove Thompson Bros. is responsible to pay Jay Vee.

10 In the same order I dismissed Kirkup Group's applications to set aside the Receivership Order or alternatively to replace BDO as Receiver. The other Kirkup Group motions listed above were adjourned.

11 Also in the September 4, 2013 order I ordered that if Thompson Bros. was the successful purchaser of Jay Vee's assets (which, as noted, it was) the question of whether and to what extent Thompson Bros. should be required to leave the assets purchased unencumbered, or alternatively the amount of security which Thompson Bros. should be required to post so that the claims advanced by Kirkup Group would not be prejudiced, would be determined at the application for

approval of the sale. In fact, at that application, on October 25, 2013, that issue was further adjourned. In the meantime the Receiver was directed to make no distribution of the net proceeds of the sale until further order.

12 The concerns that the Kirkup Group raises in the second stream of activity are more specifically described by Kirkup's counsel in the materials filed on this application as follows:

a. Payments (or at least an August 2012 payment of $300,000) made by Jay Vee to Thompson Bros. has not been credited in the accounting for Jay Vee's debt to Thompson Bros.

b. Payments were made in June, July and August 2012 by Jay Vee to "Thompson individuals" for no apparent reason. Undertakings to advise why these payments were made have not been satisfied.

c. Jay Vee records indicate that two payments totalling $88,000 were made by certified cheque to unknown payees on October 9, 2012. Information explaining these payments has not been provided.

d. The mortgage granted by Jay Vee to Thompson Bros. does not provide for compound interest. Thompson Bros. has improperly calculated the debt using interest compounded monthly.

e. The mortgage granted by Jay Vee to Thompson Bros. secured a debt of $1.5 million that was outstanding on April 24, 2009. It did not secure advances which were made by Thompson Bros. to Jay Vee after that date. Payments by Jay Vee should be credited against the oldest debt - the mortgage debt. If payments were properly credited, no payment should have been credited against advances made by Thompson Bros. to Jay Vee after the mortgage, on August 27, 2009 and August 26, 2010, totalling $650,000, until the mortgage debt was entirely repaid. The accounting records disclosed to date do not confirm that this accounting procedure was followed. If it was, the post April 24, 2009 advances would be wholly outstanding and would now be statute barred. [I note that the Kirkup Group materials do not discuss how the General Security Agreement granted by Jay Vee in favour of Thompson Bros. on April 24, 2009 which appears to grant security in respect of existing and "future obligations, liabilities and indebtedness" fits into this allegation.]

f. There was no documentation providing that interest was payable on advances made by Thompson Bros. to Jay Vee after April 24, 2009. None should be included in the debt claimed in respect of advances made after that date.

g. The debt claimed by Thompson Bros. includes legal fees incurred by Thompson Bros. in relation to the collection of the debts owed to it. The only legal fees that Thompson Bros. can properly claim against Jay Vee are those relating to the mortgage and the enforcement of the mortgage. The legal fees paid, which exceed $140,000, were for services both inside and outside that scope. The portion for services outside that scope are not properly included in the secured debt.

h. Some of the information obtained by the Kirkup Group suggests that for several months prior to the Receivership Order, Thompson Bros. may have been a mortgagee in possession as it was playing a significant role in the day to day operation of Jay Vee. This would open the question of whether Thompson Bros. mismanaged the affairs of Jay Vee during that period in such a way that the amount of the debt owed by Jay Vee to Thompson Bros. should be reduced. An example of such mismanagement could be permitting Norpoint Sandblasting & Painting Ltd. to use Jay Vee's facility without payment of rent. Other indications of mismanagement in the same period include that there were very substantial reductions in a) the reported value of Jay Vee's inventory (from $1,968,980 to $20,000), and b) the reported value of Jay Vee's accounts receivable (from $9,673,782.85 to $323,281.68).

i. Principals of Jay Vee used money of Jay Vee to pay for personal items including expensive vehicles, rent and Court ordered maintenance.

j. Jay Vee funds were paid to both related and unrelated persons and entities for unknown or no reason.

13 The stay of proceedings provision in the Receivership Order states:

No Proceedings Against the Debtor or the Property

8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8.

14 The Kirkup Group seek a lifting of the stay to permit them to apply for a bankruptcy order against Jay Vee. They submit that a bankruptcy proceeding would provide a better procedure for the determination of the issues they have raised in the second stream of activity described above than the receivership proceeding provides.

15 In particular they submit that the powers of a trustee in bankruptcy are wider in relevant ways than those of a Court appointed receiver. In that regard they cite the following passages from Bennett on Receiverships, Carswell, 3rd ed., found under the title, "Reasons for Bankruptcy from Unsecured Creditor's Point of View":

• Information: ... bankruptcy affords unsecured creditors through the trustee a right to demand an accounting from the security holder as well as an opportunity of determining whether the security instrument can be attacked. (page 624)

• Investigation: ... the bankruptcy gives all creditors a measure of protection through the mechanics of the Act. Even if the trustee in bankruptcy does not have sufficient proceeds, creditors have the right to fund the trustee or to proceed under section 38 of the *Bankruptcy and Insolvency Act* for a thorough investigation of the affairs of the debtor.

Moreover, once the debtor is placed into bankruptcy, the trustee in bankruptcy acquires causes of action that may not be apparent without an investigation. If the trustee is successful in pursuing the causes of action, the proceeds benefit preferred and unsecured creditors including the security holder who is partially secured.

... in a bankruptcy situation, the trustee may proceed and recover moneys paid as a preference with the result that such moneys devolve upon all preferred and unsecured creditors. (page 626)

And these passages found under the title, "Causes of Action available only to Trustee in Bankruptcy":

• Fraudulent Preferences and Transfers at Undervalue: ... the trustee in bankruptcy may be entitled to attack the security instrument pursuant to the *Bankruptcy and Insolvency Act* as being a fraudulent preference or a transfer at undervalue. (page 630)

... Aside from any trustee attack that might be made against the security holder, the trustee may also assert any of the causes of action against third parties who have received fraudulent preferences or who have received transfers at undervalue. (page 633)

• Examinations: ... [Pursuant to *BIA* s. 163(1)] [t]he trustee may without an order examine under oath any person reasonably thought to have knowledge of the affairs of the bankrupt. The trustee may require a person to produce any books, documents, correspondence or other papers in that person's possession or under his or her power relating all or in part to the bankrupt, his or her dealings, or property. In addition, the trustee may require anyone who has or is believed or suspected to have [it] in his or her possession to produce or deliver any property of the bankrupt, including books, documents, or papers. (page 636)

• Creditors' Remedies - Section 38 Proceedings: ... If the trustee does not have sufficient funds to proceed or receives a legal opinion that the trustee's cause of action is not meritorious, then it is open for an unsecured creditor including a security holder who has a claim for a deficiency balance, to proceed with such cause of action pursuant to s. 38 of the *Bankruptcy and Insolvency Act*. Creditors may have claims against another creditor who, for example, received a fraudulent preference and may have claims against the security holder and receiver. With respect to both types of claims, creditors do not have any cause of action against them directly as such claims are vested in the trustee in bankruptcy. The creditors must either obtain an assignment from the trustee or an order under section 38 of the Act.

16 The Kirkup Group also observe that their efforts to this point to have their concerns explored in the receivership have been largely unsuccessful. On April 18, 2013, the Kirkup Group's solicitors wrote to counsel for the Receiver requesting that the Receiver investigate what happened to Jay Vee's inventory and accounts receivable between August 2012 and March 2013. As previously noted the recorded value of the former declined from $1,968,980 to $20,000 and the recorded value of the latter declined from $9,673,782.85 to $323,281.68 in that period. A follow-up letter was sent to the Receiver's counsel on May 6, 2013. There is no indication that the Receiver has responded to these requests.

17 I note that in the Bench Brief filed on August 28, 2013 for the September 4, 2013 application the Receiver's counsel has acknowledged that the Kirkup Group has raised the issues it has and that, at some point, at least some of them must be addressed. That brief also stated that the Receiver has been unable to determine with any degree of certainty the exact amounts owed by Jay Vee to Thompson Bros. though, "it seems apparent on the evidence presented thus far, that the amount owing to Thompson Bros. is definitely in excess of $1.5 Million dollars (*sic*)". I am not aware of any objective determination having been made as to what caused the very significant decline in the stated value of Jay Vee's inventory and accounts receivable in the six months preceding the appointment of the Receiver. So far as I am aware it has not been determined whether any causes of action exist in favour of Jay Vee in connection with whatever those causes were.

18 Thompson Bros. did not file any affidavit or other materials in response to this application. In oral submissions, Mr. Delblanc, counsel for Thompson Bros., submitted that bankruptcy proceedings would be "incredibly expensive". Whether or not this is so, I note that the cost of the bankruptcy proceedings would not reduce the recovery of Thompson Bros. to the extent that, as it claims, it is a fully secured creditor.

19 Mr. Delblanc further submitted that the Kirkup Group is, in this application, seeking equitable relief (the lifting of the stay). He submitted that the Kirkup Group's conduct prior to the Receivership Order should disentitle it to do so. He referred to portions of the questioning of Grant Kirkup and Earl Northcott (the principal of Jay Vee) which, he submitted, showed that Mr. Kirkup caused the mischief which put the company into receivership.

20 Excerpts from the questioning of Mr. Northcott give some indication as to how the recorded value of accounts receivable may have become inflated. He testified that Jay Vee both billed for anticipated work that never materialized and adjusted the date of billings (without cancelling the aged accounts) so as to show accounts receivable being more current than they actually were. This was done to satisfy the margin requirements of the Canadian Western Bank. Mr. Northcott testified that Mr. Kirkup, who was providing accounting services to Jay Vee, both knew of and participated in these manipulations of the records. In his questioning, Mr. Kirkup confirmed that he knew that misrepresentations were being made to the bank.

21 Mr. Delblanc indicated that his clients will be commencing action against Grant Kirkup in connection with his actions in this regard. It seems to me that it is more likely that Jay Vee would have a cause of action arising from them, than that Thompson Bros. would. This is a matter which might properly be investigated and pursued by a bankruptcy trustee. In my view this outweighs any concern that the Kirkup Group does not have clean hands.

22 Counsel for the Canada Revenue Agency, Mr. Segal, appeared and opposed the application. He noted that there is a GST deemed trust which though presently asserted at $10,000 may in fact be less than that or non-existent. While he acknowledged that the priority that would otherwise be accorded to the deemed trust would not be recognized in a bankruptcy, he suggested that the amount in issue is so small that this should not be a factor in determining whether or not to lift the stay. I agree.

23 He also objected that the cost of bankruptcy proceedings would not appear to be justified. He suggested that the disputes that exist between Thompson Bros. and the Kirkup Group should more properly be determined in the applications that have been brought. The costs of determining those issues should be borne by the disputants. In a bankruptcy, they would be a charge on the residue, if any, available for distribution to unsecured creditors.

24 Mr. Rimer, counsel for the Receiver, observed that the Kirkup Group itself would be responsible to pay the costs of the bankruptcy trustee unless and until it is determined that the Thompson Bros.' debt is not wholly secured. Unless that determination is made, the proceeds of the sale of Jay Vee's assets in the receivership will not extend to the satisfaction of the secured creditor. There will be nothing for unsecured creditors. It may be difficult for the Kirkup Group to find a bankruptcy trustee willing to accept the appointment.

25 It can reasonably be argued that applications in the receivership proceedings have not proved to be an efficient method of having the issues raised by the Kirkup Group determined. The Receiver, probably quite properly, appears to have been focused on the first stream of activity in the receivership - the sale of Jay Vee's assets. The main adversaries in the disputes arising in the second stream of activity, the Kirkup Group and Thompson Bros., appear to have taken entrenched litigation positions which produce more heat than light. It is reasonable to expect that the inquisitorial process employed by a bankruptcy trustee would more likely achieve resolution of the issues than the adversarial setting in which these disputes currently reside.

26 The authorities indicate that in determining whether or not to lift the stay, "... the court must consider the totality of the circumstances and the relative prejudice to both the creditor and the debtor. The Court should consider a balancing of the interests of all affected parties." *Haunert-Faga v. Faga*, 2013 ONSC 5161 (Ont. S.C.J. [Commercial List]) at para. 15.

27 I would summarize the significant features of the circumstances here as follows:

• The Kirkup Group has raised serious concerns regarding the amount owing under the security claimed by Thompson Bros., the dissipation of Jay Vee assets prior to the receivership, and the involvement of Thompson Bros. in the management of Jay Vee prior to the receivership.

• Thompson Bros. has raised serious concerns regarding the involvement of the Kirkup Group in the management of Jay Vee prior to the receivership.

• The proceeds of the sale of the assets of Jay Vee exceed the undisputed amount of the secured debt by a significant amount.

• After eight months neither the receivership nor Court applications have advanced very far toward resolution of the disputes. A bankruptcy trustee would have rights and powers which would potentially bring the disputes to determination more quickly and probably more efficiently than the current proceedings appear likely to do.

• The cost to Thompson Bros. if the disputes were resolved through the bankruptcy process would not be greater than the current proceedings, if, as it asserts, its security extends to the total amount of the sale of the assets of Jay Vee.

• There will be no cost to unsecured creditors unless the bankruptcy trustee determines that there are claims to pursue and they are successfully pursued. Otherwise the applicant for the bankruptcy order, the Kirkup Group, will be responsible for the cost of the bankruptcy proceedings.

• No unsecured creditor other than the CRA has opposed the application. The CRA has not participated in the second stream applications. Mr. Segal's submissions suggest that the CRA is resigned to the conclusion that there will be nothing for unsecured creditors. If in bankruptcy proceedings any funds become available for distribution to preferred and unsecured creditors, the CRA will have been prejudiced by receiving less of a windfall than it might otherwise have received. That is not a real prejudice.

• Beyond the possibly more effective "inquisitional" approach available to a bankruptcy trustee, both the Kirkup Group and Thompson Bros. (to the extent there is a deficiency in its recovery) would, if a bankruptcy order is obtained, acquire the right to apply under *BIA* s. 38 for leave to pursue any Jay Vee cause of action the bankruptcy trustee is not willing to pursue.

• The continuation of the existing receivership to the point that the "first stream" activities are concluded need not be affected by a bankruptcy order. There would seem to be little basis for concern that the bankruptcy trustee would be required to duplicate work already done by the Receiver.

28 Having given due consideration to these circumstances and the positions of affected parties I conclude that the lifting of the stay applied for should be granted. I therefore grant leave to MMD Leasing Ltd., Sandra Kirkup and 67017 Manitoba Ltd. to bring a bankruptcy application under *BIA* s. 43 with respect to Jay Vee Sandblasting Ltd., notwithstanding the stay of proceedings contained in paragraph 8 of the Receivership Order granted herein on March 6, 2013.

Application granted.

End of Document

TAB 11

1978 CarswellBC 273
British Columbia Supreme Court

Toronto Dominion Bank v. Fortin

1978 CarswellBC 273, [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111

TORONTO DOMINION BANK v. FORTIN, KELLER, LUCY, MERRIFIELD, CHIMO STRUCTURES LTD., CHIMO CONSTRUCTION LTD. and CHIMO INDUSTRIES LTD.

Anderson J. [in Chambers]

Heard: February 3, 1978
Judgment: February 14, 1978
Docket: Vancouver No. C770770

Counsel: *J. M. Giles*, for plaintiff.
J. Goodwin, for fifth, sixth and seventh defendants.

Subject: Corporate and Commercial; Insolvency

Annotation

In this case the learned judge was not assisted by any authority on the issue as to whether the directors of a company in receivership had the power to instruct counsel to defend the debenture holder's action. Nevertheless, the learned judge came to the same conclusion as that reached by other courts in two similar cases.

In the case of *Newhart Dev. Ltd. v. Co-op. Commercial Bank Ltd.*, [1978] 2 W.L.R. 636, the Court of Appeal for England held that the directors of a company in receivership could prosecute an action against the debenture holder in the name of the company. In that case, the receiver was appointed by an instrument in writing rather than by an order of the court. Nevertheless, the same arguments were raised and the court held that the very wide powers conferred upon the receiver by the debenture did not preclude the directors of the company from bringing proceedings against the debenture holder in the name of the company.

A similar issue was raised in the case of *DelZotto v. Internat. Chemalloy Corpn.* (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268, 2 C.P.C. 198, a decision of the Supreme Court of Ontario. In that case a motion was brought by the plaintiffs to strike out a counterclaim by the defendant on the ground that the defendant was precluded from delivering the counterclaim by reason of the appointment of a receiver and manager by the court and that leave of the court was required before such a counterclaim could be delivered. It was held that the company in receivership was permitted to institute the counterclaim in its own name but that leave of the court was required since the proceedings would have to be funded by assets of the corporation in receivership. In the case of *Newhart Dev. Ltd. v. Co-op. Commercial Bank Ltd.*, supra, the company was not required to finance the proceedings out of its own resources. An indemnity was provided for the company against any possible liability for costs.

In this decision, no mention was made by the learned judge as to how the defence of the proceedings would be financed. The reasons for judgment do not indicate whether the assets of the companies would be required to fund the defence of the proceedings. If they were, there might be the incongruous result that assets which otherwise would be available to the debenture holder to satisfy its debt would be used to finance proceedings against it. It was common ground in each case that the appointment of a receiver and manager supersedes the company in the conduct of its business. However, the corporation retains title to its assets and is not dissolved or annulled as a result of the appointment of the receiver and manager. By permitting the companies in receivership to defend or bring proceedings against the debenture holder, the court has avoided the receiver being put into a position of conflict of interest which otherwise would have arisen if he had been required to determine whether an action should be brought against the party who arranged for his appointment.

D. E. Baird

Table of Authorities

Statute considered:

Companies Act, 1973 (B.C.), c. 18, ss. 108, 109, 110 (1), (2), 111, 112, 113, 114.

Application to determine whether directors of defendants entitled to instruct counsel to defend debenture holder's action.

***Anderson J.*:**

1 This is a motion to determine the following point of law:

> Whether the officers and directors of the Chimo Companies have the right to instruct counsel to plead and appear in this action for the Chimo Companies since the appointment of the Receiver-Manager of the Chimo Companies under a Debenture on May 28th, 1976, and by the Court on June 21, 1976 and March l, 1977.

2 On 1st March 1977 Harold S. Sigurdson was appointed as "receiver and manager" (hereinafter called "the receiver") of all the undertaking of the Chimo Companies. The order of Catliff L.J.S.C. reads in part as follows:

> 1. Harold Sigurdson, Chartered Accountant, of the City of Vancouver, Province of British Columbia, be appointed, without security, Receiver and Manager of all the undertaking of the Companies, including the goodwill of the business and all property and assets whatsoever and wheresoever, present and future, including the uncalled capital of the Companies, with power to manage the business and undertaking of the Companies, and with power to act at once, and until the trial of this action or until further order, with full authority to the said Receiver and Manager to enter into possession of the lands of the Companies; ...
>
> 3. The said Receiver and Manager be fully authorized and empowered to defend and prosecute all suits, proceedings, and actions at law as may in his judgment be necessary for the protection of the undertaking, properties and assets of the Companies and likewise to defend all suits, proceedings and actions instituted against him as such Receiver and Manager, and to appear in and conduct the prosecution and defence of any such proceedings and actions now pending in any Court involving the Companies, the prosecution or defence of which will in the judgment of the Receiver and Manager be necessary for the proper protection of the undertaking, properties and assets of the Companies, and the authority hereby conferred shall extend to such appeals as the Receiver and manager shall deem proper and advisable in respect to any order or judgment pronounced in any suit or action;
>
> 4. No action at law or other proceedings shall be taken or continued against the Receiver and Manager, without leave of this Court first being obtained.

3 In this debenture holder's action the plaintiff seeks to realize upon the security charged by the debenture and for judgment against the Chimo Companies.

4 A statement of defence has been filed by the Chimo Companies alleging, inter alia, that the receiver, upon the directions of the plaintiff, has so misconducted himself in dealing with the assets of the Chimo Companies that he has impaired the ability of the Chimo Companies to redeem the assets charged by the debenture.

5 The submission of counsel for the plaintiff is that, as the power to deal with all the affairs of the company has been taken from the directors and given to the receiver, the directors did not have the right to instruct counsel to appear and defend this action.

6 Counsel for the Chimo Companies submits that, while the receiver has exclusive power to deal with "the undertaking of the Companies", including the power "to defend and prosecute all suits, proceedings and actions at law as may in his judgment be necessary for the protection of the undertaking", such a power does not apply to the very proceedings in which the receiving order was made.

7 Counsel have made a very diligent search of the authorities and advise me that there are no precedents dealing with the issues confronting me.

8 The following sections of the Companies Act, 1973 (B.C.), c. 18, may be relevant:

> 108. Where a receiver-manager is appointed, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking for which he is appointed until he is discharged.
>
> 109. Every receiver-manager appointed by the Court is an officer of the Court and not of the corporation, and he shall act in accordance with the directions of the Court.
>
> 110. (1) Every receiver or a receiver-manager appointed under an instrument is an officer of the corporation and not an agent of the persons by, or on whose behalf, he is appointed, and he shall act in accordance with the instrument under which he is appointed, and any directions of the Court made under section 113.
>
> (2) The appointment of a person as a receiver-manager under an instrument ceases upon his appointment as receiver-manager by the Court.
>
> 111. Every receiver or a receiver-manager under an instrument stands in a fiduciary relationship to the corporation, and section 141 applies to that receiver or receiver-manager as if he were a director of a company.
>
> 112. No receiver or receiver-manager is, if he discloses that he acts in that capacity in a contract made by him on behalf of a corporation, personally liable on that contract.
>
> 113. A receiver or receiver-manager may apply to the Court
>
> > (*a*) to be relieved from his fiduciary relationship so that he may give special consideration to the interests of the person by or on whose behalf he is appointed; or
> >
> > (*b*) for directions on any matter arising in connection with the performance of his duties,
>
> and, upon such application, the Court may give directions, declare the rights of persons before the Court, and make any further order it considers necessary.
>
> 114. Upon application by a corporation or its creditor, the Court may order the receiver or receiver-manager to make good any default in connection with his custody or management of the property and business of the corporation.

9 It seems to me, in the absence of authority, that the proper approach is to ascertain just what happens in fact when a receiver-manager is appointed:

> The receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced.
>
> The company continues to exist and the board of directors remains in office.

10 From the above it will be seen that, while the receiver is given exclusive powers over the assets and affairs of the company, including the right to bring and defend actions relating to the assets and affairs of the company, he is not given the power to interpret or in any manner concern himself with the contract made between the debenture holder and the company. It is for the court to interpret the contract between the parties and to determine, upon the whole of the evidence, including the conduct of the receiver, the rights and liabilities of the parties.

11 If counsel for the plaintiff were correct, as soon as a receiver was appointed the board of directors would be precluded from filing a defence to the action and only the receiver would have the fight to file a defence. In my view such matters are not the concern of the receiver, whose sole task is to preserve and get in the assets of the company for the protection of the debenture holder, the shareholders, other creditors and the company. He is not entitled to engage in adversary proceedings as between the debenture holder and the company. Such an entitlement would place the receiver in an uncomfortable and untenable position, and would preclude the company from its right to be represented by counsel of its own choosing on all matters in dispute in respect of the contract itself.

12 The following defences, or partial defences, amongst others, are open to a company in a debenture holder's action:

13 (1) The debenture is ultra vires the company.

14 (2) The debenture was a forgery or obtained by fraud or misrepresentation.

15 (3) The amount claimed is not correct.

16 (4) The conditions set out in the debenture giving the right to proceed against the company have not been met.

17 (5) The receiver acted entirely outside the ambit of his powers as a receiver and thereby impaired the security afforded by the debenture.

18 (6) The company is entitled to an order for an inquiry and an accounting.

19 I make no pronouncement as to whether the defences filed here are valid or invalid. That will be a matter for the trial judge. What I do say is that the company has a right to raise these defences and it is not for the receiver to decide whether or not such defences should be raised.

20 I point out, as well, that a company has the right to be represented at any accounting ordered by the court. Such hearings are a matter of routine practice and it would be strange if a company could not appear at an accounting to question the reports made by the receiver to the court.

21 I do not think s. 113 of the Companies Act, giving the receiver the right to apply for directions, assists the plaintiff. That section does not touch upon the issues before me.

22 With respect to s. 114 of the Act, while it provides for relief against the receiver upon application by a company, it does not purport to take away the right of a company to have its contractual rights determined by the court.

23 I also hold that when the receiver took over "the undertaking of the Companies" he did not take over the contract made

between the plaintiff and the companies. The contract retained a separate existence from "the undertaking" of the companies and the board of directors continued to have the power to instruct counsel in respect of the contract.

24 In the result, I hold that the Chimo Companies have the right to instruct counsel and appear in this action. The Chimo Companies are entitled to costs.

Directors of defendants entitled to instruct counsel and to defend proceedings.