Court File No. C69603

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant
(Respondent in Appeal)

- and -

JAIMEE LYNN GDAK, TRIGGER WHOLESALE INC., THE EN CADRE GROUP INC., MARK GDAK and JAIMAK REAL PROPERTIES INC.

Respondents
(Appellant)

BOOK OF AUTHORITIES OF THE RESPONDENT (APPELLANT), JAIMEE LYNN GDAK

July 29, 2021

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Paul Housen, Appellant v. Rural Municipality of Shellbrook No. 493, Respondent

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 2, 2001
Judgment: March 28, 2002*
Docket: 27826

* A corrigendum issued by the court on May 29, 2002 has been incorporated herein.

Proceedings: reversing [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126 (Sask. C.A.); reversed in part (1997), 161 Sask. R. 241, [1998] 5 W.W.R. 523, 44 M.P.L.R. (2d) 203 (Sask. Q.B.)

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Subject: Public; Civil Practice and Procedure; Torts; Tax — Miscellaneous; Municipal

Headnote

Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should

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have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.

Municipal law --- Municipal liability — Negligence — General principles
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Municipality knew or should have known of disrepair of road and was liable under s. 192 of Rural Municipality Act, 1989 — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Rues et autoroutes --- Entretien et remise en état — Obligation de remettre en état — Étendue de l'obligation — Panneaux de signalisation et signaux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Accident a eu lieu sur une portion dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Même si le conducteur avait les facultés affaiblies, il ne conduisait pas d'une façon téméraire qui l'aurait empêché de voir, ou qui lui aurait permis de faire abstraction, d'un panneau, s'il y en avait eu un.

Droit municipal --- Responsabilité municipale — Négligence — Principes généraux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Municipalité connaissait ou aurait dû connaître le mauvais état du chemin; elle était donc responsable en vertu de l'art. 192 de The Rural Municipality Act, 1989 — Accident a eu lieu sur une partie dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

The plaintiff was a passenger in a motor vehicle driven by N. The vehicle was involved in an accident, which rendered the plaintiff a quadriplegic. At trial, N was found negligent in taking the curve in the rural road at an excessive rate of speed while impaired. The evidence established that N had travelled the road three times in the same direction in the preceding 18 to 20 hours. The municipality was also found to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*. The trial judge held that it was reasonable to expect the municipality to erect and maintain a sign warning motorists of the hazard. The trial judge found that the plaintiff was 15 per cent contributorily negligent, the driver was 50 per cent liable and the municipality was 35 per cent liable. The Court of Appeal overturned the trial judge's finding that the municipality was negligent and dismissed the plaintiff's action against it. The plaintiff appealed.

Held: The appeal was allowed.

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Per Iacobucci and Major JJ. (McLachlin C.J.C., L'Heureux-Dubé and Arbour JJ. concurring): The standard of review to be applied by an appellate court to the decision of the trial judge is that of palpable and overriding error. Palpable means "plainly seen". The standard of review for questions of law is that of correctness and for findings of fact is that of palpable and overriding error. There is a presumption of fitness in favour of the trial judge. The bases for deferring to the findings of fact of the trial judge are to limit the number, length and cost of appeals, to promote the autonomy and integrity of trial proceedings and to recognize the expertise of the trial judge and his or her advantageous position. The standard of palpable and overriding error also applies to the inferences of fact drawn by the trial judge. Questions of mixed fact and law which are findings of negligence should also be accorded great deference, except those which amount to an incorrect statement of the legal standard.

The municipality has a statutory obligation to keep the road in such a reasonable state of repair that those requiring to use it might, exercising ordinary care, travel upon it with safety. The trial judge considered the conduct of an ordinary or reasonable motorist approaching the curve in the road. The trial judge's reliance on the evidence of some witnesses as opposed to others was insufficient proof that she forgot, ignored or misconceived the evidence. The trial judge apportioned negligence between the driver and the municipality in a way that entailed a consideration of the ordinary driver. The trial judge did not adopt the de facto speed limit of 80 km/h as the speed of the ordinary motorist approaching the curve. The trial judge implicitly found that the curve could not be taken safely at greater than 60 km/h on a dry road and 50 km/h on a wet road. She did not commit a palpable and overriding error.

Section 192(3) of *The Rural Municipality Act, 1989* required the plaintiff to show that the municipality knew or should have known of the disrepair of the road before it could be found to have breached its duty of care under the Act. The issue was one of mixed fact and law. The existence of the prior accidents was simply a factor in finding that the municipality should have been put on notice with respect to the condition of the road. The trial judge based her conclusion on the perspective of a prudent municipal councillor and drew the inference that the municipality should have been aware of the permanent feature of the road which presented a hazard. The burden of proof was not shifted to the municipality. The municipality did not rebut the inference that it ought to have been aware of the danger. The trial judge's findings of fact on causation were reasonable and did not reach the level of a palpable and overriding error. The accident occurred at a dangerous part of the road where a warning sign should have been erected; driver N's degree of impairment increased his risk of not reacting even if there had been a sign; even so, N was not driving so recklessly that he would have been expected to miss or ignore a warning sign. The trial judge's judgment should be restored.

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference

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was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence actions need not be accorded deference in every case. The municipality's duty of care is limited to a duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. The mere existence of a hazard does not give rise to a duty to erect a sign. The fact that the hazard was hidden did not automatically give rise to the conclusion that it would pose a risk to a reasonable driver, nor did the expert testimony relied on support that finding. The trial judge's factual findings did not support the conclusion that the municipality was in breach of its duty. A more in-depth analysis of the state of the road was required. The Court of Appeal was correct in finding that the road was obviously not designed to accommodate travel at a general speed of 80 km/h or that drivers would be somehow fooled by the dual nature of the road. The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair of the road. The trial judge failed to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known. The municipality did not have actual knowledge of prior accidents, which had occurred on different portions of the road than the subject location. The mere occurrence of an accident did not indicate a duty to post a sign. The evidence indicated that the accident occurred as a result of N's level of impairment and not from any failure on the municipality's part. As the legislature had clearly imposed a statutory duty of care on the municipality, it was not necessary to find a common law duty of care. It was only reasonable to expect a municipality to foresee accidents which occurred as a result of the conditions of the road, not the conditions of the driver. The appeal should be dismissed.

Le demandeur est devenu quadriplégique après avoir été passager dans un véhicule à moteur, conduit par N, impliqué dans un accident. Lors du procès, il a été décidé que N avait fait preuve de négligence en abordant la courbe du chemin rural à une vitesse excessive alors qu'il avait les facultés affaiblies. La preuve a démontré que N avait emprunté trois fois ce chemin dans la même direction durant les 18 à 20 heures précédant l'accident. Il a aussi été décidé que la municipalité était fautive parce qu'elle avait manqué à son obligation de tenir la route dans un état raisonnable d'entretien tel qu'il était exigé par l'art. 192 de *The Rural Municipality Act, 1989*. La juge de première instance a statué qu'il était raisonnable de s'attendre à ce que la municipalité pose et maintienne en place des panneaux avertissant les automobilistes du danger. La juge a attribué 15 pour cent de la responsabilité au demandeur en raison de sa négligence concourante, 50 pour cent au conducteur et 35 pour cent à la municipalité. La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente et elle a rejeté l'action intentée contre celle-ci par le demandeur. Ce dernier a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ».

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La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

La municipalité avait une obligation légale de tenir le chemin dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité. La juge de première instance a examiné le comportement d'un automobiliste normal ou raisonnable qui s'approche de la courbe du chemin. Le fait qu'elle ait retenu le témoignage de certains témoins seulement n'était pas suffisant pour démontrer qu'elle avait oublié, négligé ou mal interprété la preuve. La juge de première instance a réparti la responsabilité entre le conducteur et la municipalité d'une façon qui tenait compte du conducteur normal. Elle n'a pas accepté la limite de vitesse de facto de 80 km/h comme la vitesse de l'automobiliste normal qui s'approche de la courbe. La juge a implicitement conclu que la courbe ne pouvait être empruntée de façon sécuritaire à une vitesse plus grande que 60 km/h sur une route sèche et 50 km/h sur une route mouillée. Elle n'a pas commis d'erreur manifeste et dominante.

Selon l'art. 192(3) de *The Rural Municipality Act, 1989*, le demandeur devait prouver que la municipalité connaissait ou devait connaître le mauvais état de la route pour qu'il soit décidé que celle-ci avait manqué à son obligation de diligence prévue à la Loi. Il s'agissait d'une question mixte de fait et de droit. L'existence d'accidents antérieurs ne constituait qu'un des facteurs ayant mené à la conclusion que la municipalité aurait dû être avertie de l'état de la route. La conclusion de la juge de première instance était fondée sur le point de vue d'un conseiller municipal prudent et la juge a tiré l'inférence que la municipalité aurait dû connaître la caractéristique permanente du chemin qui était dangereuse. Le fardeau de preuve n'est pas devenu celui de la municipalité. La municipalité n'a pas réussi à repousser l'inférence qu'elle aurait dû connaître le danger. Les conclusions de fait de la juge de première instance relativement au lien de causalité étaient raisonnables et ne constituaient pas une erreur manifeste et dominante. L'accident a eu lieu sur une partie dangereuse du chemin, à un endroit où il aurait dû y avoir un panneau d'avertissement; le niveau de facultés affaiblies du conducteur, N, a augmenté le risque qu'il ne puisse réagir même s'il y avait eu un panneau; et, encore là, N ne conduisait pas de façon si téméraire que l'on aurait pu s'attendre à ce qu'il ne voie pas le panneau d'avertissement ou à ce qu'il l'ignore. Le jugement rendu par la juge de première instance devrait être rétabli.

Bastarache, J. (dissident) (Gonthier, Binnie, LeBel, JJ., souscrivant): La juge de première

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instance a commis une erreur de droit lorsqu'elle n'a pas appliqué la bonne norme de diligence raisonnable à l'égard de la municipalité. Le tribunal d'appel avait le droit de conclure que les inférences de fait tirées par la juge de première instance était évidemment erronées. Il n'y avait aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a retenus et conclure que l'inférence n'était pas raisonnablement appuyée par ces faits-là. Il n'est pas nécessaire de faire preuve de retenue, dans tous les cas, à l'égard des conclusions du juge de première instance relatives aux questions mixtes de fait et de droit dans le cadre d'actions en négligence. L'obligation de diligence de la municipalité ne se limite qu'à un devoir de réparer, qui lui-même se limite à une norme permettant aux conducteurs faisant preuve de précautions normales de voyager en sécurité. La simple existence d'un danger ne donne pas lieu à une obligation de poser un panneau. Le fait qu'il s'agissait d'un danger caché ne soulevait pas automatiquement la conclusion qu'il poserait un risque pour le conducteur raisonnable et cette conclusion n'était pas non plus soulevée par le témoignage d'expert qui l'appuyait. Les conclusions de fait de la juge de première instance n'appuyaient pas la conclusion que la municipalité avait manqué à son obligation. Il aurait été nécessaire de faire une analyse plus poussée de l'état du chemin. La Cour d'appel a conclu à bon droit que le chemin n'était évidemment pas conçu pour y voyager à une vitesse générale de 80 km/h ou que les conducteurs seraient induits en erreur par la nature hybride du chemin. La juge de première instance a fait des erreurs de droit et des erreurs de fait manifestes et dominantes lorsqu'elle a décidé que la municipalité aurait dû connaître le mauvais état allégué du chemin. La juge n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue d'un conseiller municipal prudent. La municipalité n'avait pas une connaissance réelle des accidents antérieurs, lesquels avaient eu lieu à des endroits différents sur le chemin de celui concerné. Le simple fait qu'un accident ait eu lieu n'établissait pas qu'il y avait une obligation de poser un panneau. La preuve démontrait que l'accident avait eu lieu à cause du niveau de facultés affaiblies de N et non à cause d'un manquement de la municipalité. Puisque le législateur avait clairement imposé dans la loi une obligation de diligence à la municipalité, il n'était pas nécessaire de conclure à l'existence d'une telle obligation en vertu de la common law. Il était raisonnable de s'attendre à ce qu'une municipalité prévoie les accidents qui peuvent avoir lieu à cause des conditions de la route et non à cause de l'état du chauffeur. Le pourvoi devrait être rejeté.

Table of Authorities

Cases considered by *Iacobucci, Major JJ.*:

Anderson v. Bessemer (City) (1985), 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 53 U.S.L.W. 4314, 1 Fed. R. Serv. 3d 1 (U.S. N.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369, [1996] S.C.J. No. 116 (S.C.C.) — followed

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standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, *supra*, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504 (S.C.C.), at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by *Kerans*, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 The standard of review for findings of fact is that such findings are not to be reversed

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unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.), at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 (S.C.C.), at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for *general* deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in *particular*, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. ... Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504 (S.C.C.), at p. 537.

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MORRIS WAXMAN and MORRISTON INVESTMENTS LIMITED (Plaintiffs / Respondents) and CHESTER WAXMAN, CHESTER WAXMAN in trust, CHESTERTON INVESTMENTS LIMITED, ROBERT WAXMAN, GARY WAXMAN, WARREN WAXMAN, I. WAXMAN & SONS LIMITED, THE GREYCLIFFE HOLDINGS LIMITED, ROBIX FINANCIAL CORPORATION LIMITED, CIRCUITAL CANADA INC., RKW STANDARDBRED ASSOCIATES INC., RKW STANDARDBRED MANAGEMENT INC., and GLOW METAL TRADING INC. (Defendants / Appellants)

I. WAXMAN & SONS LIMITED and CHESTER WAXMAN (Plaintiffs by Counterclaim) and MORRIS WAXMAN, MICHAEL WAXMAN, SHIRLEY WAXMAN, DOUGLAS WAXMAN, THE WAXMAN HOLDING CORPORATION INC., MORRISTON INVESTMENTS LIMITED, SOLIDWASTE RECLAMATION LIMITED, SOLID WASTE RECLAMATION INC. and GENERAL ENVIRONMENTAL TECHNOLOGIES CORPORATION (Defendants to Counterclaim)

MORRIS WAXMAN (Plaintiff / Respondent) and I. WAXMAN & SONS LIMITED (Defendants / Appellant)

MORRIS WAXMAN, MICHAEL WAXMAN and SOLID WASTE RECLAMATION LIMITED (Plaintiffs /Respondents) and CHESTER WAXMAN, ROBERT WAXMAN, GARY WAXMAN and I. WAXMAN & SONS LIMITED (Defendants /Appellants)

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SOLID WASTE RECLAMATION LIMITED and THE WAXMAN HOLDING CORPORATION INC. (Defendants by Counterclaim)

MORRIS WAXMAN and MORRISTON INVESTMENTS LIMITED (Plaintiffs / Respondents)and TAYLOR LEIBOW, WAYNE LINTON and I. WAXMAN & SONS LIMITED (Defendants /Appellants)

MORRIS WAXMAN and MORRISTON INVESTMENTS LIMITED (Plaintiffs / Respondents)and PAUL ENNIS, Q.C. and ENNIS & ASSOCIATES (Defendants / Appellants)

MORRIS WAXMAN and MORRISTON INVESTMENTS LIMITED (Plaintiffs / Appellants) and TAYLOR LEIBOW, WAYNE LINTON and I. WAXMAN & SONS LIMITED) (Defendants / Respondents)

Doherty, Laskin, Goudge JJ.A.

Heard: April 22-25, 28-30, 2003; May 1-2, 5-8, 2003
Judgment: April 30, 2004
Docket: CA C38611, C38616, C38624

Proceedings: varying (2002), 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 3047, [2002] O.J. No. 3533 (Ont. S.C.J.); additional reasons at (2003), 2003 CarswellOnt 52, [2003] O.J. No. 87, 30 C.P.C. (5th) 121 (Ont. S.C.J.)

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Subject: Corporate and Commercial; Estates and Trusts; Civil Practice and Procedure; Contracts; Torts; Public

Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Fiduciary duties — General principles
Existence of fiduciary duty depends on precise circumstances of particular relationship, not on presence of any legal precondition such as existence of a contract — Policy concern about extending fiduciary principle in context of arm's length commercial relationships was inapplicable when it was clear on particular and unusual facts and transactions which took place were not arm's length.

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Business associations --- Specific corporate organization matters — Shareholders — Shareholder agreements — Fiduciary duty
Existence of fiduciary duty depends on precise circumstances of particular relationship, not on presence of any legal precondition such as existence of a contract — No reason exists to preclude existence of fiduciary duty when one shareholder sells his or her interest to another — Policy concern about extending fiduciary principle in context of arm's length commercial relationships was inapplicable when it was clear on particular and unusual facts and transactions which took place were not arm's length.

Business associations --- Creation and organization of business associations — Partnerships — Fiduciary obligations
Existence of fiduciary duty depends on precise circumstances of particular relationship, not on presence of any legal precondition such as existence of a contract — Policy concern about extending fiduciary principle in context of arm's length commercial relationships was inapplicable when it was clear on particular and unusual facts and transactions which took place were not arm's length.

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous issues
50 per cent shareholder in incorporated partnership had standing to make application for relief from oppression under Business Corporations Act — Complaint about share sale transaction fell under s. 248 of Act — In providing remedies under s. 248 of Act for conduct that took place in part before coming into effect of section but that continued after that date, trial judge was simply doing what legislation expressly contemplates, namely making orders to rectify pattern of oppressive conduct.

Equity --- Relief from unconscionable transactions — Unconscionable or improvident transactions — General
Overwhelming imbalance of power existed in relationship — Vulnerable party received no advice of any kind with respect to transactions which were substantially unfair to him — To permit bargain to remain unimpeached would not be consistent with equity and good conscience.

Fraud and misrepresentation --- Duress and undue influence — Undue influence — General
Existence of relationship of extraordinary trust and confidence gave rise to presumption of undue influence which was not rebutted — Transactions were manifestly unfair to vulnerable party who received no advice of any kind.

Fraud and misrepresentation --- Remedies — Rescission — Miscellaneous issues
Vulnerable party did not ratify or affirm share sale transaction such that rescission would be inequitable — Vulnerable party repeatedly and consistently complained to dominant party about transaction from time he learned about it until he finally commenced litigation — Equitable defences were not available to defendants who did not come to court with clean hands and could

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therefore not seek to invoke equity.

Barristers and solicitors --- Relationship with client — Conflict of interest — Lawyer acting for more than one party — General
Lawyer was liable for breach of fiduciary duty owed to client — Lawyer should have declined to act for both sides in share sale transaction — Lawyer could not draft documents clearly favourable to one party and then, purporting to act for other party but without giving advice to that party or suggesting that he obtain independent legal advice, lend the appearance of normalcy by sitting quietly during signing of them — Lawyer did not discharge onus of proving that client was not adversely affected by conflict of interest.

Professions and occupations --- Accountants — Accountant-client relationship — Fiduciary duties
Action against company's comptroller was allowed in part — Comptroller followed one shareholder's directions without question and knowingly assisted shareholder to breach his fiduciary duties to other shareholder — Comptroller accepted instructions from one shareholder that were obviously contrary to other shareholder's interest without reviewing them with other shareholder or seeking his approval.

Professions and occupations --- Auditors — Miscellaneous issues
Action against company's auditors was dismissed — Policy considerations about indeterminate liability overrode prima facie duty of care — Auditors did not owe fiduciary duty to 50 per cent shareholder personally in respect of audit of company — No evidence existed that auditors were retained specifically to provide information to shareholder.

Over more than 40 years, two brothers, M and C, built up their father's "horse and buggy" scrap metal business into a multi-million dollar operation. The business was initially operated as a partnership between M and C but was incorporated in 1956 with M and C each owning 50 per cent of the shares.

M and C were particularly close from childhood. M and C depended on each other to an extraordinary extent and divided responsibilities within the company according to their different but complementary interests and aptitudes. C handled the financial, strategic, tax and legal affairs of the company while M focused on operations. On a day-to-day basis M was in charge of the yard and decisions about processes and requirements for machinery and equipment while C managed the company's financial and legal affairs and handled negotiations and relations with customers.

C deferred to M's mechanical expertise and M deferred to C's financial expertise. Neither brother ever questioned the other's decisions within his respective domain. M never challenged C, who was the more forceful personality, in public and any disputes between the brothers were always settled privately. M trusted C completely and signed whatever documents C asked him to sign, often without reading them. M relied on C to ensure that the company's profits were distributed fairly and equally according to their 50/50 ownership as well as to protect his

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personal financial interests apart from the company. M's personal banking and finances were often handled by C.

On December 22, 1983, just days before M was scheduled to go into hospital for an angiogram, C asked him to attend a meeting at their lawyer's offices to sign some documents. None of the documents were read aloud, reviewed, discussed or explained. M had no indication that the documents he was signing were in any way out of the ordinary. M signed the documents without reading them as had been his practice over the past decades. Unbeknownst to M and against his wishes, the documents effected the sale of his shares in the company to C. As of December, 1983 the shares of the company were conservatively worth almost $9 million. The purchase price stated in the share sale agreement was $3 million but M in fact received less than $1.6 million. $412,000 of the amount used to pay M was in fact M's own money and another $500,000 came from the declaration of a dividend to which M would have been entitled anyway. The deal also included a 50-year lease of real property from M's personal holding company at rents substantially below market rates.

After the share sale M also learned that C had earlier declared $6.6 million in company bonuses and allocated most of them to himself and his sons and had allowed the diversion of company profits to various companies owned by his sons.

Beginning in January, 1984 when he discovered what had happened M repeatedly asked C to undo the deal. C promised to do so on several occasions, including the night before M was scheduled to have open-heart surgery, but never did. M was reluctant to make the matter public as he believed C's assurances that he would straighten it out and M wanted to spare himself, C and the extended family from the shame and embarrassment that would result if the events of December 22, 1983 were made public. C continued to lead M to believe that they could resolve the matter privately and continued to allow M to act as president of company and to receive a company car and benefits. M did not know that his "drawings" from the company were being deducted from an undisclosed loan account.

In late 1988, M brought an action ("the main action") against C and the company for rescission and appropriate restitutionary relief for breach of fiduciary duty, undue influence, unconscionability and oppression under the Business Corporations Act. M also brought an action against C's sons and some of their companies for knowing receipt and knowing assistance in relation to the bonuses and profit diversions. M also brought an action for damages for wrongful dismissal (after he commenced the actions M's employment and benefits with the company were terminated) and an action for inducing breach of contract in relation to a company owned by M's sons. M also brought an action against the company's comptroller, the company's auditors and the long-time lawyer for the company and for M and C. C and the company brought counterclaims against M, his sons and their company relating to the activities of the company owned by M's sons.

The main action against C and the company was allowed. The actions for knowing receipt and

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knowing assistance were allowed in part. The action for wrongful dismissal was allowed. The action for inducing breach of contract was allowed. The action against the company's lawyer was allowed. The action against the company's comptroller was allowed in part. The action against the company's auditors was dismissed. The counterclaims were found to be largely without merit and were dismissed with two minor exceptions.

In the main action the court ordered that C had held 50 per cent of the shares of the company in constructive trust for M since December 22, 1983. C and the company were ordered to transfer 50 per cent of the shares of the company to M and were ordered to pay M 50 per cent of the profits/distribution of equity of the company since December 22, 1983. Pending calculation of the share of profits and equity, C and the company were ordered to make immediate partial payment of $12 million to M. M was also found to be entitled to 50 per cent of the improper bonuses paid to C and his sons. C, the company, C's eldest son and his companies were ordered to pay M the amounts improperly diverted to them from the company. C was ordered to pay M punitive damages in the amount of $350,000.

The trial judge found that prima facie, C owed fiduciary duties to M as his partner in an incorporated partnership. The trial judge found that a fiduciary duty also arose from the conduct and relationship of C and M. By his conduct C represented to M that he was the protector of M's personal and business interests and that their personal and business interests were without conflict. In the financial and legal sphere M was dependent on C, both in relation to the company and personally. C knew that M had complete and utter trust in him and was relying on him to act in their mutual best interests. M could reasonably expect that C would act in his best interests. C and M had a special and close personal relationship as brothers and as 50/50 partners who had built a company together. By his conduct C represented to M that their personal and business interests were common, identical and without conflict. M relied absolutely and completely on C in legal and financial matters. C was fully aware of the trust and confidence that M reposed in him and of M's vulnerability. The trial judge concluded that the policy concern about extending the fiduciary principle in the context of arm's length commercial relationships was inapplicable as it was clear on the particular and unusual facts that the transactions that took place were not arm's length transactions.

The trial judge found that the share sale and lease should also be set aside on the grounds of undue influence. M had established the existence of a relationship of trust and confidence which gave rise to a presumption of undue influence. M's relationship with C went to the heart of M's identity and his lifetime habit of trusting C was his bedrock and not readily abandoned. Even after M first learned about the share sale C was able to continue to manipulate M and to abuse his trust by making M believe that he would straighten it out. Given the wide gap between the value of M's shares and the share sale price, the wide gap between market rents and the rents under the lease and the payment terms, which in part involved payment using M's own money, the deal was manifestly unfair to M. The presumption of undue influence was not rebutted. M received no advice of any kind. The presence and silence at the meeting of the long-time lawyer for the company and for M and C only added an impression of normalcy and security.

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The trial judge also found that the share sale and lease were unconscionable and should also be set aside on that basis. An overwhelming imbalance of power existed in the relationship between M and C. M received no advice of any kind and the deal was substantially unfair to M as the amount he would actually receive was little more than the value of his share of the cash in the company. To permit this bargain to remain unimpeached would not be consistent with equity and good conscience.

The trial judge also found that M had standing to make an application for relief from oppression under the Business Corporations Act. M's complaint about the share sale fell under s. 248 of the Act. The events that took place were intimately connected to M's status as 50 per cent shareholder in the incorporated partnership and several of C's actions could be described as oppressive. The trial judge found that s. 248 of the Act could be applied retrospectively to those actions which took place prior to its coming into effect, including the declaration of some of the bonuses and the profit-diverting activities.

The trial judge found that M did not ratify or affirm the share sale such that rescission would be inequitable. To the contrary, the trial judge found that M repeatedly and consistently complained to C about the share sale from the time he learned about it until he finally commenced litigation. The trial judge found that equitable defences were also not available to the defendants who did not come to the court with clean hands and could therefore not seek to invoke equity.

The trial judge found that the elements of knowing receipt were established with respect to certain of the bonuses declared to C's sons and with respect to the profit diversions to companies owned by C's son R. C's sons would have understood that the excessively large 1981 and 1982 bonuses were distributions of equity rather than the payment of reasonable compensation and had good reason to inquire about a possible breach by C of his fiduciary duty to M. R's companies knowingly received the profit diversions from C and M's company. R's knowledge as directing mind of his companies could be imputed to them. C had actual knowledge that R was breaching his fiduciary duties as a senior employee and officer of the company and diverting profits from it to his own companies. The trial judge found that C's actions and inaction made the profit diversions possible and that C was also liable to M for knowing assistance in the amount of 50 per cent of the profit diversions.

Judgment was awarded against the lawyer for M and C and the company in the same amount as against C in the main action. The trial judge found that the lawyer owed fiduciary duties to M as his long-time solicitor and clearly breached those duties. The lawyer knew that M was relying on him to protect his legal interests as he had done for years whenever he signed documents at his office or in his presence. The lawyer did not inform M of his conflict of interest in acting for both C and M in the share sale transaction and did not suggest that M obtain independent legal advice or explain the waiver of that advice to him. The lawyer should have declined to act for both C and M. The lawyer knew too much and could not draft documents clearly favourable to C and then, purporting to act for M, lend the appearance of normalcy by sitting quietly when C asked M to sign them. The lawyer did not discharge the onus of proving that M was not

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adversely affected by the conflict of interest. The share sale would never have occurred if M had been independently represented. The trial judge also found that the lawyer was negligent and in breach of his contract with M. The lawyer did not advise M on any matters pertaining to the share sale or lease transactions and did nothing to protect his interests.

The trial judge concluded that the company's auditors did not owe a fiduciary duty to M personally or as a shareholder in respect of their audit of the company. The trial judge found no evidence that the auditors were specifically retained to provide information to M. The trial judge held that policy considerations about indeterminate liability overrode the prima facie duty of care.

The trial judge found that the company's comptroller was actively involved in helping C and the lawyer structure the share sale and was intimately involved in the distribution of the bonuses, which he undertook with the knowledge that they were undeserved and that M knew nothing about them. The comptroller followed C's directions without question and knowingly assisted C to breach his fiduciary duties to M. The comptroller was actively involved in the oppressive conduct of the company with respect to M. The comptroller handled many personal financial matters for M and knew that M was relying upon him and C to act properly and in his interest, yet he accepted instructions from C that were obviously contrary to M's interest without reviewing them with M.

C and his sons and the lawyer and the comptroller appealed. M appealed the dismissal of his action against the auditors.

Held: The damages awarded at trial were varied downward to a relatively minor degree.

No basis existed upon which to interfere with the trial judge's findings of fact or liability.

C's sons were only liable to M for one half of the bonuses and profits received by them rather than the whole amount awarded by the trial judge. Liability for knowing receipt does not extend beyond the property which the third party knows (or is deemed to know) has been received in breach of trust or fiduciary duty. C's sons knew that their bonuses for 1981 and 1982 and post-sale profits represented a distribution of company equity, half of which was M's. Their knowledge (either actual or constructive) that C was in breach of his fiduciary duty to M by making these payments could only extend to the one-half in which M had a beneficial interest. C's sons could not be liable in knowing receipt for more than this amount. The remedy under s. 248 of the Business Corporations Act in respect of the bonuses should be similarly limited. The payment of the bonuses and profits constituted an act of oppression against M in that the payments were made with M's one-half share of company assets. Accordingly the order to rectify that matter under s. 248(2) also had to be limited to fifty per cent of the bonuses and profits received by C's sons.

C, the company, the comptroller and C's son R and his companies were only liable for one-half of the amounts ordered by the trial judge in relation to profit diversions by R's companies.

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Having found that excessive profits were what attracted liability the trial judge's remedial order in M's favour could not properly extend beyond the share of that portion of the profits that was excessive.

The damages payable by the lawyer to M were reduced to all losses flowing to M from having been deprived of a fifty per cent interest in the company and from the lease to the end of January 1985 only. C's assurances to M that the share sale would be undone were an intervening act for which the lawyer could not be held accountable.

Table of Authorities

Cases considered by *Doherty J.A.*:

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Antipas v. Coroneos (1988), 29 C.C.L.I. 161, 26 C.P.C. (2d) 63, 1988 CarswellOnt 358 (Ont. H.C.) — followed

B. (K.L.) v. British Columbia (2003), 18 B.C.L.R. (4th) 1, 19 C.C.L.T. (3d) 66, 230 D.L.R. (4th) 513, [2003] 11 W.W.R. 203, 309 N.R. 306, [2003] 2 S.C.R. 403, [2003] R.R.A. 1065, 44 R.F.L. (5th) 245, 187 B.C.A.C. 42, 307 W.A.C. 42, 38 C.P.C. (5th) 199, 2003 SCC 51, 2003 CarswellBC 2405, 2003 CarswellBC 2406, 2004 C.L.L.C. 210-014 (S.C.C.) — referred to

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 221 N.R. 1, 158 Nfld. & P.E.I.R. 269, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — referred to

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) — referred to

Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206, 1973 CarswellOnt 236, 1973 CarswellOnt 236F (S.C.C.) — considered

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201, 1991 CarswellBC 269, 1991 CarswellBC 925 (S.C.C.) — considered

Clarence Construction Ltd. v. Lavallee (1980), 111 D.L.R. (3d) 582, 1980 CarswellBC 630 (B.C. S.C.) — referred to

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295 Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make.

296 The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

297 An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.), at 281.

298 For example, the trial judge found that by the late 1970s, Chester was trying to take control of IWS and push Morris out of the company. In connection with that finding, she analyzed evidence of a proposed trust drawn on Chester's instructions in connection with a potential estate freeze. The trial judge found that under the terms of the proposed trust, Chester would gain voting control of IWS and that Chester kept this fact from Morris. The appellants contend that the proposed trust did not give Chester voting control over IWS while Morris was alive. They submit that the trial judge misapprehended the effect of the document.

299 We think the appellants are correct in their interpretation of the trust document. However, the trial judge's conclusion that the relationship between Chester and Morris was changing and that Chester was forcing Morris out of the IWS operation in the late 1970s was based on many findings of fact. Her erroneous interpretation of the terms of the proposed trust cannot override all of the other relevant factual findings she made. This error may be "palpable", but is clearly not "overriding".

300 *Housen* provides a detailed analysis of the "palpable and overriding" standard of review. Several specific points made in that analysis have direct application to the arguments advanced by the appellants. First and foremost, as indicated above, the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. This court cannot retry any aspect of this case.

301 The same deference must be shown to primary findings of fact flowing directly from

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Mosten Investments LP v. The Manufacturers Life Insurance Company (Manulife Financial) | 2021 SKCA 36, 2021 CarswellSask 145, 60 C.C.P.B. (2nd) 1, 12 C.C.L.I. (6th) 1, [2021] 3 C.T.C. 5, 329 A.C.W.S. (3d) 893 | (Sask. C.A., Mar 10, 2021)

2016 SCC 37, 2016 CSC 37
Supreme Court of Canada

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.

2016 CarswellAlta 1699, 2016 CarswellAlta 1700, 2016 SCC 37, 2016 CSC 37, [2016] 10 W.W.R. 419, [2016] 2 S.C.R. 23, [2016] I.L.R. I-5917, [2016] A.W.L.D. 4107, [2016] A.W.L.D. 4108, [2016] A.W.L.D. 4110, [2016] A.W.L.D. 4111, [2016] S.C.C.A. No. 251, [2016] S.C.J. No. 37, 19 Admin. L.R. (6th) 1, 269 A.C.W.S. (3d) 753, 404 D.L.R. (4th) 258, 487 N.R. 1, 54 B.L.R. (5th) 1, 56 C.L.R. (4th) 1, 59 C.C.L.I. (5th) 173, J.E. 2016-1579

Ledcor Construction Limited (Appellant) and Northbridge Indemnity Insurance Company, Royal & Sun Alliance Insurance Company of Canada and Chartis Insurance Company of Canada (Respondents)

Station Lands Ltd. (Appellant) and Commonwealth Insurance Company, GCAN Insurance Company and American Home Assurance Company (Respondents)

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

Heard: March 30, 2016
Judgment: September 15, 2016
Docket: 36452

Proceedings: reversing *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* (2015), 42 B.L.R. (5th) 190, 386 D.L.R. (4th) 482, [2015] I.L.R. I-5714, [2015] A.J. No. 338, 2015 ABCA 121, 2015 CarswellAlta 511, 16 Alta. L.R. (6th) 397, 643 W.A.C. 363, 599 A.R. 363, 47 C.C.L.I. (5th) 218, [2015] 8 W.W.R. 466, Frans Slatter J.A., Jack Watson J.A., Jean Côté J.A. (Alta. C.A.); reversing *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* (2013), [2013] I.L.R. I-5495, 2013 CarswellAlta 1943, 2013 ABQB 585, T.D. Clackson J. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Contracts; Insurance

Headnote

Insurance --- Actions on policies — Practice and procedure — On appeal
Cleaners hired to clean windows during building's construction used improper tools and methods — Windows were scratched and had to be replaced — Building's owner and general contractor claimed cost of replacing windows against builders' risk insurance policy issued in their favour which covered all contractors involved in construction — Insurers denied coverage, relying on exclusion in policy for "cost of making good faulty workmanship" — Trial judge found that exclusion clause was ambiguous and applied rule of contra proferentem against insurers — Court of Appeal reversed trial judge's decision and held that trial judge improperly applied rule of contra proferentem because exclusion clause was not ambiguous — Applying new test of physical or systemic connectedness to determine whether physical damage was excluded as "cost of making good faulty workmanship" or covered as "resulting damage", court concluded that damage to windows was physical loss excluded from coverage because it was not accidental or fortuitous — Owner and general contractor appealed — Appeal allowed — Interpretation of standard form contract attracts standard of review of correctness, exception to general rule that contractual interpretation was question of mixed fact and law subject to deferential standard of review — Proper understanding of factual matrix of case was less relevant for standard form contracts because terms were not negotiated by parties — Interpretation of standard form contract itself had precedential value and could be classified as pure question of law — Permitting appellate courts to review interpretation of standard form contracts for correctness ensured consistency in law — Base coverage under relevant clause of policy was for physical loss or damages — Exclusion clause need not necessarily encompass physical damage, however, since mutual exclusivity between initial grant of coverage and exclusions was not provided for under policy nor required when interpreting exclusion clause, it was not necessary for Court of Appeal to establish physical or systemic connectedness — General rules of contract construction served to resolve ambiguity of exclusion clause — Exclusion clause served to exclude from coverage only cost of redoing faulty work, i.e., cost of re-cleaning windows — Damage to windows and therefore cost of replacement was covered.

Insurance --- Principles of interpretation and construction — Miscellaneous

Insurance --- Extent of risk (exclusions) — Liability insurance — Construction insurance — "Faulty material, workmanship or design"

Insurance --- Principles of interpretation and construction — Contra proferentem rule

Assurance --- Actions relativement à des polices — Procédure — En appel

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Nettoyeurs engagés pour nettoyer les fenêtres d'un immeuble pendant sa construction n'ont pas utilisé les bons outils ni les bonnes techniques — Fenêtres ont été égratignées et ont dû être remplacées — Propriétaire de l'immeuble et l'entrepreneur général ont présenté une réclamation pour le coût de remplacement des fenêtres en vertu d'une police d'assurance chantier émise en leur faveur ainsi qu'en faveur de tous les entrepreneurs qui participaient aux travaux — Assureurs leur ont opposé un refus en raison d'une exclusion de la police visant les « frais engagés pour remédier à une malfaçon » — Juge de première instance a conclu que la clause d'exclusion était ambiguë et a appliqué la règle contra proferentem contre les assureurs — Cour d'appel a infirmé cette décision et a conclu que le juge de première instance avait irrégulièrement appliqué la règle contra proferentem puisque la clause d'exclusion n'était pas ambiguë — Appliquant un nouveau critère de connexité matérielle ou systémique pour décider si les dommages matériels étaient exclus au titre des « frais engagés pour remédier à une malfaçon » ou couverts en tant que « dommages [. . .] découlant » de la malfaçon, la Cour a conclu que les dommages causés aux fenêtres constituaient une perte matérielle exclue de la garantie parce qu'ils n'étaient ni accidentels ni fortuits — Propriétaire et l'entrepreneur général ont formé un pourvoi — Pourvoi accueilli — Interprétation d'un contrat type est assujettie à un contrôle selon la norme de la décision correcte, ce qui constitue une exception à la règle générale selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit dont le contrôle en appel doit être empreint de déférence — Compréhension adéquate du fondement factuel d'un dossier est moins pertinente dans le cas des contrats types parce que les parties n'en négocient pas les modalités — En soi, l'interprétation d'un contrat type a valeur de précédent et pourrait donc correspondre à la définition de pure question de droit — Permettre aux cours d'appel de contrôler l'interprétation d'un contrat type selon la norme de la décision correcte assure la cohérence du droit — Garantie de base prévue à la clause applicable de la police vise les pertes ou dommages matériels — Clause d'exclusion n'a pas nécessairement besoin d'englober des dommages matériels parce que l'exclusivité mutuelle entre des exclusions et la protection initiale n'est pas prévue dans la police et n'est pas non plus requise lorsqu'il s'agit d'interpréter la clause d'exclusion, et l'application du critère de connexité matérielle ou systémique par la Cour d'appel était inutile — Principes généraux d'interprétation des contrats servent à résoudre l'ambiguïté de la clause d'exclusion — Clause d'exclusion ne vise qu'à exclure le coût de la nouvelle exécution du travail défectueux, en l'occurrence le coût du nouveau nettoyage des fenêtres — Dommages causés aux fenêtres et, par conséquent, le coût de leur remplacement étaient couverts.

Assurance --- Principes d'interprétation — Divers

Assurance --- Étendue du risque (exclusions) — Assurance-responsabilité — Assurance de la construction — « Matériaux imparfaits, malfaçons ou plans défectueux »

Assurance --- Principes d'interprétation — Règle contra proferentem

Cleaners hired to clean windows during a building's construction used improper tools and methods. The windows were scratched and had to be replaced. The building's owner and the

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general contractor claimed the cost of replacing the windows against a builders' risk insurance policy issued in their favour which covered all contractors involved in the construction. The insurers denied coverage, relying on an exclusion in the policy for the "cost of making good faulty workmanship".

The trial judge found that the exclusion clause was ambiguous. He applied the rule of contra proferentem against the insurers.

The Court of Appeal reversed the trial judge's decision. The court held that the trial judge improperly applied the rule of contra proferentem because the exclusion clause was not ambiguous. Applying a new test of physical or systemic connectedness to determine whether physical damage was excluded as the "cost of making good faulty workmanship" or covered as "resulting damage", the court concluded that the damage to the windows was physical loss excluded from coverage because it was not accidental or fortuitous.

The owner and general contractor appealed.

Held: The appeal was allowed.

Per Wagner J. (McLachlin C.J.C. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ. concurring): The interpretation of a standard form contract attracts a standard of review of correctness, an exception to the general rule that contractual interpretation is a question of mixed fact and law subject to a deferential standard of review. A proper understanding of the factual matrix of a case is less relevant for standard form contracts because the terms are not negotiated by the parties.

The interpretation of a standard form contract itself has precedential value and could be classified as a pure question of law. Permitting appellate courts to review the interpretation of standard form contracts for correctness ensures consistency in the law.

The base coverage under the relevant clause of the policy is for physical loss or damages. The exclusion clause need not necessarily encompass physical damage, however, since mutual exclusivity between the initial grant of coverage and exclusions is not provided for under the policy nor required when interpreting the exclusion clause. It was not necessary for the Court of Appeal to establish physical or systemic connectedness.

The general rules of contract construction serve to resolve the ambiguity of the exclusion clause. The exclusion clause served to exclude from coverage only the cost of redoing the faulty work, i.e., the cost of re-cleaning the windows. The damage to the windows and therefore the cost of their replacement was covered.

Per Cromwell J. (concurring): The applicable standard of review was that of palpable and overriding error. A trial judge's interpretation of a contract generally gives rise to a mixed question of law and fact. There is no reason for standard form contracts to be excluded from the general principles that apply to appellate review. Applying the legal principle that "making good

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faulty workmanship" means "the cost of redoing the faulty work" turned on the scope of the faulty work and the nature of redoing it.

Des nettoyeurs engagés pour nettoyer les fenêtres d'un immeuble pendant sa construction n'ont pas utilisé les bons outils ni les bonnes techniques. Les fenêtres ont été égratignées et ont dû être remplacées. Le propriétaire de l'immeuble et l'entrepreneur général ont présenté une réclamation pour le coût de remplacement des fenêtres en vertu d'une police d'assurance chantier émise en leur faveur ainsi qu'en faveur de tous les entrepreneurs qui participaient aux travaux. Les assureurs leur ont opposé un refus en raison d'une exclusion de la police visant les « frais engagés pour remédier à une malfaçon ».

Le juge de première instance a conclu que la clause d'exclusion était ambiguë. Il a appliqué la règle contra proferentem contre les assureurs.

La Cour d'appel a infirmé cette décision. La Cour d'appel a conclu que le juge de première instance avait irrégulièrement appliqué la règle contra proferentem puisque la clause d'exclusion n'était pas ambiguë. Appliquant un nouveau critère de connexité matérielle ou systémique pour décider si les dommages matériels étaient exclus au titre des « frais engagés pour remédier à une malfaçon » ou couverts en tant que « dommages [. . .] découlant » de la malfaçon, la Cour d'appel a conclu que les dommages causés aux fenêtres constituaient une perte matérielle exclue de la garantie parce qu'ils n'étaient ni accidentels ni fortuits.

Le propriétaire et l'entrepreneur général ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J. (McLachlin, J.C.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, JJ., souscrivant à son opinion) : L'interprétation d'un contrat type est assujettie à un contrôle selon la norme de la décision correcte, ce qui constitue une exception à la règle générale selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit dont le contrôle en appel doit être empreint de déférence. Une compréhension adéquate du fondement factuel d'un dossier est moins pertinente dans le cas des contrats types parce que les parties n'en négocient pas les modalités.

En soi, l'interprétation d'un contrat type a valeur de précédent et pourrait donc correspondre à la définition de pure question de droit. Permettre aux cours d'appel de contrôler l'interprétation d'un contrat type selon la norme de la décision correcte assure la cohérence du droit.

La garantie de base prévue à la clause applicable de la police vise les pertes ou dommages matériels. La clause d'exclusion n'a pas nécessairement besoin d'englober des dommages matériels parce que l'exclusivité mutuelle entre des exclusions et la protection initiale n'est pas prévue dans la police et n'est pas non plus requise lorsqu'il s'agit d'interpréter la clause d'exclusion. L'application du critère de connexité matérielle ou systémique par la Cour d'appel était inutile.

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Les principes généraux d'interprétation des contrats servent à résoudre l'ambiguïté de la clause d'exclusion. La clause d'exclusion ne vise qu'à exclure le coût de la nouvelle exécution du travail défectueux, en l'occurrence le coût du nouveau nettoyage des fenêtres. Les dommages causés aux fenêtres et, par conséquent, le coût de leur remplacement étaient couverts.

Cromwell, J. (souscrivant à l'opinion des juges majoritaires) : La norme de contrôle applicable était celle de l'erreur manifeste et dominante. L'interprétation donnée par un juge de première instance au contrat soulève généralement une question mixte de droit et de fait. Il n'y a aucune raison de penser que les principes généraux applicables au contrôle en appel ne devraient pas régir l'interprétation des contrats types. L'application du principe juridique selon lequel l'expression « remédier à une malfaçon » s'entend « du coût de la nouvelle exécution du travail défectueux » repose sur l'étendue de la malfaçon et la nature de sa nouvelle exécution.

Table of Authorities

Cases considered by *Wagner J.*:

Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co. (2015), 2015 BCCA 347, 2015 CarswellBC 2210, 72 C.P.C. (7th) 1, 388 D.L.R. (4th) 174, 45 C.L.R. (4th) 177, [2015] I.L.R. I-5778, 376 B.C.A.C. 80, 646 W.A.C. 80, 77 B.C.L.R. (5th) 223, [2016] 2 W.W.R. 6, 53 C.C.L.I. (5th) 57 (B.C. C.A.) — referred to

Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada (2003), 2003 CarswellOnt 1941, 50 C.C.L.I. (3d) 107, [2003] I.L.R. I-4212, [2003] O.T.C. 446 (Ont. S.C.J.) — referred to

Anderson v. Bell Mobility Inc. (2015), 2015 NWTCA 3, 2015 CarswellNWT 3, [2015] 2 W.W.R. 215, 379 D.L.R. (4th) 682, 37 B.L.R. (5th) 1, 593 A.R. 79, 637 W.A.C. 79 (N.W.T. C.A.) — referred to

Assn. des Parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général) (2015), 2015 NWTCA 2, 2015 CATNO 2, 2015 CarswellNWT 1, 2015 CarswellNWT 2, [2015] 3 W.W.R. 490, 80 Admin. L.R. (5th) 75, (sub nom. *Northwest Territories (Attorney General) v. Assn. des parents ayants droit de Yellowknife)* 326 C.R.R. (2d) 139, (sub nom. *Association des parents ayants droit de Yellowknife v. Northwest Territories (Attorney General))* 593 A.R. 180, (sub nom. *Association des parents ayants droit de Yellowknife v. Northwest Territories (Attorney General))* 637 W.A.C. 180 (N.W.T. C.A.) — considered

Bird Construction Co. v. United States Fire Insurance Co. (1985), 18 C.L.R. 115, 18 C.C.L.I. 92, 45 Sask. R. 96, 24 D.L.R. (4th) 104, [1986] I.L.R. 1-2047, 1985 CarswellSask 172 (Sask. C.A.) — considered

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Industrial Alliance Insurance and Financial Services Inc. v. Brine, 2015 NSCA 104, 392 D.L.R. (4th) 575 (N.S. C.A.), at paras. 40-41; *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581 (Ont. C.A.), at paras. 34-36; *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223 (B.C. C.A.), at para. 35; and *GCAN Insurance Company v. Univar Canada Ltd.*, 2016 QCCA 500 (C.A. Que.), at para. 40 (CanLII). See also *Stewart Estate*, at para. 63, per Rowbotham J.A. (dissenting on this point).

24 I would recognize an exception to this Court's holding in *Sattva Capital Corp.* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

25 The statements made in *Sattva Capital Corp.* on the standard of review of contractual interpretation must be considered in their full context. That case concerned a complex commercial agreement between two sophisticated parties — not a standard form contract. Professor John D. McCamus has described standard form contracts as follows:

> ... the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.
>
> (*The Law of Contracts* (2nd ed. 2012), at p. 185)

Sattva Capital Corp. did not consider the unique issues that standard form contracts raise.

26 Moreover, the Court in *Sattva Capital Corp.* gave two reasons for concluding that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. As a general matter, those reasons are less compelling in the context of standard form contracts.

(1) Factual Matrix

27 The first reason is that the surrounding circumstances of the contract, or the factual matrix in which it was formed, are important considerations in contractual interpretation: *Sattva Capital*

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COURT OF APPEAL FOR ONTARIO

CITATION: Deswal v. ADT LLC (ADT Security Services), 2021 ONCA 475
DATE: 20210628
DOCKET: C65881

Doherty, Benotto and Brown JJ.A.

BETWEEN

Rinku Deswal and Tajinder Oberoi

Plaintiffs (Appellants)

and

ADT LLC c/o/b as ADT Security Services, and
ADT Security Services Canada

Defendants (Respondents)

Mark A. Klaiman, for the appellants

Chad M. Leddy, for the respondents

Heard: June 25, 2021 by video conference

On appeal from the judgment of Justice Lucy K. McSweeney of the Superior Court of Justice, dated August 27, 2018.

REASONS FOR DECISION

OVERVIEW

[1] In 2013, the appellants, Rinku Deswal and her husband, Tajinder Oberoi, purchased a house already equipped with a security alarm system provided by the respondents, ADT LLC and ADT Security Services Canada ("ADT"). They entered into a six-page Residential Alarm Services Agreement with ADT to activate and

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upgrade the system. In March 2015 their house was robbed. The appellants filed a proof of loss with their insurer for $139,330.73, consisting of claims for loss of contents and repairs to the house. As well, they commenced this action against ADT seeking damages of $500,000, plus $100,000 for aggravated, exemplary, or punitive damages. In their action, the appellants claim the security system did not operate when thieves broke into their house. ADT moved for summary judgment dismissing the action, which the motion judge granted.

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[2] In her reasons, the motion judge noted that the appellants advanced three arguments in opposition to the respondents' motion for summary judgment:

1. the respondents' failure to inform the appellants about a cellular backup option amounted to negligence;
2. the respondents' sales agent was under a duty to draw the appellants' attention to limitation of liability and entire agreement clauses in the Agreement, which he failed to do; and
3. the limitation of liability clause, which stated that "ADT is not an insurer" and limited any liability to 10% of the annual service charge of $335 or $250, whichever was greater, was unenforceable as it was unconscionable and contrary to public policy.

The motion judge rejected each of the appellants' submissions and granted summary judgment dismissing their action.

[3] The appellants appeal. At the hearing, we dismissed the appeal, with reasons to follow. These are those reasons.

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ISSUES ON APPEAL

[4] The appellants submit that the motion judge erred in: (i) holding that the respondents had no duty to advise the appellants of the alarm system's vulnerabilities and how they could be mitigated; and (ii) concluding that the limitation of liability clause was enforceable.

DUTY TO ADVISE

[5] In their first submission, the appellants argue that the motion judge erred in her analysis of the alleged acts of commission and omission by the respondents' sales agent when he met the appellants at their home. Specifically, they contend the agent committed negligence by: failing to tell them about a cell-backed communication option for their alarm system; assuring them that their house would be monitored 24/7, with no possibility of interruption, when, in fact, an interruption happened at the time of the robbery; and failing to explain how a security system could be circumvented. The appellants contend that these were material details that the respondents were under a duty to disclose to them and the trial judge erred by failing to find such a duty.

[6] The motion judge did not accept this submission because the appellants did not adduce legal authority to support their contention that the respondents had a duty to advise them about other offered services. As well, she found that the appellants' position was not "consistent with the general obligations between

parties that are found in a written contract entered into between them." The Agreement contained an "entire agreement" clause that stated, in part: "This agreement constitutes the entire agreement between the customer and ADT. In executing this agreement, customer is not relying on any advice or advertisement of ADT."

[7] In *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 (C.A.), this court emphasized that, in a commercial setting, in the absence of fraud or other improper conduct that induced a plaintiff to enter the alarm services contract, the plaintiff bore the onus to review the contract and satisfy itself of its advantages and disadvantages before signing it. As this court stated at para. 32, "[t]here is no justification for shifting the plaintiff's responsibility to act with elementary prudence onto the defendant."

[8] Although the Agreement in this case arose in a consumer setting, not a commercial one, the appellants are sophisticated individuals: Ms. Deswal is a practicing litigation lawyer who runs her own practice; Mr. Oberoi has a Master's Degree in Finance and his aviation consulting work involves the drafting of business and leasing contracts. Significantly, Ms. Deswal acknowledged that she signed the Agreement without reading it.

[9] Had the appellants taken the time to read the Agreement, they would have understood from the first page that a cellular back-up service was available. As

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well, the following clauses pointed out that the operation of the system could be interrupted:

(i) The entire agreement clause just above the signature line stated: “Customer acknowledges that he/she is aware that no alarm system can guarantee prevention of loss, that human error on the part of ADT or the municipal authorities is always possible, and that signals may not be received if the transmission mode is cut, interfered with, or otherwise damaged”;

(ii) On page 5, the Agreement stated, in capital letters: “Customer understands that ADT will not receive alarm signals when the telephone line or other transmission mode is not operating or has been cut, interfered with or is otherwise damaged …” That clause continued: “Customer understands that ADT recommends that customer also use an additional back-up method of communication to connect customer’s alarm system to ADT’s alarm monitoring center regardless of the type of telephone service customer uses.”

[10] The motion judge held that, in the circumstances, it was the appellants’ responsibility to read the agreement and ask about its terms. That was a conclusion open to the motion judge on the record before her.

THE LIMITATION OF LIABILITY CLAUSE

[11] The Agreement contained a limitation of liability clause that read, in part, as follows:

> Limit of liability - It is understood that ADT is not an insurer, that insurance, if any, shall be obtained by the

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> customer and that the amounts payable to ADT hereunder are based upon the value of the services and the scope of liability as herein set forth and are unrelated to the value of the customer’s property or property of others located in customer’s premises. Customer agrees to look exclusively to customer's insurer to recover for injury or damage in the event of any loss or injury and releases and waives all right of recovery against ADT arising by way of subrogation ... if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 10% of the annual service charge or $250 whichever is greater, as the agreed upon damages and not as a penalty, as the exclusive remedy …

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[12] We are not persuaded that the motion judge erred in her application of the three-part analysis set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways))*, 2010 SCC 4, [2010] 1 S.C.R. 69, to determine the enforceability of the limitation clause for the following reasons:

(i) The Agreement’s limitation of liability clause applied in the circumstances;

(ii) When the motion judge’s oral reasons are read as a whole, it is clear that she held the clause was not unconscionable. That finding was open to her on the evidence: the contractual limitations on liability were clearly set out in several provisions of the Agreement; they were not hidden or concealed in ways that would make it unfair to treat them as part of the contract; immediately above the signature line the contract contained language that the customer had read the entire agreement, including the limitation of liability clause; there was no pre-existing relationship between the appellants and ADT in which the appellants looked to the company for advice; the appellants are sophisticated and educated individuals; there was no evidence of duress or limits placed on the appellants' time to review the Agreement at the time of its execution; and Ms. Deswal chose not to read the Agreement presented to her, notwithstanding the provision, in bold capital letters just above her signature line, acknowledging that she had "read both sides of this agreement and understands all terms and conditions of both this and the reverse side of this agreement, in particular, paragraph 1, Limited Warranty, and paragraph 7, Limit of Liability"; and

(iii) The motion judge held that public policy favoured upholding the contract on its terms, relying on decisions of this court in *Fraser Jewellers* and *Suhaag Jewellers Ltd. v. Alarm Factory Inc. (AFC Advance Integration)*, 2016 ONCA 33, at para. 4, leave to appeal to S.C.C. refused, 36887 (June 23, 2016) the latter a post-*Tercon* decision. The motion judge adopted the public policy rationale supporting the limitation of liability clauses in alarm system service contracts set out by this court in *Fraser Jewellers*, at paras. 38 and 39, specifically that the service provider is not an insurer and its monitoring fee bears no relationship to the area of risk and the extent of exposure ordinarily taken into account in the determination of insurance policy premiums. We see no error in her so doing.

[13] Finally, in both written and oral submissions, the appellants argued that the circumstances of their case are analogous to those of the plaintiffs in the decision of this court in *Singh v. Trump*, 2016 ONCA 747, 408 D.L.R. (4th) 235, leave to appeal refused, [2016] S.C.C.A. No. 548. We see no such analogy.

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DISPOSITION

[14] For the reasons set out above, the appeal is dismissed.

[15] In accordance with the parties' agreement on costs, the appellants shall pay the respondents their costs of the appeal fixed in the amount of $6,000, inclusive of disbursements and applicable taxes.

"Doherty J.A."
"M.L. Benotto J.A."
"David Brown J.A."

2021 ONCA 475 (CanLII)

Para 89

Para 93

SUPREME COURT OF CANADA

CITATION: Uber Technologies Inc. *v.* Heller, 2020 SCC 16

APPEAL HEARD: November 6, 2019
JUDGMENT RENDERED: June 26, 2020
DOCKET: 38534

2020 SCC 16 (CanLII)

BETWEEN:

Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V.
Appellants

and

David Heller
Respondent

\- and -

Attorney General of Ontario, Young Canadian Arbitration Practitioners, Arbitration Place, Don Valley Community Legal Services, Canadian Federation of Independent Business, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Income Security Advocacy Centre, Parkdale Community Legal Services, United Food and Commercial Workers Canada, Workers' Health and Safety Legal Clinic, Montreal Economic Institute, Canadian American Bar Association, Chartered Institute of Arbitrators (Canada) Inc., Toronto Commercial Arbitration Society, Canadian Chamber of Commerce, International Chamber of Commerce, Consumers Council of Canada, Community Legal Assistance Society and ADR Chambers Inc.
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Joint Reasons for Judgment: (paras. 1 to 100)	Abella and Rowe JJ. (Wagner C.J. and Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)
Concurring Reasons: (paras. 101 to 176)	Brown J.
Dissenting Reasons: (paras. 177 to 338)	Côté J.

Note: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

2020 SCC 16 (CanLII)

Uber Technologies Inc.,
Uber Canada, Inc.,
Uber B.V. and
Rasier Operations B.V. *Appellants*

v.

David Heller *Respondent*

and

Attorney General of Ontario,
Young Canadian Arbitration Practitioners,
Arbitration Place,
Don Valley Community Legal Services,
Canadian Federation of Independent Business,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Income Security Advocacy Centre,
Parkdale Community Legal Services,
United Food and Commercial Workers Canada,
Workers' Health and Safety Legal Clinic,
Montreal Economic Institute,
Canadian American Bar Association,
Chartered Institute of Arbitrators (Canada) Inc.,
Toronto Commercial Arbitration Society,
Canadian Chamber of Commerce,
International Chamber of Commerce,
Consumers Council of Canada,
Community Legal Assistance Society and
ADR Chambers Inc. *Interveners*

Indexed as: Uber Technologies Inc. *v.* Heller

2020 SCC 16 (CanLII)

2020 SCC 16

File No.: 38534.

2019: November 6; 2020: June 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Contracts of adhesion — Arbitration clause — Validity — Unconscionability — Mandatory clause in standard form contract between driver and multinational corporation requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings — Driver commencing action in Ontario court against corporation — Corporation seeking stay of proceedings based on arbitration clause — Whether action should be stayed — Whether validity of arbitration agreement should be decided by court or arbitrator — Whether arbitration agreement unconscionable — Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(2).

H provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the

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Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income.

In 2017, H started a class proceeding against Uber in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with H. H argued that the arbitration clause was unconscionable and therefore invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction. The Court of Appeal allowed H's appeal and set aside the motion judge's order. It concluded that H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration.

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

Per Wagner C.J. and **Abella**, Moldaver, Karakatsanis, **Rowe**, Martin and Kasirer JJ.: Because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, H's challenge to the validity of the arbitration agreement may never be resolved. The validity of the

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arbitration agreement must therefore be resolved by the court. H's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and H because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US$14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid.

The parties disagreed on the arbitration statute applicable to their dispute. Uber argued that the Ontario *International Commercial Arbitration Act* applies and H argued that the Ontario *Arbitration Act* applies. Whether the *International Commercial Arbitration Act* governs depends on whether the arbitration agreement is international and commercial. That the agreement here is international is not in dispute. Labour or employment disputes are not the type that the *International Commercial Arbitration Act* is intended to govern. The *Arbitration Act* therefore governs.

The Court set out a framework in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, for when a court should decide if an arbitrator has jurisdiction

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over a dispute instead of referring that question to the arbitrator. That framework applies to Ontario's *Arbitration Act*. According to that framework, a court should refer all challenges to an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record — that is, if the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties.

In addition to the two exceptions to arbitral referral in *Dell* and *Seidel*, a court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. Such a situation raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay. One way in which the validity of an arbitration agreement may not be determined is when an arbitration agreement is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for all claims made under

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the agreement. The arbitration agreement would, in effect, be insulated from meaningful challenge.

Accordingly, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. To determine whether only a court can resolve the challenge to arbitral jurisdiction, the court must first determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator. While this second question requires some limited assessment of the evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. If there is a real prospect that referring a challenge to an arbitrator's jurisdiction to the arbitrator would result in the challenge never being resolved, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record. The Court, therefore, should resolve the arguments H has raised.

Unconscionability is an equitable doctrine that is used to set aside unfair agreements that resulted from an inequality of bargaining power. When the traditional assumptions underlying contract enforcement lose their justificatory authority, this doctrine provides relief from improvident contracts. The purpose of unconscionability

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is the protection of those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made.

Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect its own interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and must be assessed contextually. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.

The doctrine of unconscionability has particular implications for standard form contracts. The potential for such contracts to create an inequality of bargaining power is clear, as is the potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate a party's reasonable expectations by depriving them of remedies.

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Applying the unconscionability doctrine in this case, there was clearly inequality of bargaining power between Uber and H. The arbitration agreement was part of a standard form contract and a person in H's position could not be expected to understand that the arbitration clause imposed a US$14,500 hurdle to relief. The improvidence of the arbitration clause is also clear because these fees are close to H's annual income and are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into.

Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. In this case, the arbitration clause is the only way H is permitted to vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

Based on both the financial and logistic disadvantages faced by H in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

Per **Brown** J.: There is agreement with the majority that the appeal should be dismissed. There is also agreement with the majority that the mandatory arbitration requirement is invalid, but there is disagreement with respect to the majority's reliance upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution

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— as the arbitration agreement in this case does — are unenforceable not because they are unconscionable, but because they undermine the rule of law by denying access to justice. They are therefore contrary to public policy.

The majority vastly expands the scope of the doctrine of unconscionability's application. This is unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. It is also undesirable, because it drastically expands the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

The public policy doctrine is fundamental to Canadian contract law and provides grounds for setting aside specific types of contractual provisions including those that harm the integrity of the justice system. This head of public policy applies when a provision penalizes or prohibits one party from enforcing the terms of their agreement, which serves to uphold the rule of law. At a minimum, the rule of law guarantees Canadian citizens and residents a stable, predictable and ordered society in which to conduct their affairs. Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. There is therefore no good reason to distinguish between a clause that expressly blocks access to a legally determined resolution and one that has the ultimate effect of doing so. While public

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policy does not require access to a court of law in all circumstances, any means of dispute resolution that serves as a final resort for contracting parties must be just. Arbitration is an acceptable alternative to civil litigation because it can provide a resolution according to law, but where a clause expressly provides for arbitration while simultaneously having the effect of precluding it, the considerations which promote curial respect for arbitration dissolve. This is where the public policy principle preventing an ouster of court jurisdiction operates.

In evaluating a clause that limits access to a legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. A court must show due respect for arbitration agreements, particularly in the commercial setting. It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship and the possibility for timely resolution but that one party simply regrets in hindsight.

To decide whether a limitation on dispute resolution imposes undue hardship, the first factor to consider is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from the agreement, this suggests the possibility of undue hardship. Courts should also consider the relative bargaining positions of the parties. However, to be clear, an imbalance in bargaining power is not

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required to find that a provision bars access to dispute resolution. Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Here, the arbitration agreement effectively bars any claim that H might have against Uber and is disproportionate in the context of the parties' relationship. This form of limitation on legally determined dispute resolution undermines the rule of law and is contrary to public policy.

While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms or effects, bars access to that very arbitrator. It therefore falls to courts to do so. While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral — where a clause effectively prevents access to arbitration — is necessary to preserve the public legitimacy of the law in general, and arbitration in particular.

Per **Côté** J. (dissenting): The appeal should be allowed and a stay of proceedings should be granted on the condition that Uber advances the funds needed to initiate the arbitration proceedings. One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement. Party autonomy and freedom of contract inform the policy choices embodied in the *Arbitration Act, 1991* and the *International Commercial Arbitration Act* ("*International Act*"), one of which is that the parties to a valid arbitration agreement should abide by their

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agreement. The parties to the agreement in this case have bound themselves to settle any disputes arising under it through arbitration. The *Arbitration Act*, the *International Act*, the Court's jurisprudence and compelling considerations of public policy require the Court to respect the parties' commitment to submit disputes to arbitration.

The *International Act*, not the *Arbitration Act*, governs Uber's motion for a stay. However, neither the analysis that follows nor the ultimate conclusions would change if the *Arbitration Act* applied. The *International Act* applies to arbitrations which are international and commercial. The arbitration in this case is international because the parties have their residences or places of business in different countries, so the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being commercial in nature. A court should approach this issue by analyzing the nature of the parties' relationship on the basis of a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings. Focussing the analysis on the nature of the relationship created by the transaction is consistent with the weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law. In this case, a superficial review of the documentary evidence reveals that the underlying transaction between Uber and H is commercial in nature. The service agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, a type of transaction identified as coming within the scope of the UNCITRAL Model Law.

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A motion for a stay and for referral to arbitration may be dismissed if the arbitration agreement is found to be null and void under the UNCITRAL Model Law or invalid under the *Arbitration Act*. The validity of the arbitration clause in this case should be determined by an arbitral tribunal. There is a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. This is the rule of systematic referral. A court may depart from the rule of systematic referral only if the jurisdictional challenge is based solely on a question of law or a question of mixed law and fact that requires only a superficial review of the documentary evidence, is not a delaying tactic, and will not unduly impair the conduct of the arbitration proceeding. A review is not superficial if the court is required to review testimonial evidence.

H's arguments challenging the validity of the arbitration clause require more than a superficial review of the documentary evidence: H's arguments are dependent upon testimonial evidence regarding his financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the arbitration clause applies.

The Court should not create an exception to the rule of systematic referral. An exception that would apply where an arbitration agreement is deemed to be too costly or otherwise inaccessible is inappropriate for several reasons. First, the rule of systematic referral is the product of an exercise of statutory interpretation, so any exception to it must also be a product of statutory interpretation. The policy

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considerations relied on by the majority cannot be used to make the *Arbitration Act* or the UNCITRAL Model Law say something they do not say. Second, the Court has already declined to allow courts discretion to fully entertain a challenge to an arbitration agreement's validity. Third, it has also decided that delaying tactics should be counteracted by confining the scope of review on a motion for a stay to the documentary evidence. Fourth, the ordinary operation of the rule of systematic referral under an agreement governed by a foreign choice of law clause is not a loophole, and there is no basis in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not. Fifth, there is no basis for concluding that the mandatory fees for the administration of mediation and arbitration proceedings under the International Chamber of Commerce's ("ICC") *Arbitration Rules, Mediation Rules* ("ICC Rules") are significant relative to H's claim, given that the amount of the claim is unknown and no explanation is given by the majority for concluding that H will be unable to reach the physical location of the arbitration. Furthermore, there is disagreement with Brown J. that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*. Legislation which facilitates the enforcement of agreements to submit disputes to arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction. Courts retain an oversight role throughout the arbitration process and afterwards as proceedings commenced in contravention of an arbitration agreement are stayed, not dismissed, and as the stay may set conditions specifying how the parties are to proceed to arbitration.

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The issues as to the doctrine of unconscionability, the *Employment Standards Act, 2000* ("*ESA*"), and public policy raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that documentary evidence and, if the Court could consider the testimonial evidence in the record, it is insufficient to support a finding that the arbitration clause is unconscionable, inconsistent with the *ESA*, or contrary to public policy.

There is agreement with Brown J. with respect to the unconscionability doctrine in the general law of contracts. The unconscionability doctrine applies where there is (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and where (3) the stronger party knows of the weaker party's vulnerability. The key question in relation to the significant inequality of bargaining power is whether the weaker party had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests, thereby undermining the premise of freedom of contract. The majority's claim that vulnerability in the contracting process may arise from provisions in standard form contracts which are dense or difficult to read or understand sets the threshold so low as to be both practically meaningless and open to abuse. This sweeping restriction on arbitration clauses in standard form contracts would be best left to the legislature, especially since the sharing economy — a vital and growing sector of Canada's economy which depends on standard form contracts that are agreed to electronically

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— could be stifled if a reduced threshold for inequality of bargaining power is adopted.

H's claim that the bargain was improvident rests on three propositions: (1) the place of arbitration clause requires him to travel to Amsterdam at his own expense, (2) the choice of law clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment of fees which he alleges are disproportionately high. As to the place of arbitration clause, the place of arbitration is a legal concept which denotes the parties' selection of a particular jurisdiction whose arbitration law governs proceedings, and under whose law the arbitral award is made. There is no obligation to actually conduct the arbitration at the place of arbitration. As to the choice of law clause, arguments directed at the alleged unfairness of having the service agreement governed by foreign law are analytically distinct from those concerning alleged unfairness arising from the arbitration clause itself. The separability doctrine holds that arbitration clauses embedded in contracts should be treated as independent agreements that are ancillary or collateral to the underlying contract. The result is that the alleged invalidity of the choice of law clause on the basis that it is unconscionable does not affect the validity of the arbitration clause. As to the selection of the ICC Rules, arbitration agreements involve a mutuality of exchange, so mandatory fees which apply to disputes initiated by either party would make pursuing a claim for a small amount just as uneconomic for Uber as for H. Therefore, if unfairness results from the imposition of the ICC fees on hypothetical claims for small amounts, the unfairness is mutual. In any event, the

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actual amount of H's claim is unknown, and establishing that a dispute over a small amount is likely would require the production and review of testimonial evidence. The proportionality of the ICC fees to H's ability to finance a larger claim must be measured as of the time the contract is formed, and the Court has no evidence regarding his financial position at that time.

The evidence does not support a finding that Uber had constructive knowledge of H's alleged peculiar vulnerability. It would have been impossible for Uber to be aware of H's specific income and education level when he decided to become an Uber driver, or that he intended to use the Driver App as his primary source of income. In any event, such questions would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

The arbitration clause is not invalid under the *ESA*. The ability to file a complaint under the *ESA* is not an employment standard since the relevant section does not require an employer to do or not do anything. As such, the arbitration clause does not unlawfully contract out of an employment standard. In any event, a court cannot determine that an arbitration agreement is invalid pursuant to the *ESA* without first finding that the parties involved are an employer and an employee. Whether H is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of a superficial review of the documentary

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evidence. The rule of systematic referral applies, and the parties should be referred to arbitration.

The arbitration clause is also not invalid under public policy. The Court should not create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy. The *Arbitration Act* and the *International Act* are strong statements of public policy which favour enforcing arbitration agreements. When considering whether, or how, to refashion old common law doctrines regarding arbitration, the Court should continue to embrace a more modern approach to arbitration law which views arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. The Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered by the courts, as they are instead matters for the elected policy-makers who sit in the legislature.

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The pro-arbitration stance taken by legislatures across Canada and by the Court supports a generous approach to remedial options which will facilitate the arbitration process. Two such options include ordering a conditional stay of proceedings and applying the doctrine of severance. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. Courts should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal, but a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration. In addition, compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be unenforceable.

In light of the evidence that H cannot afford the ICC fees, Uber should be required to advance the filing fees to enable him to initiate arbitration proceedings. In addition, if the arbitration clause were unconscionable or contrary to public policy, the selection of the ICC Rules and the place of arbitration clause could be severed. The majority does not explain why they have chosen not to address severance in their reasons. Defeating the parties' commitment to submit disputes to arbitration based on a hypothetical case would be commercially impractical and, given that the dispute actually before the Court concerns a proposed class proceeding for CAN$400,000,000 and that the amount of H's individual claim is as yet unknown,

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absurd. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their operations. The arbitration clause should be upheld.

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By Côté J. (dissenting)

Hofer v. Hofer, [1970] S.C.R. 958; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *National Gypsum Co. Inc. v. Northern Sales Ltd.*, [1964] S.C.R. 144; *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529; *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213; *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297; *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588; *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359; *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346; *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356; *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395 (1967); *Fiona Trust and Holding Corp. v. Privalov*,

[2007] UKHL 40, [2007] 4 All E.R. 951; *Krutov v. Vancouver Hockey Club Ltd.*, 1991 CanLII 2077; *NetSys Technology Group AB v. Open Text Corp.* (1999), 1 B.L.R. (3d) 307; *Cecrop Co. v. Kinetic Sciences Inc.*, 2001 BCSC 532, 16 B.L.R. (3d) 15; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1; *BNA v. BNB*, [2019] SGCA 84; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1988), 29 B.C.L.R. (2d) 233; *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 67 D.L.R. (4th) 131; *Popack v. Lipszyc*, 2009 ONCA 365; *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164; *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (QL); *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254, var'd (1995), 137 Sask. R. 238; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29; *R. v. National Joint Council for the Craft of Dental Technicians (Dispute Committee)*, [1953] 1 Q.B. 704; *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888; *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (1962); *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Jonsson v. Lymer*, 2020 ABCA 167; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Downer v. Pitcher*, 2017

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NLCA 13, 409 D.L.R. (4th) 542; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Z.I. Pompey Industrie v. ECU‑Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited*, 2018 ABQB 207, 17 C.P.C. (8th) 81; *Houston v. Exigen (Canada) Inc.*, 2006 NBQB 29, 296 N.B.R. (2d) 112; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Williams v. Amazon.com, Inc.*, 2020 BCSC 300; *In re Estate of Millar (Charles), Deceased*, [1938] S.C.R. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540; *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

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(5th) 136, [2018] O.J. No. 502 (QL), 2018 CarswellOnt 1090 (WL Can.). Appeal dismissed, Côté J. dissenting.

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John Siwiec, for the intervener the Young Canadian Arbitration Practitioners.

Robert Deane and *Craig Chiasson*, for the intervener the Arbitration Place.

Alexandra Monkhouse and *Andrew Monkhouse*, for the intervener Don Valley Community Legal Services.

Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

Marina Pavlovic and *Johann Kwan*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

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Steven Barrett and *Joshua Mandryk*, for the intervener the United Food and Commercial Workers Canada.

Kevin Simms and *John Bartolomeo*, for the intervener the Workers' Health and Safety Legal Clinic.

Robert Carson and *Lauren Harper*, for the intervener the Montreal Economic Institute.

Alyssa Tomkins and *James Plotkin*, for the intervener the Canadian American Bar Association.

Joseph C. McArthur and *Rahat Godil*, for the interveners the Chartered Institute of Arbitrators (Canada) Inc. and the Toronto Commercial Arbitration Society.

Matthew Milne-Smith and *Chantelle Cseh*, for the intervener the Canadian Chamber of Commerce.

Andres C. Garin and *Alison FitzGerald*, for the intervener the International Chamber of Commerce.

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Mohsen Seddigh and *David Sterns*, for the intervener the Consumers Council of Canada.

Wes McMillan and *Greg J. Allen*, for the intervener the Community Legal Assistance Society.

Andrew D. Little and *Ranjan K. Agarwal*, for the intervener ADR Chambers Inc.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ. was delivered by

ABELLA AND ROWE JJ. —

[1] In this appeal, the Court determines who has authority to decide whether an Uber driver is or is not an "employee" within the meaning of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"): the courts of Ontario or an arbitrator in the Netherlands, as provided for in the contracts of adhesion between Uber and its drivers?

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[2] David Heller provides food delivery services in Toronto using Uber's software applications.[1] To become a driver for Uber, Mr. Heller had to accept, without negotiation, the terms of Uber's standard form services agreement. Under the terms of the agreement, Mr. Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. Mr. Heller earns between $400-$600 a week. The fees represent most of his annual income.

[3] Mr. Heller started a class proceeding against Uber in 2017 for violations of the *ESA*. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands. In response, Mr. Heller took the position that the arbitration clause[2] in Uber's services agreements is invalid, both because it is unconscionable and because it contracts out of mandatory provisions of the *ESA*. The motion judge held that he did not have the authority to decide whether the arbitration agreement was valid and stayed Mr. Heller's proceeding (2018 ONSC 718, 421 D.L.R. (4th) 343). The Court of Appeal reversed this order, determining, among other things, that the arbitration agreement was unconscionable based on the inequality of bargaining power between the parties and the improvident cost of arbitration (2019 ONCA 1, 430 D.L.R. (4th) 410).

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[1] We refer to the four appellants collectively as "Uber".
[2] The phrases "arbitration clause" and "arbitration agreement" both refer to that part of the overall contract dealing with the arbitration.

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[4] We agree with the Court of Appeal. This is an arbitration agreement that makes it impossible for one party to arbitrate. It is a classic case of unconscionability.

Background

[5] Uber operates a global business in more than 600 cities and 77 countries, with a customer base of millions of people and businesses. The company has been operating in Ontario for eight years.

[6] Uber's software applications are widely used to arrange personal transportation (the Rider and Driver Apps) and food delivery (the UberEATS App). Customers and drivers can download Uber's Apps onto their smartphones. Customers use the Apps to place requests for transportation or food delivery. Drivers use the Apps to view and respond to customer requests. Payment between the customers and drivers is facilitated through Uber's Apps, and Uber takes a share of the drivers' payments.

[7] The first time drivers log on to an Uber App, they are presented with a standard form services agreement of around 14 pages. To accept the agreement, the driver must click "I agree" twice. Once the driver does so, the Uber App is activated and the services agreement is uploaded to a "Driver Portal", accessible to the driver through an online account. The parties to the services agreement are the driver and Uber subsidiaries incorporated in the Netherlands with offices in Amsterdam.

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[8] The services agreement includes mandatory arbitration and choice of law clauses, which state:

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws . . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") . . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands . . . .
>
> (C.A. reasons, at para. 11)

[9] The choice of law clause requires the agreement to be "governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws". The arbitration clause requires all disputes to be submitted first to mandatory mediation and, if that fails, then to arbitration, both according to the International Chamber of Commerce ("ICC")'s Rules. The place of the arbitration is to be in Amsterdam.

[10] The up-front cost to begin an arbitration at the ICC according to the ICC Rules amounts to about US$14,500. The fees do not include legal fees, lost wages

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and other costs of participation. The services agreement provides no information about the cost of mediation and arbitration.

[11] Mr. Heller is an Ontario resident who entered into contracts with corporations that are part of the Uber enterprise to be a driver.[3] He earns approximately $400-$600 per week based on 40 to 50 hours of work, or $20,800-$31,200 per year, before taxes and expenses. The costs to arbitrate a claim against Uber equal all or most of the gross annual income he would earn working full-time as an Uber driver.

[12] Mr. Heller started this proposed class action against Uber in 2017. He seeks relief for four claims in this proceeding: a claim for breach of the *ESA*, a claim for breach of contract based on either implied terms or the duty of good faith, a claim for negligence, and a claim for unjust enrichment. All of these claims, however, depend on the *ESA* for their success. The essence of Mr. Heller's position is that he is an employee within the meaning of the *ESA*.

[13] Uber, relying on the arbitration clause in its services agreement with Mr. Heller, sought a stay of proceedings in favour of arbitration in the Netherlands.[4]

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[3] On June 7, 2016, Mr. Heller entered into a contract with Rasier Operations B.V. ("Uber Rasier") to use the Ride App. On December 15, 2016, he entered into a contract with Uber Portier B.V. ("Uber Portier") to use UberEATS.

[4] This case was argued on the basis that all four Uber defendants can invoke the arbitration agreement, even though only Uber Rasier is a party to it. Our reasons should not be taken as implying that an arbitration agreement can bind or be invoked by non-parties (see J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 74-75; *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121 (Comm.), [2004] 1 Lloyd's Rep. 603). That is an issue to be decided another day.

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Mr. Heller argued that the arbitration clause was invalid on two grounds: it was unconscionable, and it contracted out of mandatory *ESA* protections.

[14] The motion judge stayed the proceeding in favour of arbitration in the Netherlands. He began his analysis by determining which arbitration legislation applied: the *Arbitration Act, 1991*, S.O. 1991, c. 17 ("*AA*" or "*Arbitration Act*") or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 ("*ICAA*"). The *ICAA* applies to arbitration agreements that are "international" and "commercial". The motion judge proceeded on the basis that the *ICAA* applied because Mr. Heller and the contracting Uber companies were based in different jurisdictions, and because there was, in the motion judge's view, a *prima facie* case that the agreement was a commercial licensing arrangement.

[15] He then determined that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction (the "competence-competence" principle). In the alternative, the motion judge held that the arbitration clause was not invalid due to unconscionability or because it contracted out of the *ESA*. He accordingly stayed the proceeding in favour of arbitration in the Netherlands.

[16] The Court of Appeal allowed Mr. Heller's appeal, finding that the arbitration clause was void both because it was unconscionable and because it contracted out of the *ESA*. Writing for a unanimous court, Nordheimer J.A. concluded

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that Mr. Heller's objections to the arbitration agreement did not need to be referred to an arbitrator in the Netherlands and could be dealt with by a court in Ontario. He declined to resolve whether the *AA* or the *ICAA* applied, holding that the result would be the same under either statute. He found the arbitration clause to be unconscionable because it was an unfair bargain and resulted from significant inequality of bargaining power between Mr. Heller and Uber. He further noted that there was minimal chance of Mr. Heller having received legal advice and that it was safe to infer that Uber knowingly and intentionally chose this "Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber". The court also found the arbitration clause void because it contracted out of the *ESA*.

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[17] As a result, the Court of Appeal allowed Mr. Heller's appeal, and set aside the order of the motion judge granting Uber's motion to stay.

Analysis

[18] Throughout these proceedings, the parties have disagreed on the arbitration statute applicable to their dispute. Uber argued that the *ICAA* applies and Mr. Heller argued that the applicable legislation is the *AA*.

[19] We agree with Mr. Heller. The parties' dispute is fundamentally about labour and employment. The *ICAA* was not meant to apply to such cases.[5]

[20] The *ICAA* and *AA* are exclusive. If the *ICAA* governs this agreement, the *AA* does not, and vice versa (*AA*, s. 2(1)(b)). As the Superior Court correctly identified, whether the *ICAA* governs depends on whether the arbitration agreement is "international" and "commercial". That the agreement here is international is not in dispute. Whether the agreement is commercial is contested. To answer this question, one must understand the legislative scheme of the *ICAA*.

[21] The *ICAA* implements two international instruments: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 ("*Convention*") and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended by the United Nations Commission on International Trade Law on July 7, 2006 ("*Model Law*"). Only the *Model Law* is relevant here.

[22] Section 5(3) of the *ICAA* states that the *Model Law* applies to "international commercial arbitration agreements and awards made in international

[5] We note in passing that if the motion judge had issued a stay under the *AA*, no appeal to the Court of Appeal would have been available (*AA*, s. 7(6)). A direct appeal to this Court with leave would still have been permissible (*Crown Grain Company, Limited v. Day*, [1908] A.C. 504 (P.C.), at p. 507; *Re Sutherland and Halbrick* (1982), 134 D.L.R. (3d) 177 (Man. C.A.), at p. 181). In this case, because the motion judge's order was made (in error) under the *ICAA*, the Court of Appeal did have jurisdiction.

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commercial arbitrations". The meaning of "commercial" in this section of the *ICAA* must be the same as the meaning of "commercial" under the *Model Law*, as the latter states that it "applies to international commercial arbitration" (art. 1(1)).

[23] While the *Model Law* does not define the term "commercial", a footnote to art. 1(1) provides some guidance:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
>
> (*Model Law*, art. 1(1), fn. 2)

[24] The *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* further explains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business":

> Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. *Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business*.

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> (United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at p. 10 (emphasis added); see also p. 11.)

[25] Two points emerge from this commentary. First, a court must determine whether the *ICAA* applies by examining the nature of the parties' dispute, not by making findings about their relationship. A court can more readily decide whether the *ICAA* applies (or an arbitrator can more readily decide whether the *Model Law* applies) by analysing pleadings than by making findings of fact as to the nature of the relationship. Characterising a dispute requires the decision-maker to examine only the pleadings; characterising a relationship requires the decision-maker to consider a variety of circumstances in order to make findings of fact. If an intensive fact-finding inquiry were needed to decide if the *ICAA* or the *Model Law* applies, it would slow the wheels of an arbitration, if not grind them to a halt.

[26] The second point to draw is that an employment dispute is not covered by the word "commercial". The question of whether someone is an employee is the most fundamental of employment disputes. It follows that if an employment dispute is excluded from the application of the *Model Law*, then a dispute over whether Mr. Heller is an employee is similarly excluded. This is not the type of dispute that the *Model Law* is intended to govern, and thus it is not the type of dispute that the *ICAA* is intended to govern.

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[27] This result is consistent with what courts have held (*Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at paras. 11-13; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213 (Q.B.); *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125, at para. 27; *Ross v. Christian & Timbers Inc.* (2002), 23 B.L.R. (3d) 297 (Ont. S.C.J.), at para. 11). It is also consistent with the *Model Law*'s reference to "trade" transactions, which, as Gary B. Born observes, "arguably connot[es] involvement by traders or merchants, as distinguished from consumers or employees" (*International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309). Further, one could draw a negative inference from the definition's omission of "employment" relations (p. 309, fn. 454). It seems unlikely to us that the drafters of the *Model Law* would have included such a thorough list of included commercial relationships and not considered whether to include "employment".

[28] Employment disputes, in sum, are not covered by the *ICAA*. The *AA* therefore governs.

[29] The *AA* directs courts, on motion of a party, to stay judicial proceedings when there is an applicable arbitration agreement:

> **Stay**
>
> **7** (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

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[30] But a court has discretion to retain jurisdiction and decline to stay proceedings in five circumstances enumerated in s. 7(2):

> **Exceptions**
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. *The arbitration agreement is invalid.*
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment.

The only relevant exception here is para. 2 of s. 7(2), which gives a court discretion to refuse to grant a stay if the court determines that the arbitration agreement is invalid.

[31] The *AA* is silent on what principles courts should consider in exercising their discretion to determine the validity of an arbitration agreement under s. 7(2). But some criteria were set out in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, which interpreted similar arbitration regimes in Quebec and British Columbia. In those decisions, this Court set out a framework for when a court should decide if an arbitrator has jurisdiction, instead of referring that question to the arbitrator out of respect for the competence-competence principle.

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[32] Under the *Dell* framework, the degree to which courts are permitted to analyse the evidentiary record depends on the nature of the jurisdictional challenge. Where pure questions of law are in dispute, the court is free to resolve the issue of jurisdiction (para. 84). Where questions of fact alone are in dispute, the court must "normally" refer the case to arbitration (para. 85). Where questions of mixed fact and law are in dispute, the court must refer the case to arbitration unless the relevant factual questions require "only superficial consideration of the documentary evidence in the record" (para. 85).

[33] In setting out this framework, *Dell* adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the "*prima facie*" analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must "refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable" (para. 75). To be so manifestly tainted, the invalidity must be "incontestable", such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, "Compétence arbitrale", in *Juris-classeur Procédure civile* (loose-leaf), fasc. 1034, at No. 105). Rather than adopting these standards literally, *Dell* gave practical effect to what was set out in the arbitration literature by creating a test whereby a court refers all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).

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[34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921, at para. 11:

> The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[35] The parties agree that the framework from *Dell* and *Seidel* applies to Ontario's *Arbitration Act*. We agree, based on the similarities between the arbitration regimes in Ontario, British Columbia and Quebec. The two exceptions to arbitral referral in *Dell* and *Seidel* therefore apply in Ontario. This case, according to Mr. Heller, engages one of those exceptions because it requires at most only a superficial review of the record.

[36] Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc.*, 2019 ABQB 800, at para. 23 (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).

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[37] Although it is possible to resolve the validity of Uber's arbitration agreement through a superficial review of the record, we are of the view that this case also raises an issue of accessibility that was not raised on the facts in *Dell* and justifies departing from the general rule of arbitral referral. As *Dell* itself acknowledged, the rule of systematic referral of challenges to jurisdiction requiring a review of factual evidence applies "normally" (para. 85; see also *Muroff*, at para. 11). This is one of those abnormal times.

[38] The underlying assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. As *Dell* says, the matter "must be resolved first by the arbitrator" (para. 84). *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. This raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.

[39] One way (among others) in which the validity of an arbitration agreement may not be determined is when an arbitration is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying

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relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge (see Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 *McGill L.J.* 693; Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12; Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 *N.C. L. Rev.* 679).

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[40] These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will.

[41] Against these real risks of staying an action in favour of an invalid arbitration, one could pit the risk of a plaintiff seeking to obstruct an arbitration by advancing spurious arguments against the validity of the arbitration. This concern animated *Dell* (see paras. 84, 86).

[42] In our view, there are ways to mitigate this concern that make the overall calculus favour departing from the general rule of referring the matter to the arbitrator in these situations. Courts have many ways of preventing the misuse of court processes for improper ends. Proceedings that appear vexatious can be handled by requiring security for costs and by suitable awards of costs. In England, courts have awarded full indemnity costs where a party improperly ignored arbitral jurisdiction (Hugh Beale, ed., *Chitty on Contracts* (33rd ed. 2018), vol. II, *Specific Contracts*, at para. 32-065; *A. v. B. (No.2)*, [2007] EWHC 54 (Comm.), [2007] 1 All E.R. (Comm.) 633, at para. 15; *Kyrgyz Mobil Tel Limited v. Fellowes International Holdings*

Limited [2005] EWHC 1329, 2005 WL 6514129 (Q.B.), at paras. 43-44). Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate (Beale, at para. 32-052; *West Tankers Inc. v. Allianz SpA*, [2012] EWHC 854 (Comm.), [2012] 2 All E.R. (Comm.) 395, at para. 77).

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[43] Moreover, *Dell* itself makes clear that courts may refer a challenge to arbitral jurisdiction to the arbitrator if it is “a delaying tactic”, or would unduly impair the conduct of the arbitration proceeding (para. 86). This provides an additional safeguard against validity challenges that are not *bona fide*.

[44] How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

[45] While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains

narrowly focused (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must remain alert to "the danger that a party will obstruct the process by manipulating procedural rules" and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).

[46] As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[47] Turning to the appeal before us, we would first observe that Mr. Heller has made a genuine challenge to the validity of the arbitration agreement. The clause is said to be void because it imposes prohibitive fees for initiating arbitration and these fees are embedded by reference in the fine print of a contract of adhesion. Second, there is a real prospect that if a stay is granted and the question of the validity of the Uber arbitration agreement is left to arbitration, then Mr. Heller's genuine challenge may never be resolved. The fees impose a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller's contention without those — possibly unconscionable — fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.

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[48] We would therefore resolve the arguments Mr. Heller has raised against the validity of Uber's arbitration agreement rather than refer those arguments to arbitration in the Netherlands.

[49] We observe, incidentally, that departing from the general rule of arbitral referral in these circumstances has beneficial consequences. It will prevent contractual drafters from evading the result of this case through a choice of law clause. A choice of law clause could convert a jurisdictional question that would be one of law (and which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings as to the content of foreign law, something that one would not ordinarily contemplate in a superficial review of the record.

[50] This is a significant loophole for contractual drafters to exploit. Indeed, Uber's contract here includes a foreign choice of law clause. As the intervener Canadian Federation of Independent Business ("CFIB") submitted, this Court should presume that Dutch law governs the question of whether the arbitration agreement is unconscionable because the contracts have a choice of law clause indicating Dutch law (I.F., at para. 34; see also *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.), at pp. 289-91). Neither party, however, chose to lead evidence of Dutch unconscionability law. Since the parties chose not to lead evidence of Dutch law, this Court must address the issue of unconscionability according to Ontario law (see *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at pp. 853-54; *Das v. George Weston*

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Limited, 2017 ONSC 4129, at para. 215 (CanLII)). If Uber had adduced evidence of Dutch law, then under the two exceptions to arbitral referral recognized in *Dell*, this Court would have had to grant the stay in favour of an arbitrator determining the unconscionability argument.

[51] As well, even though *this* case could have been resolved based on undisputed facts, such an approach may not be sustainable in future cases. An approach to arbitral referral that depends on undisputed facts would invite parties to dispute facts. Were that standard to apply, unreasonably disputing facts would allow a party to evade any review of the merits, by use of an arbitration clause. There would be no negative consequence, in this context, to a party unreasonably disputing facts if it meant the stay in favour of arbitration would be granted. This differs significantly from the standard civil litigation context, wherein unreasonable disputes as to facts can be deterred by costs awards.

[52] We turn finally to the validity of the arbitration agreement. As mentioned, Mr. Heller raised two independent arguments as to why the arbitration agreement with Uber is invalid: first, the clause is void for unconscionability; and, second, the clause is void because it contracts out of the *ESA*.

[53] We agree with Mr. Heller that the arbitration agreement is unconscionable. The parties and interveners focused their submissions on unconscionability in accordance with this Court's direction in *TELUS Communications Inc. v. Wellman*, [2019] 2 S.C.R. 144, at para. 85, that "arguments

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over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability".

[54] Unconscionability is an equitable doctrine that is used to set aside "unfair agreements [that] resulted from an inequality of bargaining power" (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the "poor and ignorant" from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence (Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 521; see also pp. 520-24; Bradley E. Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 *Can. Bar Rev.* 142, at p. 143). This development has been described as "one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness" (Peter Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 925).

[55] Unconscionability is widely accepted in Canadian contract law, but some questions remain about the content of the doctrine, and it has been applied inconsistently by the lower courts (see, among others, *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R.

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166 (C.A.), at p. 177, per Lambert J.A.; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at para. 20; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 263 D.L.R. (4th) 368; *Titus v. William F. Cooke Enterprises Inc.,* 2007 ONCA 573, 284 D.L.R. (4th) 734; *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809, 305 D.L.R. (4th) 64; see also Swan, Adamski and Na, at p. 982; McInnes, at pp. 518-19). These questions require examining underlying contractual theory (Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005), 84 *Can. Bar Rev.* 171, at p. 173).

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[56] The classic paradigm underlying freedom of contract is the "freely negotiated bargain or exchange" between "autonomous and self-interested parties" (McCamus, at p. 24; see also Swan, Adamski and Na, at pp. 922-23; P. S. Atiyah, *Essays on Contract* (1986), at p. 140). At the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process (Atiyah, at pp. 146-48; Bigwood, at pp. 199-200; Alan Brudner, "Reconstructing contracts" (1993), 43 *U.T.L.J.* 1, at pp. 2-3). It also presumes equality between the contracting parties and that "the contract is *negotiated*, *freely agreed*, and therefore *fair*" (Mindy Chen-Wishart, *Contract Law* (6th ed. 2018), at p. 12 (emphasis in original)).

[57] In cases where these assumptions align with reality, the arguments for enforcing contracts carry their greatest weight (Melvin Aron Eisenberg, "The Bargain

Principle and Its Limits" (1982), 95 *Harv. L. Rev.* 741, at pp. 746-48). But these arguments "may speak more or less forcefully depending on the context" (*Wellman*, at para. 53; see also B. J. Reiter, "Unconscionability: Is There a Choice? A Reply to Professor Hasson" (1980), 4 *Can. Bus .L.J.* 403, at pp. 405-6). As Professor Atiyah has noted:

> The proposition that a person is always the best judge of his own interests is a good starting-point for laws and institutional arrangements, but as an *infallible empirical proposition* it is an outrage to human experience. The parallel moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill.
> [Emphasis added; p. 148]

[58] Courts have never been required to take the ideal assumptions of contract theory as "infallible empirical proposition[s]". Equitable doctrines have long allowed judges to "respond to the individual requirements of particular circumstances . . . . humaniz[ing] and contextualiz[ing] the law's otherwise antiseptic nature" (Leonard I. Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016), 2 *C.J.C.C.L.* 497, at pp. 503-4). Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests. The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984); the ship captain

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stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447) — these and similar scenarios bear little resemblance to the operative assumptions on which the classic contract model is constructed.

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[59] In these kinds of circumstances, where the traditional assumptions underlying contract enforcement lose their justificatory authority, the doctrine of unconscionability provides relief from improvident contracts. When unfair bargains cannot be linked to fair bargaining — when they cannot be attributed to one party's "donative intent or assumed risk", as Professor Benson puts it — courts can avoid the inequitable effects of enforcement without endangering the core values on which freedom of contract is based (p. 182; see also Eisenberg, at pp. 799-801; S.M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 *J.C.L.* 55, at p. 60). This explains how unconscionability lines up with traditional accounts of contract theory while recognizing the doctrine's historical roots in equity, which has long operated as a "corrective to the harshness of the common law" (McCamus, at p. 10; see also Rotman, at pp. 503-4).

[60] This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 405 and 412; *Hunter Engineering Co. v. Syncrude*

Canada Ltd., [1989] 1 S.C.R. 426, at p. 462, per Dickson C.J., and p. 516, per Wilson J.; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 247; see also *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, at para. 43). We agree. Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made (see Mindy Chen-Wishart, *Unconscionable Bargains* (1989), at p. 109; see also James Gordley, "Equality in Exchange" (1981), 69 *Cal. L. Rev.* 1587, at pp. 1629-34; *Birch*, at para. 44). Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing "islands of intervention" so that the "clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions . . . will disappear" (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 378).

[61] Openly recognizing a doctrine of unconscionability also promotes fairness and transparency in contract law (Swan, Adamski and Na, at p. 925; McCamus, at p. 438; Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (2019), at p. 225). There is value in recognizing that "judges are and always will be concerned with unfairness, with arrangements that work harshly and with conduct that is oppressive" (Swan, Adamski and Na, at p. 925). The unconscionability doctrine allows courts to "focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties" (*Hunter*, at p. 462). As Dickson C.J. observed in *Hunter*:

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> In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong. . . . There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. [p. 462]

[62] Most scholars appear to agree that the Canadian doctrine of unconscionability has two elements: "an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and . . . an improvident transaction" (McInnes, at p. 524 (emphasis deleted); see also Swan, Adamski and Na, at p. 986; McCamus, at pp. 424 and 426-27; Benson, at p. 167; Waddams (2017), at p. 379; Stephanie Ben-Ishai and David R. Percy, eds., *Contracts: Cases and Commentaries* (10th ed. 2018), at p. 719).

[63] This Court has long endorsed this duality. In *Hunter*, Wilson J. observed that

> [t]he availability of a plea of unconscionability in circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century ago . . . . [Emphasis in original; p. 512; see also p. 462, per Dickson C.J.]

[64] In *Norberg*, La Forest J. described proving the elements of unconscionability as "a two-step process", involving "(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain" (p. 256). The

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concurring judgment in *Douez v. Facebook Inc.*, [2017] 1 S.C.R. 751, followed a similar approach in a case involving a standard form consumer contract[6]:

> Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:
>
> > . . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis deleted; para. 115.]

(See also *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, 347 D.L.R. (4th) 591, at paras. 29-31; *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, 345 D.L.R. (4th) 323, at para. 29; *McNeill v. Vandenberg*, 2010 BCCA 583, at para. 15 (CanLII); *Kreutziger*, at p. 173; *Morrison*, at p. 713)

[65] We see no reason to depart from the approach to unconscionability endorsed in *Hunter*, *Norberg* and in *Douez*. That approach requires both an inequality of bargaining power and a resulting improvident bargain.

[66] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see McCamus, at pp. 426-27 and 429; Crawford, at p. 143; Chen-Wishart (1989), at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R (4th) 60, at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (H.C.A.), at p. 392; *Commercial Bank of Australia*, at pp. 462-63, and 477-78; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601, at para. 166).

[6] The majority did not discuss the elements of unconscionability.

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[67] There are no "rigid limitations" on the types of inequality that fit this description (McCamus, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (McInnes, at p. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:

> Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be *personal* (*i.e.*, characteristics of the claimant generally) or *circumstantial* (*i.e.*, vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment". [Emphasis in original; footnotes omitted; p. 525.]

(See also Chen-Wishart (2018), at p. 363.)

These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract (Chen-Wishart (2018), at p. 340; see also McInnes, at pp. 525-26).

[68] In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both (see Stephen A. Smith, *Contract Theory* (2004), at pp. 343-44; John R. Peden, *The Law of Unjust Contracts: Including the Contracts Review Act 1980 (NSW) With Detailed Annotations*

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Procedure and Pleadings (1982), at p. 36; Andrew Burrows, *A Restatement of the English Law of Contract* (2016), at p. 210; *Downer*, at para. 54; McInnes, at p. 525).

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[69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation. As the Privy Council has said, "as a matter of common fairness, 'it [is] not right that the strong should be allowed to push the weak to the wall'" (*Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17, at p. 6 (BAILII), quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, [1985] 1 W.L.R. 173, at p. 183; see also *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 336-37).

[70] The classic example of a "necessity" case is a rescue at sea scenario (see *The Medina* (1876), 1 P.D. 272). The circumstances under which such agreements are made indicate the weaker party did not freely enter into the contract, as it was the product of his "extreme need . . . to relieve the straits in which he finds himself" (*Bundy*, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party"

(*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see *Norberg*, at pp. 247-48; see also McInnes, at p. 543).

[71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" (see Smith, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met (see Sébastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010), 49 *Can. Bus. L.J.* 345, at pp. 353-54).

[72] These examples of inequality of bargaining power are intended to assist in organizing and understanding prior cases of unconscionability. They provide two examples of how weaker parties may be vulnerable to exploitation in the contracting process. Regardless of the type of impairment involved, what matters is the presence of a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied"

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(Bigwood, at p. 185 (emphasis deleted); see also Benson, at pp. 189-90). In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship.

[73] This leads us to the second element of unconscionability: an improvident bargain.

[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see McCamus, at pp. 426-27; Chen-Wishart (1989), at p. 51; Benson, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at pp. 87 and 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" (John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 *Man. L.J.* 187, at p. 202 (emphasis in original)).

[75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial

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setting or the positions of the parties (see Chen-Wishart (1989), at pp. 51-56; McInnes, at pp. 528-29; Reiter, at pp. 417-18).

[76] For a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.

[77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party (see Swan Adamski and Na, at pp. 993-94) or cause an "unfair surprise" (American Law Institute and National Conference of Commissioners on Uniform State Laws, *Proposed Amendments to Uniform Commercial Code Article 2 – Sales: With Prefatory Note and Proposed Comments* (2002), at p. 40). This is an objective standard, albeit one that has regard to the context.

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" (Rotman, at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not

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easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

[79] Unconscionability, in sum, involves both inequality and improvidence (Crawford, at p. 143; Swan, Adamski and Na, at p. 986). The nature of the flaw in the contracting process is part of the context in which improvidence is assessed. And proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests (see Chen-Wishart (1989), at pp. 47-48; *Portal Forest Industries Ltd. v. Saunders*, [1978] 4 W.W.R. 658 (B.C.S.C.), at pp. 664-65). It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power.

[80] Uber argues, however, that the Court should abandon the classic two-part approach to unconscionability and adopt a stringent test consisting of four requirements:

- a grossly unfair and improvident transaction;

- a victim's lack of independent legal advice or other suitable advice;

- an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of

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the bargain, blindness, deafness, illness, senility, or similar disability; and

- the other party's knowingly taking advantage of this vulnerability.

(See *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98, 420 D.L.R. (4th) 335, at para. 15; see also *Titus*, at para. 38; *Cain*, at para. 32.)

[81] This higher threshold requires that the transaction was "grossly" unfair, that there was no independent advice, that the imbalance in bargaining power was "overwhelming", and that there was an intention to take advantage of a vulnerable party.

[82] We reject this approach. This four-part test raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused. Unconscionability has always targeted unfair bargains resulting from unfair bargaining. Elevating these additional factors to rigid requirements distracts from that inquiry.

[83] Independent advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party (see Rick Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2018), 60 *Can. Bus. L.J.* 124, at p. 136; Spencer Nathan Thal, "The Inequality of Bargaining Power Doctrine: the Problem of Defining Contractual Unfairness" (1988), 8 *Oxford J. Legal Stud.* 17, at

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pp. 32-33). It, for example, can assist a weaker party in understanding the terms of a contract, but might not ameliorate a weaker party's desperation or dependence on a stronger party (Thal, at p. 33). Even where advice might be of assistance, *pro forma* or ineffective advice may not improve a party's ability to protect their interests (Chen-Wishart (1989), at pp. 110-11).

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[84] Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see *Boustany*, at p. 6). But unconscionability can be triggered without wrongdoing. As Professor Waddams compellingly argues:

> The phrases 'unconscionable conduct', 'unconscionable behaviour' and 'unconscionable dealing' lack clarity, are unhistorical insofar as they imply the need for proof of wrongdoing, and have been unduly restrictive.
>
> (Waddams (2019), at pp. 118-19; see also Benson, at p. 188; Smith, at pp. 360-62.)

[85] We agree. One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power;

a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

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[86] In our view, the requirements of inequality and improvidence, properly applied, strike the proper balance between fairness and commercial certainty. Freedom of contract remains the general rule. It is precisely because the law's ordinary assumptions about the bargaining process do not apply that relief against an improvident bargain is justified.

[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts. As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.
>
> . . .

> There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which . . . at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.
>
> (*The Common Law Tradition: Deciding Appeals* (1960), pp. 370-71)

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[88] We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).

[89] Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand (see Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016), 33 *Windsor Y.B. Access Just.* 177, at p. 179; Stephen Waddams, "Review

Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2013), 53 *Can. Bus. L.J.* 475, at pp. 475-476; Thal, at pp. 27-28; William J. Woodward, Jr., "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006), 2 *Hastings Bus. L.J.* 1, at p. 46). The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply.

[90] This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where "the normative rationale for contract enforcement . . . [is] stretched beyond the breaking point" (Radin, at p. 179). The link between standard form contracts and unconscionability has been suggested in judicial decisions, textbooks, and academic articles for years (see, e.g., *Douez*, at para. 114; *Davidson v. Three Spruces Realty Ltd.* (1977), 79 D.L.R. (3d) 481 (B.C.S.C.); *Hunter*, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 *Can. Bus. L.J.* 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (1965), at pp. 449-50).

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[91] Applying the unconscionability doctrine to standard form contracts also encourages those drafting such contracts to make them more accessible to the other party or to ensure that they are not so lop-sided as to be improvident, or both. The virtues of fair dealing were explained by Jean Braucher as follows:

> Businesses are driven to behave competitively in their framing of market situations or otherwise they lose to those who do. Only if there are meaningful checks on what might be considered immoral behavior will persons in business have the freedom to act on their moral impulses. An implication of this point is that, absent regulation, business culture will become ever more ruthless, so that the distinctions between "reputable businesses" and fringe marketers gradually wither away. . . . [p. 390]

[92] This brings us to the appeal before us and whether Mr. Heller's arbitration clause with Uber is unconscionable.

[93] There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between Mr. Heller, a food deliveryman in Toronto, and Uber, a large multinational corporation. The arbitration agreement, moreover, contains no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory

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mediation "under the International Chamber of Commerce Mediation Rules" that could be followed by "arbitration under the Rules of Arbitration of the International Chamber of Commerce", there lay a US$14,500 hurdle to relief. Exacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

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[94] The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

[95] The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent

precondition that he travel to Amsterdam,[7] initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

[96] We add that the unconscionability of the arbitration clause can be considered separately from that of the contract as a whole. As explained in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909 (H.L.), an arbitration agreement "constitutes a self-contained contract collateral or ancillary to the [main] agreement" (p. 980; see also p. 998, per Lord Scarman). Further support comes from the severability clause of the Uber Rasier and Uber Portier agreements, and s. 17(2) of the *AA*.[8]

[97] Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. As our colleague Justice Brown

[7] We note that Uber's concession that the arbitration could physically occur in Ontario is of no moment in the context of a standard form contract that stipulates the "place of arbitration shall be Amsterdam, The Netherlands".

[8] This Court, moreover, has confirmed that a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, at para. 122, citing *Hunter*, at p. 462, per Dickson C.J.; McCamus, at pp. 440-42; Chris D. L. Hunt and Milad Javdan, "Apparitions of Doctrines Past: Fundamental Breach and Exculpatory Clauses in the Post-*Tercon* Jurisprudence" (2018), 60 *Can. Bus. L.J.* 309, at p. 328, fn. 112).

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notes, under the arbitration clause, "Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit" (para. 136). The arbitration clause is the only way Mr. Heller can vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

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[98] Based on both the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

[99] Given the conclusion that the arbitration agreement is invalid because it is unconscionable, there is no need to decide whether it is also invalid because it has the effect of contracting out of mandatory protections in the *ESA*.

Conclusion

[100] We would dismiss the appeal with costs to Mr. Heller throughout.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[101] While I agree with my colleagues Justices Abella and Rowe that the mandatory arbitration requirement is invalid, I would not rely upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution — that is, to dispute resolution according to law — are unenforceable *not* because they are unconscionable, but because they undermine the rule of law by denying access to justice, and are therefore contrary to public policy.

[102] The arbitration agreement between Uber and Mr. Heller does just that: it effectively bars Mr. Heller from advancing any claim against Uber, no matter how significant or meritorious. In effect, it is not an agreement *to* arbitrate, but rather *not* to arbitrate. In these exceptional circumstances, a central premise of curial respect for arbitration agreements — that they furnish an accessible method of achieving dispute resolution according to law — falls away. On this narrow basis, I would find that the arbitration agreement is unenforceable, and would dismiss the appeal and affirm the judgment of the Court of Appeal.

II. Analysis

[103] This appeal was framed by the parties in terms of unconscionability, which presents an unfortunate difficulty since applying unconscionability here amounts to forcing a square peg into a round hole. My colleagues Abella and Rowe JJ. seek to avoid this difficulty by vastly expanding the scope of the doctrine’s application and removing any meaningful constraint. As I will explain, their approach

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is, in my respectful view, both unnecessary and undesirable. Unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. And undesirable, because it would drastically expand the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

A. *Access to Justice and the Rule of Law*

[104] I agree with my colleagues Abella and Rowe JJ. that the *Arbitration Act, 1991*, S.O. 1991, c. 17, applies to this appeal. While the parties' relationship determines which statute applies, the nature of the parties' relationship is the very question to be decided in Mr. Heller's action: is Mr. Heller an employee of Uber? Without subjecting that question to a full trial, the preliminary issue of the statute to apply should be determined by reference to the pleadings (see, e.g., *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at paras. 27-30).

[105] The *Arbitration Act* generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s. 7(1)). Of the few exceptions to this general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s. 7(2)). Answering that question is really this simple. As a matter of public policy,

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courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.

[106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is *not* whether Uber's arbitration agreement is *unconscionable*, but whether it is *invalid* as contemplated by the *Arbitration Act* (i.e., unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same: the issues raised by the parties remain the focus (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, 337 O.A.C. 85, at para. 87). Further, this Court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative "arbitration agreement" in this case: "public policy and respect for the rule of law go hand in hand" (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 59).

[107] My colleague Justice Côté stresses freedom of contract, for which I readily share her enthusiasm. Freedom of contract is of central importance to the Canadian commercial and legal system and, to promote the certainty and stability of contractual relations, often trumps other societal values (*Tercon Contractors Ltd. v.*

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British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 117 (per Binnie J., dissenting (but not on this point))). Indeed, a hallmark of a free society is the freedom of individuals to arrange their affairs without fear of overreaching interference by the state, including the courts.

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[108] But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated:

> . . . there are cases in which rules of law cannot have their normal operation because <u>the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.</u> It is, in our opinion, important not to forget that <u>it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates</u>. [Emphasis added.]
>
> (*In Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1, at p. 4)

[109] This public policy doctrine has been described by this Court as *fundamental* to Canadian contract law, and its "role in the enforcement of contracts has never been doubted" (*Tercon*, at paras. 113 and 116 (per Binnie J., dissenting (but not on this point))). Of course, and as Côté J. cautions, public policy must not be used as a tool to prioritize idiosyncratic judicial views over the interests of contracting parties. But that is not a live concern under our law: courts have cautioned against the recognition of *new* heads of public policy (*Millar Estate*, at pp. 4-7), and the existing public policy grounds for setting aside specific types of contractual provisions are

narrow and well-established (see B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 1, at p. 17 and fn. 85). This Court has relied on public policy sparingly, and most recently to limit the operation of forum selection clauses and exclusion clauses, which raise concerns relating to the administration of justice, and to limit the operation of restrictive covenants (*Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at paras. 47 and 51-63; *Tercon*, at paras. 117-20; *Elsley v. J. G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 923; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-22). While the considerations relevant to each type of clause vary, public policy furnishes the common and narrowly framed solution. And by focusing on the specific rationale that suggests a certain type of clause is unenforceable, this Court has sought to ensure a disciplined approach by providing concrete guidance and developing specific principles that apply to similar provisions.

[110] The ground upon which I proceed is that which precludes an ouster of court jurisdiction or, more broadly, which protects the integrity of the justice system. As Lord Atkin stated in *Fender v. St. John-Mildmay*, [1938] A.C. 1 (H.L.), at p. 12, ousting the jurisdiction of the courts is harmful in itself and "injurious to public interests" (see also Kain and Yoshida, at pp. 20-23). A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel about the proposition that contracting parties, as a matter of public policy, cannot oust the court's supervisory

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jurisdiction to resolve contractual disputes (see e.g. *Kill v. Hollister* (1746), 1 Wils. K.B. 129, 95 E.R. 532; *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Deuterium of Canada Ltd. v. Burns & Roe Inc.*, [1975] 2 S.C.R. 124). Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party's right to legal recourse is "a right inalienable even by the concurrent will of the parties" (*Scott*, at p. 1133).

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[111] This head of public policy serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (*Jonsson v. Lymer*, 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law.

[112] Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty. That such an agreement is contrary to public policy is not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there is no value in a contract that cannot be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they cannot enforce is "substantially incontestable" (*Millar Estate*, at p. 7, quoting *Fender*, at p. 12). It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak. Or, as Frederick Wilmot-Smith puts it, "[l]egal structures that make enforcement of the law practically impossible will leave weaker members of society open to exploitation at the hands of, for example, unscrupulous employers or spouses." (*Equal Justice: Fair Legal Systems in an Unfair World* (2019), at pp. 1-2).

[113] The reference to making enforcement of the law *practically* impossible leads to a further, related point: there is no good reason to distinguish between a clause that *expressly* blocks access to a legally determined resolution and one that has the ultimate *effect* of doing so. That this is so is illustrated by the judgment of Drummond J. in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.A.). In *Novamaze*, the terms of a franchise agreement permitted the franchisor to

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take control of the franchisee's business if either party threatened to commence, or commenced, legal proceedings against the other. This clause, Drummond J. explained, was "capable of operating as a powerful disincentive to the franchisee to take proceedings of any kind against [the franchisor], no matter how strong a case the franchisee may have that it has suffered wrong" (p. 548). Summarizing the relevant principle, Drummond J. continued:

> . . . the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that "inalienable right" contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation. [pp. 548-49]

[114] I agree. At some point, there is no material difference between a provision that discourages dispute resolution and one that precludes dispute resolution altogether. As the Court of Appeal of Alberta recently recognized, "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" (*Lymer*, at para. 67). During the hearing of this appeal, Uber's counsel would not concede that a clause requiring an upfront payment of 10 billion dollars to commence a civil claim would necessarily be equivalent to a brick wall standing in the way of dispute resolution. With respect, the conclusion that independent adjudication would be blocked by such a clause is obvious. Courts have long recognized that upfront payments may effectively drive litigants from the judgment seat (in the context of requiring security for costs, for example).

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[115] None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, "new models of adjudication can be fair and just" (*Hryniak*, at para. 2). But public policy does require access to *justice*, and access to justice is not merely access to a resolution. After all, many resolutions are *un*just. Where a party seeks a rights-based resolution to a dispute, such resolution is *just* only when it is determined *according to law*, as discerned and applied by an independent arbiter.

[116] The law's historical view was that arbitration could not yield dispute resolution according to law. Any arbitration agreement that removed contractual disputes from the purview of the courts was unenforceable as a matter of public policy (see *Deuterium*, at pp. 131-36). Courts, in essence, took the view that an agreement to arbitrate had the effect of precluding any legitimate form of dispute resolution. Contracting parties were seen as being unable to access justice without access to the ordinary courts (see *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 48). Given this hostile judicial posture, legislators intervened by enacting modern arbitration legislation, prompting courts to accord due respect to the use of arbitration as a dispute resolution mechanism, particularly in a commercial setting (*Wellman*, at para. 54; *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, at pp. 533-42). Our conception of access to justice has been modified accordingly, to account for "the other important objectives pursued by the *Arbitration Act*" (*Wellman*, at para. 83). It is now accepted that courts are not the only bodies capable of providing dispute

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resolution according to law. Indeed, arbitration is endorsed and encouraged as a means for resolving disputes (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 38).

[117] Uber's position requires this Court to accept that the change in judicial posture following the enactment of modern arbitration legislation leaves no room for the operation of public policy. But curial respect for arbitration, and for parties' choices to refer disputes to arbitration, is premised upon two considerations. First, the purpose of arbitration is to ensure that contracting parties have access to "a 'good and accessible method of seeking resolution for many kinds of disputes' that 'can be more expedient and less costly than going to court'" (*Wellman*, at para. 83, quoting Legislative Assembly of Ontario, March 27, 1991, at p. 245). Second, courts have accepted arbitration as an acceptable alternative to civil litigation because it can provide a resolution according to law. As this Court observed in *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, at p. 581:

> The legislator left . . . various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, <u>the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts</u>, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice . . . are observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator's real function and that of a judge who has to decide a case. [Emphasis added.]

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In other words, any means of dispute resolution that serves as a final resort for contracting parties must be *just*. This is important because, unlike the submission of *existing* disputes to arbitration, and contrary to my colleague Côté J.'s assertion, an agreement to submit all *future unknown* disputes to arbitration is not simply a substitute for the parties' negotiations (para. 250). Rather, it serves as a transfer of dispute resolution authority away from public adjudicators (W. G. Horton, "A Brief History of Arbitration" (2017), 47 *Adv. Q.* 12, at p. 14; *Sport Maska*, at p. 581; *Wellman*, at para. 48; *Desputeaux*, [2003] 1 S.C.R. 178, at para. 40). The legitimacy of such a transfer rests upon whether it can provide a comparable measure of justice.

[118] As this Court stated in *Sport Maska*, arbitration *does* provide a comparable measure of justice, which is ensured by modern arbitration legislation. Ontario's *Arbitration Act* serves as an example. Like the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, addressed in *Sport Maska*, the *Arbitration Act* also contemplates a legally determined outcome. It states that an arbitral tribunal shall resolve disputes according to the rules of law and equity (s. 31). (And, while contracting parties may be able to opt out of this section's application, they are at least entitled to the inalienable benefit of fair and equal treatment (ss. 3 and 19).) The *Arbitration Act* also contemplates court oversight throughout the arbitral process.

[119] Where a clause expressly provides for "arbitration" while simultaneously having the effect of *precluding* it, however, these considerations which promote curial respect for arbitration dissolve and *here* is where the public policy principle

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preventing an ouster of court jurisdiction continues to operate. The legislature could not have intended that, by enacting the *Arbitration Act*, arbitration clauses whose effect *precludes* access to justice would be untouchable. Yet Uber's position and, I say with respect, my colleague Côté J.'s position require imputing that very intention — an intention that would defeat the legislature's purpose in enacting the *Arbitration Act* of promoting access to justice. Meaning, a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right.

[120] Moreover, access to justice is constitutionally protected through s. 96 of the *Constitution Act, 1867*, which limits the legislature's ability to place restrictions on dispute resolution (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 43). As this Court stated in *Trial Lawyers*, at para. 32:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. [Emphasis added.]

As I have explained, arbitration does not strike at the core of superior court jurisdiction, because arbitration provides a comparable measure of justice to the

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superior courts. Preconditions that prevent contracting parties from even *commencing* arbitration, however, have the same effect as hearing fees that cause undue hardship and deter litigants from advancing legitimate claims in the courts (*Trial Lawyers*, at para. 46). It follows that, in the (inconceivable) event that cutting off access to justice was the legislature's intent in enacting the *Arbitration Act*, that *Act* must not be interpreted so broadly as to sanction agreements that impose such preconditions. In this regard, and again with respect, my colleague Côté J.'s assertion that applying the principles articulated by this Court in *Trial Lawyers* poses a risk of permanently restraining legislative competence is not well taken (para. 318). Reports of the death of legislative competence in this area are, like those of the death of freedom of contract, greatly exaggerated.

[121] In sum, applying public policy to determine whether an arbitration agreement prohibits access to justice is neither stating a "new common law rule" as my colleague Côté J. characterizes it, nor an expansion of the grounds for judicial intervention in arbitration proceedings (paras. 307, 312 and 316). Common law courts have long recognized the right to resolve disputes according to law. The law has simply evolved to embrace arbitration as means of achieving that resolution. Contractual stipulations that prohibit such resolution altogether, whether by express prohibition or simply by effect, continue to be unenforceable as a matter of public policy.

(1) <u>The Rule of Law's Impact on the Competence-Competence Principle</u>

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[122] Before commenting on the types of clauses that by their terms or effect foreclose access to legally determined dispute resolution, I pause to comment on the competence-competence principle. There are two aspects to this principle. First, arbitrators are empowered to rule on issues relating to their own jurisdiction. Second, arbitrators generally *should* make such rulings before they are decided by the court. The former aspect is implemented expressly in legislation like the *Arbitration Act*, which states that "[a]n arbitral tribunal may rule on its own jurisdiction" (s. 17(1)). This Court accepted the latter aspect in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, by defining "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator" (para. 84). An exception applies where the challenge is based solely on a question of law or requires only a superficial review of the record (paras. 84-85). But even then, the court must be sure that the jurisdictional challenge is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding (para. 86).

[123] The Court's conclusion in *Dell* was based on the provisions of the Quebec *Code of Civil Procedure*, CQLR, c. C-25. As Deschamps J. recognized, art. 940.1 *C.C.P.*, which generally directed the court to refer court proceedings in favour of arbitration, "incorporate[d] the essence of art. II(3) of the New York Convention and of its counterpart in the Model Law, art. 8", while art. 943 *C.C.P.* "confer[ed] on arbitrators the competence to rule on their own jurisdiction" (para. 80). Thus, the *C.C.P.* "clearly indicate[d] acceptance of the competence-competence

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principle incorporated into art. 16 of the Model Law" (para. 80). This Court reached the same conclusion about British Columbia's arbitration regime, based on comparable provisions (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 28-29).

[124] Like the legislative schemes in Quebec and British Columbia, Ontario's *Arbitration Act* adopts the same two features that led to the Court's conclusion in *Dell*: courts are generally directed to stay proceedings in favour of arbitration (s. 7(1) and (2)) and arbitrators are given the competence to rule on their own jurisdiction (s. 17(1)). It follows that, on this Court's jurisprudence, the competence-competence principle also applies to Ontario's legislative scheme (*Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745, 118 O.R. (3d) 241, at para. 30). Further, this Court has repeatedly recognized, most recently in *Wellman*, that courts should generally take a "hands off" approach to arbitration (para. 56). The competence-competence principle described in *Dell* accords with that directive.

[125] I agree with my colleagues Abella and Rowe JJ. that *Dell* did not contemplate clauses that effectively prevent access to arbitration. I would therefore recognize a further, narrow exception to the general rule that a challenge to an arbitrator's jurisdiction should first be resolved by the arbitrator. As I have explained, contracting parties cannot preclude access to legally determined dispute resolution. While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms

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or effects, bars access *to that very arbitrator*. It therefore falls to courts to do so. Nothing in the *Arbitration Act* suggests any other conclusion. Further, and if there were any doubt, the imperative of ensuring access to justice should inform interpretation of the *Arbitration Act* and its adoption of the competence-competence principle. As this Court held in *Trial Lawyers,* access to justice carries such importance that it maintains a constitutional dimension, which restricts even the legislature's ability to prevent private parties from resolving their disputes.

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[126] While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral stated in *Dell* is necessary to preserve the public legitimacy of the law in general, and arbitration in particular. Unlike my colleagues, I would limit this exception to cases where arbitration is arguably inaccessible. It should not apply merely because the parties' agreement contains a foreign choice of law provision (Abella and Rowe JJ.'s reasons, at para. 39). Further, and as with any other challenge to an arbitrator's jurisdiction, courts must be satisfied that the challenge "is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding" (*Dell*, at para. 86).

[127] In addition to creating an exception to the framework set out in *Dell*, my colleagues direct a new, contested hearing to consider whether there is "a *bona fide* challenge to arbitral jurisdiction that only a court can resolve" (paras. 44-46). In other

words, my colleagues say that this hearing is necessary because a court must resolve whether there is an issue of validity that a court must resolve.

[128] I say respectfully that this new procedural mechanism is unnecessary and will serve only to complicate and delay proceedings. Indeed, my colleagues appear to recognize this by their warnings that "this assessment must not devolve into a mini-trial", that "a single affidavit will suffice" and that "[b]oth counsel and judges are responsible for ensuring the hearing remains narrowly focused". First, it seems to me that any development in contract law that requires a new affidavit from anyone on anything is probably a mistake. More fundamentally, however, and again with respect, my colleagues' warnings seem to me entirely unrealistic. This Court might as well tell the parties and the motion judge to keep the hearing to 20 minutes, to conduct it on "Zoom" during the morning break or to dispense with cross-examination on the affidavit(s). My colleagues' exhortations, well-intentioned as they undoubtedly are, are simply futile. Even worse, they will be seen as such; in the face of the realities of litigating the individual motion, it will not matter to anyone what we who dwell on Mt. Olympus think about such matters. The motion that my colleagues direct will proceed in the form in which the parties see fit, and the hearing will be conducted in the manner that the parties and the motion judge think appropriate in the circumstances. It therefore seems reasonable to expect that time savings, if any, will be minimal for those cases in which no genuine issue exists for the court to decide. And where a genuine issue *does* exist, the additional hearing will simply create duplication.

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(2) When Does a Contractual Provision Effectively Prohibit Dispute Resolution?

[129] In evaluating a clause that limits access to legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. Again, it is helpful to refer to the limitation that the rule of law places on the government's ability to impose hearing fees. As this Court explained in *Trial Lawyers*, at para. 45:

> Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[130] I pause here to affirm that "courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting" (*Wellman*, at para. 54). It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Arbitration may require upfront costs, sometimes significant costs and far greater than those required to commence a court action. But those costs may be warranted in light of the parties' relationship and the timely resolution that arbitration can provide. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship but that one party simply regrets in hindsight.

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[131] Several factors should be considered to decide whether a contractual limitation on legally determined dispute resolution imposes undue hardship and is therefore contrary to public policy. The first consideration is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement, this suggests the possibility of undue hardship. This consideration must, however, be situated in the context of the agreement as a whole; a clause that discourages the pursuit of certain low-value claims may be proportionate in light of overall risk allocation between the parties.

[132] The record here shows that Mr. Heller receives $20,800 to $31,200 per year while working 40 to 50 hours per week for Uber. One would reasonably anticipate that a claim by Mr. Heller would not exceed his total annual compensation. Indeed, Mr. Heller's evidence is that a typical claim against Uber would be for non-payment of fees of less than $100. The upfront cost of US$14,500 to advance a claim represents a significant portion of the total compensation Mr. Heller receives each year under his agreement with Uber, and is grossly disproportionate in light of the sort of dispute that agreement is reasonably likely to generate. It is not the case that, as my colleague Côté J. suggests, Mr. Heller and Uber are simply being discouraged from advancing low-value claims (paras. 283 and 311). The costs of proceeding to arbitration are so prohibitive that the agreement effectively bars *any* claim that Mr. Heller might have against Uber. My colleague describes these costs as comparable to an award of litigation costs (paras. 236 and 319), but in my respectful

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view that is simply not so. These costs are payable by Mr. Heller *in advance*, and *irrespective* of the merit of his claim against Uber — and therefore bear no resemblance to litigation costs awarded at the end of proceedings. Thus, much like the clause addressed in *Novamaze*, the arbitration agreement here is "capable of operating as a powerful disincentive to . . . take proceedings <u>of any kind</u>". The costs payable by Mr. Heller act as an insurmountable precondition that prevent him from commencing a claim (*Lymer*, at para. 67).

[133] I disagree with my colleague that reaching this conclusion requires further evidence (para. 319). The record in support is ample. Mr. Heller is required to pay US$14,500 to pursue a claim against Uber. That includes a claim for breach of contract, though Mr. Heller's agreement with Uber would rarely, if ever, be expected to produce a claim of that magnitude. These facts are unchallenged. While Mr. Heller may be able to pursue a class action by combining his claim with other individuals in a similar position, that is of no moment here. Class actions are a procedural mechanism and their use "neither modifies nor creates substantive rights" (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17). What matters is *Mr. Heller's* contractual relationship with Uber. Nor, with respect, is the availability of third-party funding a relevant consideration (Côté J.'s reasons, at paras. 236, 286 and 319). A litigant does not need to canvass options for third-party financing — likely compromising the quantum of their claim in the process — to benefit from the principle that contracting parties cannot preclude access to dispute resolution according to law.

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[134] Courts should also consider the relative bargaining positions of the parties. To be clear, an imbalance in bargaining power is not required to find that a provision bars access to dispute resolution. An outright prohibition on dispute resolution would undermine the rule of law, even in the context of an agreement between sophisticated parties. That said, the hardship occasioned by a limit on legally determined dispute resolution is less likely to be "undue" if it is the product of negotiations between parties of equal bargaining strength. What is reasonable between the parties must be considered in light of the parties' relationship. The role that bargaining strength plays in this context is comparable to its role in the enforcement of other contractual provisions that raise public policy concerns, including restrictive covenants and forum selection clauses (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-57). Here, which it does not dispute, Uber maintains a vastly superior bargaining position in relation to Mr. Heller. The agreement between the parties was formed through a contract of adhesion, which Mr. Heller had no opportunity to negotiate.

[135] Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Arbitration agreements may, for example, be tailored to exclude certain claims or to require the party with a stronger bargaining position to pay a higher portion of the upfront costs. No such nuance is evident, however, in the agreement between Mr. Heller and Uber. It covers any dispute he has with Uber, regardless of its quantum, and requires him to pay all upfront costs required to advance a claim. The ICC Rules that apply to the arbitration agreement

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also appear to be specifically designed for large commercial claims. For example, the rules contemplate an expedited process, which applies only to claims valued at less than US$2 million (International Court of Arbitration and International Center for ADR, *Arbitration Rules, Mediation Rules* (2016), at pp. 35 and 71 et seq.). Far from being tailored to the circumstances, Uber's chosen arbitration procedure tends to affirm that this limitation on dispute resolution is disproportionate.

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[136] In short, the arbitration agreement between Uber and Mr. Heller is disproportionate in the context of the parties' relationship. Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit. This form of limitation on legally determined dispute resolution undermines the rule of law and is therefore contrary to public policy. It follows that I agree with the Court of Appeal that the arbitration agreement between Uber and Mr. Heller is invalid.

[137] In response to my colleague Côté J.'s critique of this approach, I say that the foregoing represents a straightforward application of the applicable law as stated by this Court. By agreeing to arbitrate, contracting parties transfer jurisdiction to resolve disputes from the courts (*Wellman*, at para. 48; Horton, at p. 19; see also *Sport Maska*, at p. 581; *Desputeaux*, at para. 40). The point, to be clear, is not whether curial jurisdiction is ousted: it clearly is. The issue is when such ousting is legally acceptable. And the view of this Court, which I endorse and apply here, is that it is acceptable when it is replaced by a mechanism □ like arbitration □ that provides

a comparable measure of justice (*Sport Maska*, at p. 581). The proposition I advance is therefore modest and, viewed in the light of our jurisprudence, uncontroversial: contracting parties must have access to *some* means of resolving their disputes according to law. Otherwise, "justice cannot be done" (*Scott*, at p. 1138). While the rule of law is perfectly compatible with agreements *to arbitrate*, it is *in*compatible with what is in effect an agreement *not to arbitrate* or to preclude parties from resorting to any form of dispute resolution according to law. It is the rule of *law*, not the rule of *Uber*.

[138] This is the narrow but fundamental point that divides my colleague Côté J. and me. I agree that the *Arbitration Act* is a "strong statemen[t] of public policy which favour[s] enforcing arbitration agreements" (para. 309). Indeed, and as I have explained, contracting parties will generally be held to their commitment to arbitrate, even when arbitration requires significant upfront costs. But the agreement my colleague seeks to uphold is a *non*-arbitration agreement. None of the *Arbitration Act*'s objectives require blindly enforcing an agreement labelled as "arbitration" when its effect, in the context of the parties' relationship, is to ultimately *bar* access to legal dispute resolution. Indeed, and as I consider below, my colleague appears to recognize as much by granting a conditional stay requiring Uber to pay for the upfront costs of arbitration.

(3) The Appropriate Remedy

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[139] My colleague Côté J. says that, even if the agreement here violates public policy, the appropriate remedy is to "apply blue-pencil severance and strike the selection of the ICC rules" (para. 333). In light of this, and while the parties did not canvass the applicable test, I turn to consider this Court's approach to severance.

[140] Blue-pencil severance is permissible only where it is possible to draw a line through the illegal portion of the parties' agreement, "leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining" (*Shafron*, at para. 29, quoting *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249, at para. 57, per Bastarache J., dissenting). It is therefore important to note here that what my colleague Côté J. views as separate "terms" in the agreement between Uber and Mr. Heller are, in fact, drafted as a single provision:

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a [r]equest for [m]ediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") . . . . The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .
>
> (2019 ONCA 1, 430 D.L.R. (4th) 410, at para. 11)

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[141] As I have explained, the illegal portion of the parties' agreement is the *cumulative effect* of this provision. Uber and Mr. Heller agreed to submit all future disputes to mediation, which requires a significant upfront cost, following which any unresolved claim would be submitted to arbitration, requiring additional upfront costs. Reducing the costs of dispute resolution could be achieved by selecting between, or combining, several options: the commitment to mediate could be struck; references to the ICC Rules could be struck; and the commitment to arbitrate could be struck. Blue-pencil severance is achieved by "mechanically removing <u>illegal</u> provisions from a contract" (*Transport North American*, at para. 33 (emphasis added)). Here, there is no single component of the arbitration clause that is, on its own, illegal and that could be struck with a blue line, as my colleague Côté J. suggests.

[142] Moreover, the purpose of severance is to "give effect to the intention of the parties when they entered into the contract", and any application of the doctrine should be restrained (*Shafron*, at para. 32). As my colleague correctly observes, the agreement here may very well embody not just the intention to arbitrate, but also the intention to prohibit either party from advancing claims valued at less than US$14,500 (para. 311). Barring such claims, however, in the context of *this* agreement between *these* parties, is precisely what makes the arbitration clause illegal. It is therefore impossible to strike any illegal portion of the agreement without "fundamentally alter[ing] the consideration associated with the bargain and do[ing] violence to the intention of the parties" (*Transport North American*, at para. 28).

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[143] I also say that the remedy my colleague Côté J. would ultimately award — granting Uber a conditional stay of proceedings — is inappropriate here for two reasons. First, it is difficult to conclude from the cases cited by my colleague Côté J. that such a remedy is even available in this context. In *Popack v. Lipszyc*, 2009 ONCA 365, the court directed a proposed arbitrator to set a timetable or advise that it would not take jurisdiction, so that a court could otherwise determine whether the arbitration agreement was unable to be performed (paras. 1 and 3 (CanLII)). In *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254 (Q.B.), the court was not dealing with a stay *in favour* of arbitration proceedings but rather a stay of court proceedings *pending* a related arbitration proceeding. The jurisdiction to stay proceedings did not arise from arbitration legislation and was therefore referred to by the Saskatchewan Court of Appeal as an "extraordinary indulgence" ((1995), 137 Sask. R. 238, at para. 5). And in both *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.), and *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (QL), the proposed court action was stayed on the condition that the defendant waive any time-related defences in the relevant arbitration proceedings (*Iberfreight*, at para. 5; *Continental Resources*, at para. 5). One might question whether it was appropriate to impose such a condition rather than leaving the availability of any applicable defences to the arbitrator's discretion. In any event, however, and even on a broad reading, the conditions imposed in *Iberfreight* and *Continental Resources* simply facilitated the intention of the parties' agreements — to proceed with arbitration in a timely manner rather than delaying in the courts.

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[144] Which brings me to my second point, being that to award a conditional stay is simply to grant notional severance by a different name. There is no bright line of illegality here, and the doctrine of notional severance is therefore inapplicable (*Shafron*, at para 31; Côté J.'s reasons, at paras. 327 and 334). My colleague Côté J. would, however, effectively super-impose such a bright line onto the parties' agreement by reading in a requirement that Uber advance the fees of arbitration. Her view, as I understand it, is that, because Mr. Heller has given sworn evidence that he cannot afford the fees required to pursue his claim, Uber must advance those fees (para. 324). Taking this reasoning to its logical conclusion, Uber will be required to advance the arbitration fees for *any* driver in a comparable financial situation who intends to commence a claim against Uber. While such a claim may be devoid of any merit, Uber is encouraged to take solace in the possibility of recovering its costs (para. 324) — notwithstanding that any award of costs would be made against a driver who has an already demonstrated inability to pay.

[145] It goes without saying that neither party could have intended such a result. Unlike the conditions imposed in *Iberfreight* and *Continental Resources*, the condition my colleague would impose completely rewrites the parties' agreement in an attempt to render it enforceable. The pathway to reconciling this outcome with my colleague's stress upon party autonomy and freedom of contract is elusive.

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[146] The only available remedy in response to the illegality I have identified is to find that the entire arbitration agreement is unenforceable. Any other remedy would require considerable distortion of the intention of the parties.

B. *The Doctrine of Unconscionability*

[147] While the foregoing is sufficient to dispose of the appeal, I offer some observations on the reliance placed by Abella and Rowe JJ. on the doctrine of unconscionability. In my respectful view, the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount.

[148] In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, Sopinka J. commented that "the doctrine of unconscionability and the related principle of inequality of bargaining power are evolving and, as yet, not completely settled areas of the law of contract" (p. 309). More than 20 years later, this uncertainty persists, even at the most fundamental level of determining the rationale that underpins the doctrine's existence (C. D. L. Hunt, "Unconscionability Three Ways: Unfairness, Consent and Exploitation" (forthcoming, *S.C.L.R.*); see also M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at pp. 517-19). Rather than unsettling the doctrine further by jamming it with what are in substance public policy concerns, the preferable course in my view would be to develop unconscionability in a manner that places more emphasis on reasoning than results, to ensure that the doctrine is conceptually sound and explicit in its policy underpinnings (R. Bigwood,

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"Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005), 84 *Can. Bar. Rev.* 171, at p. 173).

(1) Confusion in Terminology

[149] At least some of the uncertainty surrounding unconscionability can be attributed to varying usage of the term "unconscionable". Unconscionability, as an independent doctrine, is "a specific concept, like duress and undue influence, that provides a basis upon which a transfer may be reversed" (McInnes, at p. 520). But unconscionability may also refer, in a more general sense, to a unifying theme or organizing equitable principle, or to a constituent element of a distinct legal test (pp. 519-20; Bigwood (2005), at p. 177; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 74). Some commentators suggest that unconscionability as a broader principle explains several independent rules in contract law, including those relating to forfeitures, penalties, exclusion clauses, duress, and restraint of trade (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at c. 14 and p. 306).

[150] While it may be that "unconscionable" is an apt description for multiple and various circumstances, it is important to distinguish unconscionability as an independent basis for setting aside transactions. For example, even though in a generic or lay sense, the arbitration agreement at issue in this appeal might well be considered "unconscionable", it does not follow that it is unconscionable in the specific sense contemplated by the equitable doctrine of that name. As this Court said in *Ryan*, unconscionability "has developed a special meaning in relation to inequality

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of bargaining power", and use of the term in other contexts therefore has the potential to cause confusion (para. 74). To avoid such confusion, the term "unconscionability" should be used to refer *only* to the independent doctrine of that name (McInnes, at p. 520).

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[151] Specificity is critical here, because the same policy rationale does not underlie each of the distinct concepts that unconscionability may be said to explain. Rules relating to *substantive* concerns with specific contractual provisions (such as penalty and exclusion clauses) arise independently from, and address different concerns than, rules that address *procedural* concerns surrounding contract formation. As Professor McInnes explains:

> Substantive unconscionability would trigger relief where the *result* of a transaction is intolerable. Procedural unconscionability would trigger relief on the basis of the intolerable *manner* in which a transaction is created. [Emphasis in original; p. 548.]

[152] It is therefore important to elaborate on the criteria that form the basis for reaching the conclusion that a contract or contractual provision should be set aside. Attempting to jam multiple grounds for setting aside contracts and contractual terms into one single principle serves only to obfuscate those criteria. To move forward in a coherent and rational way, "it is absolutely imperative, in connection with the doctrine of unconscionability, to resist appeals to unreasoned intuition" (McInnes, at p. 532; see also Bigwood (2005), at pp. 172-73 and 192). Courts must not develop

contract doctrines that invite "*ad hoc* judicial moralism or 'palm tree' justice" (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70).

[153] But unreasoned intuition and *ad hoc* judicial moralism are *precisely* what will rule the day, in my respectful view, under the analysis of my colleagues Abella and Rowe JJ. In their view, judges applying unconscionability are to mete out justice as they deem fair and appropriate, thereby returning unconscionability to a time when equity was measured by the length of the Chancellor's foot (para. 78, quoting L. I. Rotman "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016), 2 *C.J.C.C.L.* 497, at p. 535). As Professor Bigwood writes:

> . . . acceptance of such a "free-wheeling" approach is also acceptance of the risk that those subject to Canadian law in this area will lose the very virtues of guidance, transparency and accountability that come with forced specificity in application, justification and analysis. To the extent the test bypasses such natural controlling phenomena of the common law method, it certainly risks decline into unprincipled and undisciplined judicial decision-making, and thus could rightly be viewed as an "enemy" of reason, discipline and the rule of law. [Footnote omitted.]
>
> (Bigwood (2005), at p. 198, citing P. Birks, "Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment" (1999), 23 *Melbourne U.L. Rev.* 1, at pp. 20-21).

(2) Unconscionability as an Independent Doctrine

[154] Focusing squarely on *the doctrine* of unconscionability reveals that it does not apply to this appeal. At the outset, I emphasize that unconscionability

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applies to all types of contracts, "indicating, by implication, that its application must be highly exceptional" (S. Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010), 49 *Can. Bus. L.J.* 378, at p. 392). Unconscionability is also relevant to unjust enrichment, providing "a means by which an apparent juristic reason (e.g., donative intent, contract) may be negated" (McInnes, at p. 520 (footnote omitted); see also pp. 534-36). Broad ramifications therefore flow from how the doctrine of unconscionability is conceptualized by this Court, and a correspondingly heavy cost arises from applying unconscionability without careful reflection upon the rationale that underpins its existence (Hunt, at pp. 37-39).

[155] A leading statement of the unconscionability doctrine appears in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), where Davey J.A. remarked, at p. 713:

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable or perhaps by showing that no advantage was taken. [Citation omitted.]

[156] Davey J.A.'s statement of the principle reflects the traditional understanding that unconscionability requires both substantive unfairness (an improvident bargain) and procedural unfairness (an inequality of bargaining power

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stemming from a weakness or vulnerability affecting the claimant) (*Norberg*, at p. 256; McInnes, at p. 524; P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 167; J.A. Manwaring, “Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law” (1993), 25 *Ottawa L. Rev.* 235, at p. 262; Hunt, at p. 54). While both of these elements are typically viewed as necessary, each does not have an equally important role. There is little support in the jurisprudence for the view that unconscionability operates solely, or even primarily, on the basis of substantive unfairness (McInnes, at p. 549; Hunt, at pp. 65-67). To the contrary, the more settled view has been that the mere fact that a court sees a bargain as improvident or unreasonable does *not* make the transaction unconscionable (*Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 72; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 24 and 64; see also McInnes, at pp. 549-50).

[157] While this Court has not closely examined unconscionability from a doctrinal standpoint, its references thereto support the view that unconscionability is intended to redress *procedural* deficiencies associated with contract formation — arising, for example, from abuse of an inequality in bargaining power, or exploitation of a weaker party’s vulnerability (*Norberg*, at pp. 256 and 261; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 412; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at paras. 82, 86 and 93, per Bastarache and Arbour JJ., and para. 208, per LeBel J., dissenting; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 6 and

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58). In *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589, the Court remarked, at p. 593:

> . . . the relationship of Dyck and the Association [does not] fall within the class of cases . . . where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities.

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[158] The procedural focus of unconscionability has been similarly emphasized in the most recent appellate decisions giving thorough consideration to the doctrine (*Downer*, at paras. 35-37; *Input Capital*, at paras. 29-37).

[159] Although it is not necessary to decide it here, I note that some commentators have even argued that substantial improvidence in the resulting bargain should not itself be a requirement to establish unconscionability, as it simply serves as a hallmark of a procedurally flawed transaction (McInnes, at pp. 550-52; Bigwood (2005), at p. 176; see also R. Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2018), 60 *Can. Bus. L.J.* 124). This position was adopted in *Downer*, at para. 35:

> Jettisoning the requirement of a resulting improvident bargain as a requirement for the application of the unconscionability doctrine, and affirming it, instead, as an important consideration in determining whether a position of inequality existed and whether it was unfairly taken advantage of will bring the doctrine into line with the early English cases which placed emphasis on vulnerability resulting from a disparity of

> bargaining positions and the taking advantage of that vulnerability. See for example, Chesterfield v. Janssen (1751), 2 Ves. Sen. 125 (Eng. Ch.) where Lord Hardwicke stressed the need to "prevent taking surreptitious advantage of the weakness or necessity of another."

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[160] All this leads, unavoidably, in my respectful view, to the conclusion that unconscionability primarily addresses procedural concerns surrounding contract formation. In that sense, I agree with my colleagues (Abella and Rowe JJ.'s reasons, at para. 60). It also leads me to the conclusion, however, that a *significant* degree of procedural unfairness is required to invite unconscionability's application. While the procedural component of unconscionability is often stated as simply requiring an "inequality of bargaining power", this phrasing is "inadequate, if not misleading" (McInnes, at p. 524 (emphasis deleted)). Almost every contract involves some difference in bargaining power. Mere inequality — even substantial inequality — is, therefore, insufficient on its own to warrant application of unconscionability to set aside the transaction. Instead, unconscionability has traditionally been understood as requiring a *particular* vulnerability on the part of the plaintiff. As the Newfoundland and Labrador Court of Appeal concluded in *Downer*, at para. 39:

> It is not any inequality of position that will do . . . . It must be such that it has the potential for seriously affecting the ability of the relief-seeker to make a decision as to his or her own best interests and thereby allows the other party an opportunity to take advantage of the claimant's personal or situational circumstances. That is why terms such as "overwhelming" or "substantial" or "special" have been used . . . . I would venture to say that what is meant by such terminology is that the inequality must relate to a special and significant disadvantage that has the potential of overcoming the ability of the claimant to engage in autonomous self-interested bargaining.

(See also McInnes, at pp. 524-28; Bigwood (2005), at pp. 199-204.)

[161] Hence the cases cited by my colleagues, which deal with elderly persons suffering from cognitive impairments (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984), ship captains stranded at sea (*The Mark Lane* (1890), 15 P.D. 135; *The Medina* (1876), 1 P.D. 272), and elderly persons with limited competency in written English and no understanding of the transaction they have agreed to (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447). Each requires a degree of vulnerability particular to the claimant.

[162] By contrast, the only alleged procedural deficit in the agreement between Uber and Mr. Heller is the nature of Uber's contract terms, as they were presented to Mr. Heller through a standard form contract of adhesion. The argument is effectively that *any* party contracting with Uber would be in a position to raise unconscionability because they were unable to negotiate the contract's terms. While my colleagues readily accept this deficit as sufficient (paras. 87-91), this Court has never before accepted that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability. My colleagues see "no reason to depart from the approach to unconscionability endorsed in . . . . [*Douez*]" (para. 65). And, indeed, they do not depart from Abella J.'s separate *concurring* reasons in *Douez*. But they *do depart* from *the majority's* approach in that case. Specifically, in *Douez* the Court *declined* to address unconscionability in the context of a consumer contract of adhesion, and instead considered the matter through

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the lens of public policy. And the majority's view — that standard form agreements are not inherently flawed — is consistent with our liberal conception of freedom of contract, a value that accords great respect to individual autonomy. Though one may be required to accept a standard form agreement without negotiation to use a service, that fact "affects neither party's ability to bargain effectively from the standpoint of legal autonomy, choice and responsibility" (Bigwood (2005), at pp. 199-200). *Douez* is, of course, a precedent of our Court.

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[163] The stakes are undoubtedly high here. Concluding that a standard form contract is sufficient to satisfy unconscionability's procedural requirement would open up the terms of every such contract for review on a measure of substantive reasonableness. This would represent a radical and undesirable change in the law, particularly considering the complexity and range of transactions to which unconscionability applies (see Bigwood (2005), at pp. 208-9). The result of the inevitable, undisciplined application by courts of such an undisciplined expansion of the scope of unconscionability will be profound uncertainty about the enforceability of contracts.

[164] My colleagues further expand the scope of unconscionability by eliminating knowledge as a requirement. Unconscionability is generally viewed as requiring the stronger party to have at least constructive knowledge of the weaker party's vulnerability (see e.g. McInnes, at pp. 537 and 544-48; *Downer*, at

paras. 44-49; Bigwood (2005), at p. 195; Hunt, at pp. 58-59). As Professor McInnes writes:

> Even more clearly than its equitable cousin, undue influence, unconscionability involves an element of impropriety. The gist of the doctrine is the *exploitation* of vulnerability, the ". . . unconscientious use of power by a stronger party against a weaker [party]." And while there is some debate as to the precise nature of the mental element, the best view is that relief is premised upon proof that the defendant *knew* of the claimant's weakness. [Emphasis in original; footnotes omitted; p. 537]

A recent confirmation of this requirement appears in *Downer*, where the Newfoundland and Labrador Court of Appeal concluded that knowledge of either the claimant's vulnerability or "of circumstances that pointed to special and significant disadvantage created or flowing from an inequality of bargaining relationship" must be proven to make out the claim (paras. 46-49).

[165] Without accounting for or even acknowledging this controversy, my colleagues state that knowledge is not essential (paras. 84-85), despite a majority of scholars concluding that *at least* constructive knowledge is required. To reach this conclusion, my colleagues equate knowledge with wrongdoing (paras. 85-86). There is, however, a distinction between the two concepts in matters of unconscionability (see e.g. McInnes, at p. 540; C. Rickett, "Unconscionability and Commercial Law" (2005), 24 *U.Q.L.J.* 73, at pp. 78 and 80). While there is clear support for the proposition that unconscionability can be established without wrongdoing □ that is, conduct rising to the level of intention, actual fraud, dishonesty, or active overreaching □ the same cannot be said of knowledge (see *Chesterfield (Earl of) v.*

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Janssen (1750), 2 Ves. Sen. 125, 28 E.R. 82, at pp. 100-101; *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. App. 484, at pp. 490-91; *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 339-40; *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.), at pp. 401-6; *Morrison*, at p. 714; *Woods v. Hubley* (1995), 146 N.S.R. (2d) 97 (C.A.), at paras. 28-33). Even viewed as a plaintiff-sided doctrine, there can be no claim unless the defendant exploits the plaintiff's vulnerability (McInnes, at pp. 540-43). Accordingly, "there is very little support for the direct application of [strict liability] in the context of unconscionability", which is what my colleagues would impose (McInnes, at p. 544 (footnote omitted)).

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[166] There is clear merit in a knowledge requirement, at least when applied to contractual dealings, as opposed to gratuitous transfers. Where the relationship between plaintiff and defendant is contractual, equity's interest in protecting those who are vulnerable must be balanced against the countervailing interests of commercial certainty and transactional security (McInnes, at p. 541; Rickett, at p. 80). Equity therefore demands an explanation as to why the defendant should suffer the consequences of the plaintiff's vulnerability (McInnes, at p. 541, citing P. Birks and C. Mitchell, "Unjust Enrichment" in P. Birks, ed., *English Private Law* (2000)). Requiring knowledge on the part of the defendant makes it possible for *both* parties to know whether their agreement is enforceable at the time of contracting and provides a compelling reason for holding the stronger party accountable.

[167] The wholesale shift in the law that my colleagues advance by removing knowledge as a requirement, seemingly in response to the equities of this particular case, drastically expands the scope of unconscionability. It is neither supported by the jurisprudence nor counselled by academic commentary, and rightly so. Not only is eliminating the knowledge requirement a recipe for further uncertainty in the doctrine of unconscionability, it is commercially unworkable. Contracting parties are left to wonder whether an unknown state of vulnerability will someday open up their agreement to review on grounds of "fairness". This alone should give pause, but my colleagues do not stop there. Under their approach, a party who contracts exclusively with individuals who have received independent legal advice *still* cannot take comfort in the finality of their agreements. According to my colleagues, only *competent* legal advice will ameliorate an imbalance in bargaining power (para. 83). A potential defendant therefore cannot be assured of finality unless it knows the content of the advice its counterparty has received.

[168] Moreover, this expansion of unconscionability is entirely unnecessary in the context of this appeal. Ultimately, the concern underlying my colleagues' approach is simply that Mr. Heller cannot access any form of dispute resolution (paras. 94-95). As I have explained, this concern is already guarded against by a long-standing rule of public policy. And this Court's decisions clearly demonstrate that where the concern with enforcing a contract relates primarily to the *substance* of a particular provision, unconscionability is not the appropriate doctrine for granting relief. This Court has adopted specific rules to respond to the public policy

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considerations suggesting that the substance of a particular type of provision is cause for concern. For example, in *Douez*, the Court declined to apply the doctrine of unconscionability to a forum selection clause appearing in a consumer contract of adhesion. Instead, inequality of bargaining power was raised as a relevant consideration in relation to public policy (paras. 47 and 51-63). In its reasons, the Court provided specific guidance and directly addressed the mischief relating to a forum selection clause in the consumer context. The Court has taken a similar approach to restrictive covenants that operate in restraint of trade, viewing those provisions through the lens of public policy (*Elsley*, at p. 923; see also *Shafron*, at paras. 15-23; Benson, at p. 203). In both contexts, imbalance in bargaining power is a relevant consideration, but the degree of vulnerability necessary to establish unconscionability is not required (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-53). This reflects that the inquiry is grounded in public policy, addressing the substance of the provision at issue.

[169] By addressing substantive provisions of contracts through specific rules designed to address particular types of provisions, courts can provide, and have provided, concrete guidance addressing the relevant mischief. This Court has approached the enforcement of contracts in a principled and rational manner by attempting to "ascertain the existence and the exact limits" of the overriding public policy considerations that prohibit enforcement (*Fender*, at p. 22). The nature of the inquiry varies, depending on the policy issue raised by the provision in question; different considerations will apply in considering exclusion clauses (*Tercon*, at

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paras. 117-20, per Binnie J., dissenting (but not with regards to the analytical approach to be followed with regards to the applicability of an exclusion clause)), forum selection clauses (*Douez*, at paras. 51-62), restraints of trade (*Elsley*, at pp. 923-24), and clauses that limit access to legally determined dispute resolution (as I have explained in these reasons). While these types of provisions might all be described as improvident in certain circumstances, it is critical to explain *why* that is so. Applying unconscionability in the manner suggested by my colleagues invites the conclusion that well-established rules relating to the enforcement of specific clauses should be swept aside in favour of a unified *ad hoc* and unprincipled approach to enforceability. This is why I say that, while unconscionability is appropriate for remedying procedural concerns that arise during contract formation, applying its generally-framed requirements to address what are ultimately concerns of public policy will serve only to obfuscate the criteria for granting relief. In turn, commercial certainty is undermined.

[170] Indeed, the approach adopted by my colleagues embodies this concern by failing to provide concrete guidance for determining what substantive unfairness □ or an improvident transaction □ looks like. My colleagues assert that improvidence arises whenever a bargain "unduly advantages the stronger party or unduly disadvantages the more vulnerable" (para. 74). Their approach is, they say, "contextual" and incapable of being framed precisely (para. 78). My colleagues therefore invite judges to apply their own subjective, even idiosyncratic understandings of "[f]airness" and "situationa[l] . . . . appropriate[ness]" in deciding

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whether a contract should be enforced (para. 78, quoting Rotman, at p. 535). It is difficult to imagine a judicial approach more likely to undermine commercial certainty. Professor Rickett's comments are apposite:

> Judges ought not to announce principles at so abstract a level that they are devoid of clear ordinary meaning. Still less should they attempt to apply them as *legal* principles. That there is no generally accepted meaning for unconscionability should immediately warn us off its use. It is not good enough to trumpet the rule of law, and then to apply the rule of men's hearts. The rule of law requires juridically applicable principles. [Emphasis in original; p. 87].

[171] Further, my colleagues say that terms may be unconscionable when a party does not "understand or appreciate" them (para. 77). This suggests that Uber's agreement with Mr. Heller could have been remedied if the US$14,500 fee for commencing a claim was spelled out expressly. As I have explained, however, even a contract that imposes express consequences for commencing a civil claim — like the contract in *Novamaze* — will be contrary to public policy if those consequences rise to the level of undue hardship. It may be relevant to consider whether the stronger party obfuscated the limit on dispute resolution, but it cannot be determinative. Directly addressing the public policy concern at issue in this appeal, rather than obscuring it through the lens of unconscionability, allows for a more appropriate response to the problem.

[172] Finally, the doctrine of unconscionability was never meant to apply to individual provisions of a contract. Unlike public policy considerations that target a specific contractual provision, unconscionability's substantive inquiry must consider

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the entire bargain — that is, the entire exchange of value between the parties (Benson, at pp. 176-82). Indeed, my colleagues seem to agree that a contract appearing to be unfair may be explained by showing that it is accounted for in the assumption of risk between the parties (para. 59; Benson, at p. 182). And yet, nowhere in their analysis do they consider the overall exchange of value and assumption of risk between Mr. Heller and Uber, which may very well justify what appears to be substantial "improvidence" solely from Mr. Heller's perspective. While Mr. Heller was unable to negotiate the terms of his agreement with Uber, he did receive the benefit of working as an Uber driver and receiving income. The contract was in no way foisted upon him. In failing to even consider the value exchange between the parties, my colleagues ultimately create a doctrine of contract enforcement that rests entirely on grounds of distributive justice. I see no justification for this development, and agree with Professor Benson, who writes:

> Unconscionability represents a conception of fairness in transactions or commutative justice, not justice in distributions. It treats parties as equal by recognizing and protecting in each the power to receive something of equal value from the other in return for what he or she gives. [Footnote omitted; p. 190]
>
> (See also Waddams (2017), at p. 304.)

[173] Instead of examining the entire bargain, my colleagues assert that unconscionability can be alleged against specific provisions of a contract, rather than the contract as a whole (para. 96 and fn. 8). In my view, however, this is a novel proposition. Some support for their position could possibly be drawn from this

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Court's decision in *Tercon*, which requires courts to consider whether an "exclusion clause was unconscionable at the time the contract was made" (para. 122, per Binnie J., dissenting (but not on this point)). But nothing in *Tercon*, or *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 (where the reference to unconscionability in the context of exclusion clauses first appeared) suggests an intention to adopt a novel approach to unconscionability that targets individual terms (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 442). In my view, use of the term "unconscionability" in *Hunter Engineering* (and later in *Tercon*) is explained by the fact that unconscionability is often used loosely to refer to a number of different concepts. In any event, the test set out in *Tercon* ultimately reflects a similar approach to that taken in *Douez*, which I find compelling: if a specific contractual term is properly incorporated into a valid agreement (considering the general doctrines of contract enforcement), then that provision should be held enforceable, absent compelling public policy reasons.

[174] In sum, my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change.

[175] Here, there is no allegation that Mr. Heller suffered from any specific vulnerability that would traditionally ground a claim in unconscionability. It follows that there is no procedural deficit warranting the application of unconscionability to

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the agreement between Uber and Mr. Heller. The true concern is one of substance: Uber's arbitration agreement bars access to justice, undermining the rule of law. As I have explained, that concern is best addressed by considering whether the limitation on access to justice is reasonable in the circumstances or, instead, imposes undue hardship.

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III. Conclusion

[176] The arbitration agreement between Mr. Heller and Uber effectively bars Mr. Heller from accessing a legally determined dispute resolution, thereby imposing undue hardship on Mr. Heller and undermining the rule of law. The arbitration agreement is unenforceable. I would dismiss the appeal, with costs to Mr. Heller in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[177] One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement: *Hofer v. Hofer*, [1970] S.C.R. 958, at p. 963. Although times change and conventional models of work and business

organization change with them, the fundamental conditions for individual liberty in a free and open society do not. Party autonomy and freedom of contract are the philosophical cornerstones of modern arbitration legislation. They inform the policy choices embodied in the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 ("*International Act*"), one of which is that the "parties to a valid arbitration agreement should abide by their agreement": *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 52.

[178] The parties to the agreement at issue in this appeal have bound themselves to settle any disputes arising under it through arbitration. My colleagues Abella and Rowe JJ. and Brown J. advance competing theories which impugn, to varying degrees, the choice of the law that governs the parties' contractual arrangements, the designated seat of the arbitration, and the selection of an international arbitral institution's procedural rules. My colleagues do not impeach the parties' agreement to submit disputes to arbitration, yet they find that the parties' commitment to do so is invalid. I cannot reconcile this result with the concepts of party autonomy, freedom of contract, legislative intent, and commercial practicalities. These important considerations — which ought to be taken into account — are disregarded in the majority's reasons.

[179] As I explain below, the *Arbitration Act*, the *International Act*, this Court's jurisprudence and compelling considerations of public policy require this Court to

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respect the parties' commitment to submit disputes to arbitration. I would therefore allow the appeal.

II. Background

[180] The appellants, Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. (collectively, "Uber"), form part of a corporate group with strong connections to the Netherlands, including the corporate headquarters of Uber B.V. and Rasier Operations B.V. The corporate group has global operations in what has been styled the "sharing economy".

[181] Uber develops and operates software applications ("Apps" or an "App") for users of GPS-enabled smartphones, which connect ride-seeking passengers with drivers and allow customers to have food delivered from restaurants. The food delivery business is known as "UberEATS", and the App developed for it is known as the "UberEATS App".

[182] Uber licenses another App — the "Driver" App — to David Heller, the respondent. Mr. Heller delivers food from restaurants to customers who have ordered food through UberEATS and is paid through the Driver App. A person in his position is commonly referred to as an "Uber driver". He earns CAN$400 to CAN$600 per week driving for 40 to 50 hours.

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[183] To become an Uber driver, Mr. Heller was required to enter into a service agreement with Rasier Operations B.V. through the Driver App. He was periodically required to agree to new versions of the service agreement and of an agreement subsequently signed with Uber Portier B.V., which is not a party to this appeal. To accept the service agreement, Mr. Heller was required to scroll through the entire contract and to click two buttons to indicate his acceptance. The Driver App does not limit the time an Uber driver may take to review the service agreement before accepting.

[184] The parties do not suggest that there were any meaningful substantive differences between the various service agreements for the purposes of this appeal. I refer to the agreements collectively throughout these reasons as the "Service Agreement".

[185] The Service Agreement includes a clause that provides that any dispute, conflict or controversy arising in connection with the agreement is to be first submitted to mediation and, if mediation is unsuccessful, is to be finally resolved by arbitration ("Arbitration Clause"). The Arbitration Clause adds that the International Chamber of Commerce's ("ICC") *Arbitration Rules, Mediation Rules* developed by the International Court of Arbitration ("ICA") and the International Centre for ADR, as amended from time to time ("ICC Rules"), are to apply, and designates Amsterdam, the Netherlands, as the place of arbitration ("Place of Arbitration Clause"). The Service Agreement also includes a clause that provides that it is to be

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governed by and construed in accordance with the laws of the Netherlands (“Choice of Law Clause”).

[186] Uber offers a free internal dispute resolution mechanism which connects Uber drivers to customer support representatives. Ontario-based drivers may also visit a local support centre referred to as a Greenlight Hub to resolve disputes. It is noteworthy that Mr. Heller has raised over 300 complaints through Uber’s internal procedure, most of which were resolved within 48 hours.

[187] The selection of the ICC Rules in a mediation or arbitration agreement entails the administration of the proceedings by the ICC’s autonomous dispute resolution bodies: the ICA and the International Centre for ADR. The ICC Rules provide for the payment of mandatory fees to these dispute resolution bodies for the administration of mediation and arbitration proceedings, which total US$14,500 for a claim under US$200,000 (“ICC Fees”).

[188] Mr. Heller commenced a proposed class proceeding in Ontario for CAN$400,000,000, alleging that Uber drivers such as himself have been misclassified by Uber because they are employees who are entitled to the benefits and protections of Ontario’s *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“*ESA*”).

[189] Uber brought a motion to have Mr. Heller’s proceeding stayed in favour of arbitration pursuant to the Arbitration Clause and the *International Act* or, alternatively, the *Arbitration Act*.

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[190] Applying the *International Act*, the Ontario Superior Court stayed Mr. Heller's action in favour of arbitration: 2018 ONSC 718, 41 D.L.R. (4th) 343. The Court of Appeal allowed the appeal and set the stay aside, holding that, if the drivers are employees, as is alleged, then the Arbitration Clause illegally contracted out of an employment standard. In addition, the Arbitration Clause was found to be unconscionable at common law. Either conclusion meant that the Arbitration Clause is invalid under s. 7(2) of the *Arbitration Act* such that the mandatory stay does not apply.

III. Legislation

[191] The *ESA* includes the following provisions:

> **Definitions**
>
> **1.** (1) In this Act,
>
> . . .
>
> "employment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee; . . .
>
> . . .
>
> **No contracting out**
>
> **5.** (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> **Greater contractual or statutory right**
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard

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provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

No treating as if not employee

5.1. (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.

. . .

Complaints

96. (1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

. . .

When complaint not permitted

98. (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.

[192] The *Arbitration Act* includes the following provisions:

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.

2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.

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4. To enforce awards.

. . .

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment.

. . .

Arbitral tribunal may rule on own jurisdiction

17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

Independent agreement

(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.

. . .

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(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

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[193] The *International Act* includes the following provisions:

Application of Model Law

5. (1) Subject to this Act, the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006, set out in Schedule 2, has force of law in Ontario.

. . .

Stay of proceedings

9. Where, pursuant to article II (3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[194] Schedule 2 of the *International Act* implements the United Nations Commission on International Trade Law's *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985 ("UNCITRAL" and "UNCITRAL Model Law", respectively), which includes the following provisions:

Article 1. Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

. . .

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

. . .

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(pp. 1, 5 and 8)

[195] The *Courts of Justice Act*, R.S.O. 1990, c. C.43, includes a provision which addresses stays of proceedings:

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[196] The part of the ICC Rules that deals with arbitration ("ICC Arbitration Rules") include the following provisions:

Article 18

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Place of Arbitration

1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.

2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

3. The arbitral tribunal may deliberate at any location it considers appropriate.

. . .

Article 22

Conduct of the Arbitration

1. The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

. . .

4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

. . .

Article 38

Decision as to the Costs of Arbitration

. . .

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

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[197] Appendix VI to the ICC Arbitration Rules contains a set out of procedural rules for the expedited conduct of arbitration ("ICC Expedited Rules"), which include the following provisions:

> **Article 3**
>
> **Proceedings**
>
> . . .
>
> 4. The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).
>
> 5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication. [pp. 71-72]

IV. Issues

[198] The overall issue in this appeal is whether Uber's motion for a stay of Mr. Heller's proceeding should be granted pursuant to either s. 9 of the *International Act* or s. 7(1) of the *Arbitration Act*. A number of related questions arise:

- Which arbitration legislation governs Uber's motion for a stay?

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- Is the Arbitration Clause null and void under the *International Act*, or invalid under the *Arbitration Act*?

- Should a court or an arbitral tribunal rule first on the validity of the Arbitration Clause?

- What conditions, if any, should the Court impose on the stay of proceedings?

V. Analysis

A. *Overview*

[199] I would allow the appeal and grant Uber's motion for a stay of proceedings, on the condition that Uber advances the funds needed to initiate the ICA arbitration proceedings.

[200] I begin my analysis by considering historical trends in Canadian arbitration law, which was initially characterized by a judicial attitude of overt hostility to arbitration. In recent decades, though, Canadian arbitration law has seen a dramatic reversal, as arbitration has been embraced and Canada has been transformed into a world leader in arbitration jurisprudence. I fear, however, that, in taking the approaches they do, my colleagues risk abdicating Canada's leadership role in arbitration law.

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[201] Next, I turn to the concrete doctrinal problems posed by this appeal. I consider which arbitration legislation governs Uber's motion for a stay. While I conclude that the *International Act* applies, the ultimate conclusions I reach would be the same under the *Arbitration Act*. I then consider whether the Arbitration Clause is either null and void or invalid, depending on which legislation is concerned. A primary sub-issue is whether a court or the arbitral tribunal should rule first on these questions, and this turns on whether Mr. Heller's arguments can be characterized as raising questions of law or questions of mixed law and fact which require only a superficial review of the documentary evidence in the record in order to establish the relevant factual aspects. I find that his arguments based on the doctrine of unconscionability and on the *ESA* raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that evidence and should therefore be decided by the arbitrator.

[202] These conclusions would be sufficient to decide the appeal, but, because my colleagues go further and consider Mr. Heller's arguments on their merits, I also comment on the merits of his challenge in respect of the validity of the Arbitration Clause. I find that the testimonial evidence before the Court is insufficient to support a finding that the Arbitration Clause is unconscionable. I also find that the Arbitration Clause is neither inconsistent with the *ESA*, nor contrary to public policy, as Brown J. would find.

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[203] I conclude by considering the possible remedies on a motion for a stay. The majority appears to believe that the courts face a stark choice between rigidly enforcing what they perceive to be a one-sided arbitration agreement and finding that the entire arbitration agreement is invalid. I suggest that at least two remedies are available to a court hearing a motion for a stay in order to alleviate any perceived unfairness: (1) a conditional stay of proceedings and (2) severance of an unenforceable term of an arbitration agreement. These remedies would enable courts to safeguard procedural fairness in a manner consistent with the principle of party autonomy and with the legislature's intent.

[204] I turn now to the broader historical and jurisprudential context of this appeal.

B. *Historical Trends in Canadian Arbitration Law: From Overt Hostility to World Leadership*

[205] Until the 1980s, Canadian courts displayed hostility to arbitration, treating it as a second-tier class of dispute settlement: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 89-96, per LeBel and Deschamps JJ. (dissenting, but not on this point). The Canadian judiciary's hostility was inherited from the English common law, which held that arbitration agreements had the effect of ousting the jurisdiction of the courts and were therefore void on the basis that they were contrary to public policy: *Seidel*, at paras. 89-90; *Wellman*, at para. 48. This hostility was exemplified by *National Gypsum Co. Inc. v.*

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Northern Sales Ltd., [1964] S.C.R. 144, in which this Court held that an agreement to submit disputes to arbitration in New York was unenforceable on the basis of public policy.

[206] Beginning in the 1980s, however, this Court recognized that the prevailing attitude was misconceived and began to chart a new course for arbitration law jurisprudence in Canada. In *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, this Court distanced itself from the approach it had taken in *National Gypsum* and advanced a more favorable position on arbitration. In *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, it recognized that the judiciary's hostility to arbitration had unfortunately inhibited the legal community's interest in arbitration, thereby inhibiting the growth of this form of dispute resolution. Around the same time, legislatures began to intervene to further promote the use of arbitration: *Wellman*, at para. 49.

[207] Over time, courts, including this Court, began to take notice that the legislatures had adopted a pro-arbitration stance. In *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at paras. 38 and 40-41, this Court acknowledged that arbitration is a legitimate form of dispute resolution and that this had been fully recognized and endorsed by the legislature and in its own jurisprudence. In *Seidel*, at para. 2, this Court stated that, "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration

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clause". It added that it had both recognized and welcomed the virtues of commercial arbitration: *Seidel*, at para. 23. Finally, in *Wellman*, this Court endorsed "the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts": *Wellman*, at para. 56, quoting *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14.

[208] As a result of legislative and judicial encouragement, Canada is now a world leader in arbitration law. The jurisprudence of Canadian courts features prominently with that of other leading UNCITRAL Model Law jurisdictions, such as Germany, Australia, Hong Kong and Singapore, in the United Nations Commission on International Trade Law's *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012). Canada sits on the cusp of becoming a world-class seat for arbitration, with modern arbitration legislation and a thriving community of dedicated practitioners, scholars, and arbitrators: J. Walker, "Canada's Place in the World of International Arbitration" (2019), 1 *Can. J. Comm. Arb.* 1.

[209] My colleagues threaten to roll back the tide of history and Canadian jurisprudence to the days when judges were overtly hostile to arbitration. They decline to follow the rule of systematic referral to arbitration that was clearly established in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34,

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[2007] 2 S.C.R. 801, at paras. 84-85. Instead, they add to the grounds for judicial intervention in the arbitration process by proposing new exceptions to the rule of systematic referral. Finally, they suggest that, regardless of the legislative intent embodied in the *Arbitration Act* and the *International Act*, judicial respect for arbitration is predicated upon the accessibility of arbitration in a given case: *Wellman*, at paras. 48-56 and 82; Abella and Rowe JJ.'s reasons, at para. 97; Brown J.'s reasons, at para. 117. As a result, my colleagues' approaches call into question this Court's commitment to encouraging the use of arbitration and to the modern "hands-off" approach to arbitration it so recently endorsed in *Wellman*. Canada's role as a world leader in arbitration law may now be in doubt.

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C. *Which Arbitration Legislation Applies to Uber's Motion for a Stay?*

[210] Mr. Heller argues that the *Arbitration Act* applies because employment disputes are excluded from the scope of the UNCITRAL Model Law, which is incorporated into Ontario law by the *International Act*.

[211] The *International Act* applies to arbitrations which are "international" and "commercial": UNCITRAL Model Law, art. 1(1). In this appeal, the arbitration is "international" because the parties have their residences or places of business in different countries: UNCITRAL Model Law, art. 1(3)(*a*) and (4)(*b*). Therefore, the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being "commercial" in nature. In my view, a court should approach this issue by analyzing the nature of the parties' relationship on the basis of

a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings.

[212] An interpretive footnote in the UNCITRAL Model Law explains that the term "'commercial' is to be given a wide interpretation so as to cover all matters arising from all *relationships* of a commercial nature": fn. 2 (emphasis added). The footnote also contains a non-exhaustive list of covered transactions, which includes licensing agreements. This implies that the focus of the analysis is on the nature of the relationship created by the transaction: see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-36 to 1-40.

[213] The weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law has focused on the nature of the relationship and not of the dispute. For example, in *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 158 A.R. 213 (Q.B.), Murray J. found that the UNCITRAL Model Law did not apply to the case before him, because the evidence established that the relationship between the parties was that of master and servant (i.e., an employment relationship): para. 30. In other cases, the UNCITRAL Model Law was found to be inapplicable because the plaintiff's status as an employee was not in dispute, thereby obviating any need to characterize the relationship: *Ross v. Christian & Timbers Inc*. (2002), 23 B.L.R. (3d) 297 (S.C.J. Ont.); *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588. In *United Mexican States v. Metalclad Corp.*, 2001

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BCSC 664, 89 B.C.L.R. (3d) 359, at para. 46, by contrast, Tysoe J. found that the UNCITRAL Model Law did apply despite the fact that the *dispute* was not itself commercial in nature, because the *relationship* between the parties was commercial. Similarly, in *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at para. 26, Kerans J.A. held that a dispute over liability in tort falls within the scope of the UNCITRAL Model Law despite its non-contractual nature, "so long as the relationship that creates liability is one that can fairly be described as 'commercial'".

[214] Labour and employment disputes are said to be excluded from the scope of the term "commercial": United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985. However, this does not shift the focus of the analysis from the nature of the relationship to the nature of the dispute between the parties. Rather, its effect is to exclude arbitrations arising in the context of employment and labour relationships from the scope of the UNCITRAL Model Law. The focus of the analysis is still on the nature of the relationship.

[215] My colleagues, Abella and Rowe JJ., take the opposite position, arguing that the analysis turns on the nature of the dispute, not of the relationship: para. 25. However, the author of the learned treatise upon which Abella and Rowe JJ. rely in support of their view actually takes a position diametrically opposed to their approach

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to the applicability of the UNCITRAL Model Law: Abella and Rowe JJ.'s reasons, at para. 27. Gary B. Born does present the proposition that consumer and employment disputes are excluded from the UNCITRAL Model Law, but as an alternative to his own view. He then rebuts it by pointing to the fact that the list of covered transactions is non-exhaustive and "expressly extends to the 'carriage of . . . passengers' and 'consulting' agreements, which very arguably include at least certain consumer or employment relations": *International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309. Born's assessment is that "the Model Law includes within its coverage both consumer and employment matters, subject to any specific nonarbitrability rules adopted in particular states": p. 309. His work is therefore of no assistance to my colleagues on this point. On the contrary, he expresses the opinion that the term "commercial" applies "without regard to the nature or form of the parties' claims and looks only to the character of their underlying transaction or conduct": p. 308.

[216] A superficial review of the documentary evidence reveals that the underlying transaction between Uber and Mr. Heller is commercial in nature. The Service Agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, which, as I mentioned above, is a type of transaction that is identified as coming within the scope of the UNCITRAL Model Law.

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[217] But Mr. Heller submits that he is an employee of Uber. While the parties' characterization of their relationship is not determinative in a dispute as to whether an employment relationship has been misclassified, a court hearing a motion for a stay should not decide complex questions of mixed law and fact which require more than a superficial review of the documentary evidence in the record: *Dell*, at paras. 84-85. This Court cannot decide that the Service Agreement creates an employment relationship without usurping the role of the arbitral tribunal. I therefore agree with the motion judge, Perell J., that "until the arbitrator rules otherwise, the court should take the parties at their word that the Service Agreements are not employment contracts": para. 49.

[218] On the basis of a superficial review, I am satisfied that the parties' relationship is both commercial and international within the meaning of the UNCITRAL Model Law. As a result, I conclude that the *International Act* applies to Uber's motion for a stay. Because my colleagues are of the view that the *Arbitration Act* applies, however, I will continue to address both statutes, where relevant. I reiterate that the analysis that follows would not change were I to conclude that the *Arbitration Act* applied instead of the *International Act*.

D. *Is the Arbitration Clause Null and Void Under the International Act, or Invalid Under the Arbitration Act?*

[219] Mr. Heller does not contest that this dispute falls within the scope of the Arbitration Clause, which means that the criteria for a stay under both the

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International Act and the *Arbitration Act* are met. A court hearing a motion for a stay and for referral to arbitration may, nonetheless, dismiss the motion if the arbitration agreement is found to be null and void, or invalid: UNCITRAL Model Law, art. 8(1); *Arbitration Act*, s. 7(2). Mr. Heller submits that the Arbitration Clause is invalid, or null and void, because it amounts to an unlawful contracting out of the *ESA* and because it offends the doctrine of unconscionability. I will address his arguments below after first considering some preliminary questions concerning the correct analytical approach to such a challenge.

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(1) Doctrine of the Separability of Arbitration Agreements

[220] Mr. Heller challenges the validity of the Arbitration Clause itself, and not of the Service Agreement as a whole. He rests his argument on the proposition that arbitration clauses embedded in contracts should be treated as independent agreements: R.F., at para. 101. Mr. Heller's submission therefore gives this Court an occasion to recognize and affirm the doctrine of the separability of arbitration agreements. I would do so readily.

[221] The doctrine of separability is "one of the conceptual and practical cornerstones" of arbitration law which plays an important role in ensuring the efficacy and efficiency of the arbitration process: Born, vol. I, at pp. 350-51 and 401. According to this doctrine, an arbitration clause should be analyzed as a separate agreement that is ancillary or collateral to the underlying contract: *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981]

A.C. 909 (H.L.), at p. 980; see also *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 (H.L.); *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395 (1967), at pp. 402 and 404; *Fiona Trust and Holding Corp. v. Privalov*, [2007] UKHL 40, [2007] 4 All E.R. 951. Put another way, an arbitration clause should be considered "autonomous and juridically independent from the main contract in which it is contained": A. J. van den Berg, ed., *Yearbook Commercial Arbitration 1999* (1999), vol. XXIVa, at p. 176, as quoted in Born, vol. I, at p. 350.

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[222] The separability doctrine is a logical extension of the rule created by this Court in *Dell* which states that a challenge to an arbitral tribunal's jurisdiction should be considered first by the tribunal itself because arbitral tribunals have the competence to determine their own jurisdiction: paras. 84-85. I will refer to this holding as the "rule of systematic referral". The same statutory provisions which ensure an arbitral tribunal's competence to determine its own jurisdiction also ensure its competence to determine the invalidity of the underlying contract by providing that the arbitration agreement should be treated as an independent agreement for the purposes of such a determination: *Arbitration Act*, s. 17(1) and (2); UNCITRAL Model Law, art. 16(1). Given that the legislature saw fit to give the arbitral tribunal the competence to decide these questions, the legislative choice embodied in s. 17(2) should receive the same respect as the one embodied in s. 17(1). The relationship between this "competence-competence" principle and separability is highlighted by the fact that they are both provided for in art. 16(1) of the UNCITRAL Model Law.

[223] National courts around the world nearly uniformly recognize the separability doctrine, even where no legislation provides for it: Born, vol. I, at p. 361 and 390; R. Feehily, “Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine” (2018), 34 *Arb. Intl.* 355, at pp. 356-57. In addition, some superior and appellate courts in Canada have already recognized the doctrine: see, e.g., *Krutov v. Vancouver Hockey Club Ltd.*, 1991 CanLII 2077 (B.C.S.C.); *NetSys Technology Group AB v. Open Text Corp.*, 1 B.L.R. (3d) 307 (S.C.J. Ont.), at para. 21; *Cecrop Co. v. Kinetic Sciences Inc.*, 2001 BCSC 532, 16 B.L.R. (3d) 15, at para. 25; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1.

[224] The *Arbitration Act* and the UNCITRAL Model Law codify one aspect of the doctrine, that is, the preservation of an arbitral tribunal’s jurisdiction to rule on the validity of the underlying contract on the basis that the arbitration agreement is to be treated as a separate and independent contract for such purposes. However, the separability doctrine has wider significance. More broadly, the doctrine holds that an arbitration agreement is invalidated only by a defect relating specifically to the arbitration agreement itself and not by one relating merely to the underlying contract in which that agreement is found: *Fiona Trust*, at paras. 32-35, per Lord Hope; Feehily, at p. 373; Born, vol. I, at pp. 351, 457 and 466-69. In effect, the separability doctrine “immunizes the arbitration clause, protecting it from flaws or defects” in the underlying contract: Feehily, at pp. 371 and 373. Nonetheless, there may be instances

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where the same circumstances which impugn the validity of the underlying contract also call the validity of the arbitration agreement into question: *Fiona Trust*, at para. 17, per Lord Hoffmann.

[225] Recognizing the separability doctrine has a number of implications for this appeal. For the purposes of Mr. Heller's challenge to the validity of the Arbitration Clause, the commitment to submit disputes to arbitration should be considered to be an independent agreement which is separate from the Service Agreement. Therefore, while the Choice of Law Clause and the Arbitration Clause appear together in the Service Agreement, the Choice of Law Clause applies to the Service Agreement as a whole and must be analyzed separately from the Arbitration Clause. Further implications are addressed below.

(2) Law Governing the Substantive Validity of the Arbitration Clause

[226] The Choice of Law Clause selects Dutch law to govern the Service Agreement. Owing to the separability doctrine, however, the validity of an arbitration agreement may be governed by a different substantive law than the one that governs the validity of the underlying contract in which the arbitration clause is found: Born, vol. I, at pp. 475-76 and 835; McEwan and Herbst, at pp. 8-1 to 8-6.

[227] Nonetheless, not much turns on this distinction in this appeal, for two reasons. The first is that the Arbitration Clause is likely governed by Dutch law, because the law of the underlying contract and the seat of arbitration are generally

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considered to be persuasive factors in determining the law applicable to the arbitration agreement: N. Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed. 2015), at p. 158; *BNA v. BNB*, [2019] SGCA 84, at paras. 44-48 (CommonLII). The law of the Arbitration Clause is therefore likely Dutch law because of the Choice of Law Clause and the Place of Arbitration Clause — although I express no firm conclusions in this regard at this juncture. The second is that the parties have failed to prove Dutch law. In the absence of evidence proving the foreign law, the court may apply the law of the forum: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1053. For the purposes of this appeal, therefore, this Court may apply the law of Ontario to determine whether the Arbitration Clause is substantively valid.

[228] I wish to stress, however, that a court hearing a challenge to the validity of an arbitration agreement, even under domestic arbitration legislation, should not presume that the law of the forum always governs the substantive validity of the arbitration agreement. Neither should a court assume that the law applicable to the arbitration agreement is the same as the law that applies to the underlying contract.

(3) <u>Rule of Systematic Referral to Arbitration</u>

[229] Mr. Heller's arguments against Uber's motion raise the same question as the one this Court considered in *Dell*: which body should decide first — a court or an arbitral tribunal? Given that the *International Act* implements the UNCITRAL Model Law, the rule of systematic referral from *Dell* clearly applies to motions brought under that Act. The rule of systematic referral from *Dell* also applies to the

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Arbitration Act, which is largely based on the *Uniform Arbitration Act*, 1990 (online), drafted by the Uniform Law Conference of Canada ("ULCC"). This is because, despite slight modifications for the purposes of domestic arbitrations, the "organisation and the principles of the Uniform Arbitration Act are recognizably those of the Model Law": *Uniform Arbitration Act*, p. 2-3. In particular, the *Arbitration Act* provides that an arbitral tribunal has the competence to rule on its own jurisdiction, including the ability to rule on challenges to the validity of the arbitration agreement: *Arbitration Act*, s. 17(1). Thus, *Dell* applies regardless of which arbitration legislation governs Uber's motion for a stay.

[230] In *Dell*, this Court interpreted Quebec's legislation implementing the UNCITRAL Model Law in the context of the *Civil Code of Québec*. It established a "general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator": *Dell*, at para. 84. A court *may* depart from the rule of systematic referral to arbitration only if the challenge is based solely on a question of law or on a question of mixed law and fact that requires only a "superficial" consideration of the documentary evidence: *Dell*, at paras. 84-85. The court must also be satisfied that the jurisdictional challenge "is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding": para. 86.

[231] Contrary to Abella and Rowe JJ.'s view, expressed at para. 36, this Court has clearly decided on the meaning of "superficial review". A review is not

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superficial if the court is required to review testimonial evidence: *Dell*, at para. 88. Put another way, "the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause": *Dell*, at para. 84. Throughout her reasons in *Dell*, Deschamps J. carefully distinguished between the types of evidence a court can consider in ruling on a motion for a stay. She stated that when a challenge to the validity of the arbitration agreement requires a court to consider "factual evidence", the court should normally refer the case to arbitration: *Dell*, at para. 85. The exception she mentioned for questions of mixed law and fact applies only if the questions of fact require only "superficial consideration of the documentary evidence in the record": *Dell*, at para. 85. Deschamps J. then explained that one of the issues raised in the appeal required more than a superficial review of the record because it required a review of the "documentary and testimonial evidence" in the record: *Dell*, at para. 88. Thus, testimonial evidence is not seen as being reviewable on a superficial basis, and should be left for the arbitral tribunal. In the language of the *prima facie* test which this Court sought to incorporate into the analysis in *Dell*, the "nullity" of an arbitration agreement is "manifest" if, having regard to the contract in which it is found, the question of the validity of the arbitration agreement is a primarily legal one that can be answered without recourse to further evidence: see *Dell*, at paras. 75-77 and 83.

[232] In the cases in which it has applied the rule of systematic referral, this Court has remained faithful to this limit on the kind of evidence which may be considered on a motion for a stay. In *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35,

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[2007] 2 S.C.R. 921, Dr. Muroff challenged the validity of an arbitration agreement in his cellphone contract with Rogers Wireless on the basis that it was abusive. The Court held that resolving the challenge would require more than a superficial review of the documentary evidence. Determining whether the arbitration agreement was abusive would have required the Court to look beyond the documentary evidence, given that "an arbitration clause is not necessarily abusive simply because it appears in a consumer contract": para. 15; see also para. 25, per LeBel J. (concurring). This Court therefore declined to entertain Dr. Muroff's challenge because it was dependent on testimonial evidence. Subsequently, in *Seidel*, the Court entertained a challenge to the validity of an arbitration agreement in a case in which a superficial review of the documentary evidence in the record was itself sufficient to establish the applicability of the legislation the Court relied upon to find that the arbitration clause was invalid: paras. 13 and 30. Therefore, this Court has applied the superficial review standard consistently since first articulating it in *Dell* — until this appeal.

[233] The new standard for superficial review introduced by Abella and Rowe JJ. allows for the production and review of considerable testimonial evidence. Superficial review will now incorporate a searching review of the record for the purpose of determining whether findings of fact can be made on the basis of apparently undisputed testimonial evidence, and this review might even involve cross-examination. This is a marked departure from the clear principles laid down in *Dell*, which were followed in *Rogers* and *Seidel*, and I therefore cannot accept it.

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[234] This point is important because this appeal should turn on the rule of systematic referral. More than a superficial review of the documentary evidence is required, because Mr. Heller's arguments, like those of my colleagues Abella and Rowe JJ. and Brown J., are dependent upon testimonial evidence regarding Mr. Heller's financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the Arbitration Clause applies.

[235] Further, my colleagues avoid the operation of the rule of systematic referral by creating new exceptions to *Dell* which permit them to consider the testimonial evidence in the record. However, even if that evidence could properly be considered by a court ruling on a motion for a stay, it is lacking in many important respects. For example, there is no evidence that Mr. Heller was in a state of necessity or was incapacitated when he entered into the agreement. He had an unlimited amount of time to review the agreement before accepting it. His evidence suggests that he is capable of understanding the significance of the Arbitration Clause: A.R., vol. II, at p. 134. As counsel for Uber demonstrated in cross-examination, Mr. Heller is sufficiently knowledgeable that he was able to quickly grasp the implications of a change in Uber's fee payment structure and voice his concerns through the media: A.R., vol. III, at pp. 145-46. He also showed considerable sophistication in lodging over 300 complaints through Uber's internal dispute resolution procedure: A.R., vol. III, at p. 129. The record is simply not sufficient for this Court to conclude with certainty that Mr. Heller was vulnerable throughout the contracting process.

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[236] In addition, my colleagues assert that the Arbitration Clause is inaccessible to Mr. Heller despite the fact that there is no evidence in the record regarding the comparative availability of third party funding for arbitration or litigation. This Court also has no indication as to what fraction of the CAN$400,000,000 being sought in Mr. Heller's proceeding represents his individual claim against Uber. Nor is there any evidence regarding the comparative cost of pursuing a class action — although I note that the costs awarded in the Court of Appeal (CAN$20,000) were greater than the amount of the ICC Fees (approximately CAN$19,000), and the parties are not even at the certification stage of the class proceeding: C.A. reasons, at para. 75. I am of the view that all of this evidence is necessary, because I find it highly unlikely that the cost of pursuing this claim in the courts, whether individually or by way of a class action, would be very much less than the ICC Fees. Indeed, such a proceeding might even be more costly. It is therefore not the absolute dollar value of the ICC Fees which is at issue. I think that what is implicit in my colleagues' arguments about accessibility is an unstated assumption about the comparative accessibility of pursuing a class action, given the existence of a specialized third party litigation funding industry and lawyer fee structures for the pursuit of such claims. However, such assumptions should be grounded in evidence. As the record currently stands, this Court cannot say on the basis of the testimonial evidence that the Arbitration Clause makes dispute resolution any less accessible than litigation.

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[237] In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of *ad hoc* judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements. This is in fact what the *Arbitration Act* and the UNCITRAL Model Law were designed to avoid.

(4) Proposed Exceptions to the Rule of Systematic Referral

[238] I will now address the exceptions to the rule of systematic referral proposed by the Court of Appeal as well as by Abella and Rowe JJ. and Brown J. I will confine my comments on Brown J.'s approach to his contention that s. 96 of the *Constitution Act, 1867* requires such an exception.

(a) *Systematic Referral and Challenges to the Validity of the Arbitration Agreement*

[239] The Court of Appeal appears to have held that the rule of systematic referral is confined to challenges relating to the scope of arbitration agreements, and

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therefore does not apply to challenges to the validity of such agreements: C.A. reasons, at paras. 39-40. I disagree.

[240] The rule of systematic referral is based on the arbitral tribunal's competence to rule on its own jurisdiction. Article 16(1) of the UNCITRAL Model Law and s. 17(1) of the *Arbitration Act* both state that the arbitral tribunal has competence to rule on objections with respect to "the existence or validity of the arbitration agreement". In *Seidel* and in *Rogers Wireless*, this Court applied the rule of systematic referral to challenges to the validity of the arbitration agreements that were at issue. There is accordingly no basis in the words of either statute for excluding the rule of systematic referral from a challenge to the validity of an arbitration clause, and there is in fact authority from this Court to the contrary.

(b) *Systematic Referral and Accessibility*

[241] Abella and Rowe JJ. propose to create an exception to the rule of systematic referral that would apply where an arbitration agreement is deemed to be "too costly or otherwise inaccessible": paras. 38-46. With great respect, I am of the view that this Court should not create this exception to the rule of systematic referral. I also do not agree that, if such an exception were to be created, it should be applied on the basis of the record before the Court.

[242] First, and foremost, the rule of systematic referral is the product of an exercise of interpretation of the UNCITRAL Model Law. This means that any

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exception to the rule must also be a product of statutory interpretation. However, Abella and Rowe JJ. do not purport to justify their proposed exception with reference to the words, the scheme, the context, the object, and the purposes of either statute, as this Court's jurisprudence requires: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. The exception they propose rests instead on policy considerations related to access to justice: paras. 38-39. While I appreciate the importance of those considerations, I am respectfully of the view that they cannot be used to make the *Arbitration Act* say something it does not say: see *Wellman*, at para. 79. Further, because Abella and Rowe JJ. propose this exception as a modification of the *Dell* framework itself, the exception must also be justified on the basis of an interpretation of the UNCITRAL Model Law which was interpreted in *Dell*.

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[243] Second, the dissenting justices in *Dell* proposed a flexible approach to referral according to which the courts would have retained some discretion to fully entertain a challenge to an arbitration agreement's validity: para. 178, per Bastarache and LeBel JJ. (dissenting). The majority chose not to adopt this discretionary approach, preferring instead a rule of *systematic* referral to arbitration "in any case involving an arbitration clause": para. 84. Abella and Rowe JJ.'s exception would transform the rule of systematic referral by turning it into a rule of *situational* referral that is dependent on the circumstances of a given case. This situational "carve-out" of part of the rule of systematic referral would add to the grounds for judicial intervention in the arbitration process and thus create a perverse incentive to engage

in "parasitic" litigation as a delaying tactic: see J. Paulsson, *The Idea of Arbitration* (2013), at pp. 58-60. It would be open to future courts to endlessly identify issues which constitute "unforeseen circumstances" that *Dell* did not contemplate, thus sowing uncertainty and giving rise to incessant litigation with respect to the degree of scrutiny to apply when ruling on a motion for a stay. Inviting litigiousness is more likely to thwart access to justice than to advance it because litigiousness increases the time and cost of dispute resolution.

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[244] Third, Abella and Rowe JJ. argue that courts are well positioned to mitigate the risk of spurious arguments being advanced against the validity of an arbitration agreement by awarding costs and requiring security for costs: para. 42. However, this Court contemplated the risk of spurious arguments being used as a delaying tactic in *Dell* and decided that the scope of review on a motion for a stay should be confined to a superficial review of the documentary evidence in order to counteract such tactics: *Dell*, at para. 84. If costs awards were an effective deterrent against delaying tactics, there would be no need to confine the scope of the review to a superficial review of the documentary evidence in the record at all. In addition, seeking security for costs would require a motion within the motion, thus adding further complexity and a potential for further delays.

[245] Fourth, Abella and Rowe JJ. observe "incidentally" that their approach would prevent the drafting of arbitration agreements which "exploit" what they see as a "significant loophole" in *Dell*: paras. 49-50. The exploitative loophole they are

worried about results from the ordinary operation of the rule of systematic referral to arbitration under an agreement which is governed by a foreign choice of law clause. This argument amounts to a critique of *Dell* itself. What is more, the critique is not grounded in legislative intent. There is no basis in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not.

[246] Fifth, Abella and Rowe JJ. state that their exception applies where the fees to commence arbitration proceedings are "significant" relative to the plaintiff's claim: para. 39. However, they provide no guidance on what amount might be considered "significant", and this Court has no indication in the record regarding the size of Mr. Heller's claim. They also express a concern that Mr. Heller may not reasonably be able to reach the physical location of the arbitration. But, as I explain in detail below, the choice of a foreign seat for arbitration should not be equated with the choice of the physical location of the arbitration proceedings. In fact, Uber has agreed to hold the proceedings in this case in Ontario. While it might be appropriate to disregard this concession on Uber's part for the purpose of determining whether the contract is valid, there is no reason to do so in relation to Abella and Rowe JJ.'s fact-specific exception to the rule of systematic referral. There is therefore no basis for concluding that the ICC Fees are significant relative to Mr. Heller's claim, given that the amount of the claim is unknown, or for concluding that he will be unable to reach the physical location of the arbitration, given that Uber has agreed to hold it in his home jurisdiction.

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[247] For these reasons, I do not accept that an exception should be either created or applied in this case. If the Constitution requires such an exception, I would, of course, have to reconsider the issue. It is to that question which I now turn.

(c) *Systematic Referral and the Governor General's Constitutional Power to Appoint Superior Court Judges*

[248] My colleague Brown J. refers to a "constitutional dimension" which, in his view, demands an exception to the rule of systematic referral where arbitration is inaccessible in the context of the parties' relationship: paras. 120 and 125. I will confine my comments here to the question whether the Constitution requires such an exception, as I will consider Brown J.'s additional arguments regarding public policy below. While I agree that access to justice and the rule of law are important considerations, I respectfully disagree that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*.

[249] Section 96 of the *Constitution Act, 1867* assigns to the Governor General the power to appoint superior court judges. This Court has interpreted this provision as a restriction on the competence of provincial legislatures and Parliament to enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 30. In my view, legislation which facilitates the enforcement of agreements to submit disputes to

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arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction.

[250] As a preliminary matter, it is important to understand that arbitration is not litigation by another name: W. G. Horton, "A Brief History of Arbitration" (2017), 47 *Adv. Q.* 12, at p. 12. Rather, it is a substitute for the parties' own ability to negotiate or to reach agreement through mediation, and is not based on a transference or denial of court power: Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 24. Courts retain an oversight role throughout the arbitration process and afterwards: *Arbitration Act*, ss. 6, 8, 10, 15, 17(8) and 45 to 48. Arbitration legislation, and supporting doctrines such as the rule of systematic referral, should not therefore be conceptualized as a limit on the supervisory jurisdiction of the courts. Instead, they should be seen as a positive reinforcement of the principle of party autonomy in that they require parties to an arbitration agreement to abide by their agreement.

[251] From this perspective, it is party autonomy, not statutory edict, which compels the parties to an arbitration agreement to refrain from litigation in the courts and to pursue the mode of dispute settlement to which they have previously agreed: see *Wellman*, at paras. 51-52. The legislation merely gives the parties to an arbitration agreement machinery they can use to enforce their agreement. Section 96 of the *Constitution Act, 1867* and the unwritten principle of the rule of law are not engaged because s. 96 "has never been construed (and cannot be) as forbidding two or more

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citizens from appointing another as their ‘private judge’ to resolve their dispute”: *Quintette Coal Ltd. v. Nippon Steel Corp.* (1988), 29 B.C.L.R. (2d) 233 (S.C.). Further, “[a]s legislation similar in effect has been on the books for nearly 300 years without it being attacked as constitutionally outrageous, I think it too late to take the point”: *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 67 D.L.R. (4th) 131 (B.C.C.A.), at p. 136. Thus, no constitutional issue arises. In my view, the possibility that the agreed-upon terms of a given arbitration agreement may be ill suited to a hypothetical claim for a small amount that is unrelated to the appeal now before the Court does not elevate the issue from one of private law to one of constitutional law.

[252] Another relevant — and important — consideration is the type of remedy courts are to grant in order to enforce arbitration awards. A court stays a proceeding that has been commenced in contravention of an arbitration agreement — it does not dismiss the action: *Arbitration Act*, s. 7. This has important practical ramifications, because a stay can be lifted. Further, a court hearing a motion for a stay may order a conditional stay and specify how the parties are to proceed to arbitration: see, e.g., *Popack v. Lipszyc*, 2009 ONCA 365 (CanLII); *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.); *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (F.C.); see also *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 135 Sask. R. 254 (Q.B.), var’d (1995), 137 Sask. R. 238 (C.A.). It is therefore wrong to conceptualize a successful motion for a stay as the end of the line for the plaintiff’s pursuit of their claim.

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[253] It would also be wrong to characterize private arbitral tribunals as statutory tribunals, which are amenable to judicial "surveillance" by virtue of s. 96 of the *Constitution Act, 1867*: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13, quoting *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at para. 14. A statutory tribunal is "a body set up by statute and which has duties conferred on it by statute so that the parties are bound to resort to it": *R. v. National Joint Council for the Craft of Dental Technicians (Dispute Committee)*, [1953] 1 Q.B. 704, at p. 706, quoted in *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888, at pp. 893-94. By contrast, arbitration "is essentially a creature of contract, a contract in which the parties themselves charter a private arbitral tribunal for the resolution of their disputes": *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, quoted in *Wellman*, at para. 52. Thus, the distinction between a statutory tribunal and a private arbitral tribunal is the greater autonomy which parties have and are free to exercise in the private arbitration context. That is why this Court's jurisprudence distinguishes between a statutory tribunal and "a clearly consensual tribunal which owes its existence solely to the will of the parties": *Roberval Express*, at p. 900; see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 104.

[254] I would add that, even if s. 96 were considered to be engaged, the constitutional right to access to the courts is not absolute: *British Columbia (Attorney*

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General) v. Christie, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 17. The legislature has the power to impose conditions on how and when people have access to the courts. Any impediment to such access under the *Arbitration Act* or the *International Act* exists simply because the parties to an arbitration agreement must abide by their agreement. Payment of the hearing fees at issue in *Trial Lawyers Association* was a mandatory condition on litigants' access to the superior courts which had the effect of taking the choice of pursuing litigation in the superior courts away from a segment of society: para. 35. Similarly, the Alberta Court of Appeal's comment that "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" concerned court orders which bar vexatious litigants from commencing proceedings in the courts unless the litigants fulfill certain preconditions: *Jonsson v. Lymer*, 2020 ABCA 167, at para. 67 (CanLII). By contrast, the *Arbitration Act* and the *International Act* deny access (to the limited extent that they do) only to "those who by agreement have surrendered their constitutional right of access": *Stancroft*, at para. 21. Since the legislature has the competence to impose conditions on access, these humble conditions must be permissible.

[255] For these reasons, I conclude that the rule of systematic referral applies unaltered to Uber's motion for a stay. The general rule is that the parties must be referred to arbitration unless Mr. Heller's challenge to the validity of the Arbitration Clause can be characterized as a pure question of law or a question of mixed law and fact which requires only a superficial review of the documentary evidence. If the arguments against the validity of the Arbitration Clause require more than a

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superficial review of the documentary evidence, that will be sufficient to decide the appeal. However, as the parties have made submissions on the merits of Mr. Heller's challenge to the validity of the Arbitration Clause, I will also comment on the merits of their arguments.

(5) Does Determining Whether the Arbitration Clause Is Valid Require More Than a Superficial Review of the Documentary Evidence?

[256] Three main arguments have been raised against the validity of the Arbitration Clause. Mr. Heller argues the Arbitration Clause is invalid because it is unconscionable and because it is contrary to the *ESA*. Brown J. raises a separate argument that the Arbitration Clause is invalid because it is contrary to public policy. I address each of these arguments below in turn.

(a) *Doctrine of Unconscionability*

[257] Despite Abella and Rowe JJ.'s learned analysis of the theoretical underpinnings of the unconscionability doctrine, I am unfortunately unable to agree with their statement of that doctrine. In particular, I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts. Abella and Rowe JJ. state that vulnerability in the contracting process may arise from "dense or difficult to understand terms" in the agreement: at para. 71. They also note that one situation in which a standard form contract might impair a party's ability to protect their interests

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would be if it contained provisions which were "difficult to read or understand": para. 89. I find this standard rather vague and illusory. I fear it might be open to abuse by a party to a standard form contract who chooses to enjoy the benefits of the agreement as long as it suits them, but who then chooses to rely on this opaque standard when called upon to honour an obligation which is not in their interest. As Brown J. observes, a lower threshold for finding that there is inequality of bargaining power risks exposing the terms of every standard form contract to review in order to ensure that they are substantively reasonable: para. 163. This would be an unwelcome development, as it would undermine private ordering and commercial certainty, which are important considerations in the law of contracts: see *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 66.

[258] I therefore agree with Brown J.'s able exposition of the unconscionability doctrine in the general law of contracts. However, an arbitration agreement engages unique considerations which require an analytical approach that differs from the one he takes in para. 172. In particular, Mr. Heller directs his unconscionability arguments specifically at the Arbitration Clause, which should be considered a separate and autonomous contract for this purpose.

[259] I will now analyze Mr. Heller's arguments and those of Abella and Rowe JJ. in light of the components of the unconscionability doctrine identified by Brown J., which I understand to be (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and

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(3) the stronger party's knowledge of the weaker party's vulnerability: Brown J.'s reasons, at paras. 156, 159 and 164-66. However, I add that I would reach the same conclusions if I were to apply the test set out by Abella and Rowe JJ.

(i) <u>Significant Inequality of Bargaining Power</u>

[260] The key question in relation to this component of the doctrine is whether the weaker party "had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests", thereby undermining the premise of freedom of contract: *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 37. The "personal characteristics or attributes of the weaker party are a fundamental consideration" in this regard: *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 39.

[261] The vulnerability alleged by Mr. Heller relates to his high school education and his comparatively limited access to financial resources: R.F., at paras. 121-22. Establishing these facts would require the Court to consider testimonial evidence, which means that the rule of systematic referral is engaged and that the parties must be referred to arbitration. This conclusion suffices to dispense with Mr. Heller's unconscionability argument; however, I wish to address the question whether the testimonial evidence is adequate to support a finding of unconscionability on the merits.

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[262] Even if the superficial review criterion did not apply, the testimonial evidence before this Court is contradictory on the question as to whether Mr. Heller had the capacity to understand and appreciate the significance of the Arbitration Clause. Mr. Heller's evidence established that he is capable of understanding the significance of the Arbitration Clause, but that he simply declined to read it before agreeing to the terms: A.R., vol. II, at p. 134. He was free to review the Service Agreement for as long he wished before communicating his acceptance: A.R., vol. II, at p. 16. And as counsel for Uber demonstrated in cross-examination, Mr. Heller showed considerable sophistication by lodging over 300 complaints through Uber's internal dispute resolution procedure and by communicating with the media shortly after a change had been made to Uber's fee payment structure: A.R., vol. III, at pp. 129 and 145-46. There is nothing in the record to suggest that he was rushed into accepting the terms of the Service Agreement, and no evidence regarding why he decided to become an Uber driver. There is accordingly no basis for finding that his capacity for autonomous self-interested decision-making was compromised or that the law's normal assumptions about free bargaining no longer hold true. Because this inquiry requires findings of fact based on conflicting evidence, this issue cannot be resolved on the basis of the record before the Court.

[263] Abella and Rowe JJ. find that there was inequality of bargaining power in this case because the Service Agreement in which the Arbitration Clause is found is a standard form contract, and because it was not accompanied by information about the cost of mediation and arbitration proceedings administered by the ICC's dispute

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resolution bodies: para. 93. Of course, these circumstances would not be sufficient to find that there was inequality of bargaining power based on the approach articulated by Brown J., with which I agree: para. 162. Nonetheless, I appreciate the reasons of Abella and Rowe JJ. for what they do not say. They do not contend that an arbitration agreement in a standard form contract is itself unconscionable. Such a conclusion would conflict with the weight of authority from this Court:

> . . . nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* — as well as its predecessors *Dell*, *Rogers*, and *Desputeaux* — confirm that the starting presumption is the opposite.
>
> (*Wellman*, at para. 84)

[264] At first blush, Abella and Rowe JJ.'s point that it would not be clear to a person reading the Arbitration Clause that the selection of the ICC Rules means that initiating the arbitration process would entail the payment of US$14,500 (approximately CAN$19,000) in fees has some force. On reflection, however, my view is that individuals should be expected to be aware that any form of dispute settlement, including litigation in the courts, comes with a price. A person cannot read an arbitration clause and reasonably assume that the process will be free of charge. It has not been shown that the ICC Fees are out of step with the cost of pursuing litigation — or of pursuing arbitration under a different set of rules — for a claim involving an amount equivalent to the unknown amount of Mr. Heller's claim. I therefore find it difficult to accept Abella and Rowe JJ.'s speculation that Mr. Heller

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would have had no reason to suspect that fees of this magnitude were required. With respect, they are effectively arguing that individuals have no reason to suspect that dispute settlement has a cost. To approach the matter as they do infantilizes individuals by viewing all of them as being bereft of autonomy and incapable of rational decision making. There is ample evidence in the record to suggest that Mr. Heller is not such an individual.

[265] Further, although Abella and Rowe JJ. do not expressly state that a standard form contract containing an arbitration clause is unconscionable, one wonders how a contract drafter could possibly anticipate the cumulative fees that would have to be paid in every possible arbitration scenario given the wide variety of disputes which could arise under an arbitration agreement. Arbitration is a private form of dispute resolution in which, generally speaking, the parties are required, at a minimum, to pay for the arbitral tribunal's time and expenses and for the venue, as well as to pay certain other costs. Abella and Rowe JJ. implicitly take the position that Uber should not have selected the ICC Rules because, in their view, the ICC Fees are substantively unfair. It is difficult to see how the drafter of a contract could anticipate the total of the fees to be paid in a non-institutional arbitration that would be conducted on an *ad hoc* basis under either the *Arbitration Act* or the *International Act*, which means that it is hard to see how an arbitration clause in a standard form contract could possibly be drafted in a way that would satisfy the requirements of Abella and Rowe JJ.'s approach to the unconscionability doctrine.

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[266] Regrettably, I fear that the effect of their approach amounts to a sweeping restriction on arbitration clauses in standard form contracts, even if they did not intend such a consequence. This Court has stated that deciding whether to restrict arbitration clauses in standard form contracts is a matter for the legislature: *Seidel*, at para. 2; *Wellman*, at paras. 46 and 79-80. With respect, the approach taken by Abella and Rowe JJ. to the doctrine of unconscionability is therefore inconsistent with the proper law-making role of the courts. In our democracy, it is the legislature, and not the courts, which is primarily responsible for law reform: *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666-70. Major changes in the law are best left to the legislature, because reform should be considered with a wider view of how the new rule will operate in the broad generality of cases: pp. 666-68. A court of law may not be in a position to appreciate the economic, social and other policy issues at stake: p. 668.

[267] These concerns are heightened by the economic context of this appeal, which relates to the contractual arrangements of businesses operating in what some have styled the "sharing economy": I. F. (Montreal Economic Institute), at para. 6. Enterprises with business models similar to that of Uber and individuals in Mr. Heller's position are part of a vital and growing sector of Canada's economy which could be stifled if the majority's reduced threshold for inequality of bargaining power is adopted. This sector depends on standard form contracts that are agreed to electronically by businesses and the people who use their online platforms: I. F. (Montreal Economic Institute), at para. 12. Individuals in Mr. Heller's position may have reduced opportunities to generate income in this sector of the economy if

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businesses like Uber cannot be assured of certainty in their contractual arrangements, as certainty is essential for global business operations. This Court is simply not in a position to know what the fallout from Abella and Rowe JJ.'s approach might be.

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[268] It is not the role of the courts to establish policies where the legislature has declined or omitted to do so. Ontario's Ministry of Labour, Training and Skills Development recently undertook a comprehensive review of the *ESA* in order to address the changing nature of work, including the sharing economy: *The Changing Workplaces Review: An Agenda for Workplace Rights — Final Report* (2017). That review culminated in amendments to the *ESA* that were enacted in the *Fair Workplaces, Better Jobs Act, 2017*, S.O. 2017, c. 22. If the legislature was concerned about arbitration agreements in this sector's standard form digital contracts, it could easily have amended the *ESA* to restrict such clauses, as it has in the case of consumer protection legislation: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7 and 8. Whether the legislature's omission was an oversight or a deliberate policy choice, any decision to restrict or not to restrict standard form contracts containing arbitration clauses in a matter for the legislature, not the courts.

[269] In the end, whether Mr. Heller suffered from a peculiar vulnerability that undermined his capacity to engage in rational autonomous decision making is a question of mixed law and fact which requires more than a superficial review of the documentary evidence. Therefore, the rule of systematic referral applies and the

parties must be referred to arbitration. I will nonetheless consider the other components of unconscionability below.

(ii) Improvident Bargain

[270] Mr. Heller's attack on the Arbitration Clause rests on three propositions: (1) the Place of Arbitration Clause forces him to travel to Amsterdam at his own expense, (2) the Choice of Law Clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment in advance of disproportionately high fees in order to initiate a dispute. I will address each of these propositions in turn, not because they could not cumulatively add up to a substantially unfair bargain, but because, in my view, the first two are unpersuasive, which leaves the third to stand on its own.

1. *Place of Arbitration Clause*

[271] Mr. Heller equates the Place of Arbitration Clause in the Arbitration Clause with a forum selection clause that requires him to travel to Amsterdam in order to pursue his claim. With respect, it is wrong to equate the designation of a foreign seat in an arbitration agreement with a forum selection clause.

[272] One major distinction relates to the fact that the discretion not to enforce a forum selection clause comes from the common law: see *Z.I. Pompey Industrie v. ECU‑Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. By contrast, a court's power to

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decline to enforce an arbitration agreement is circumscribed by the exhaustive list in s. 7(2) of the *Arbitration Act*. The designation of a foreign place of arbitration is not one of the enumerated grounds for declining a stay.

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[273] Another distinction stems from the fact that "[f]orum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction": *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 1. If enforced, such a clause requires a litigant to commence a proceeding in the foreign forum, which may indeed involve travelling to the foreign jurisdiction. The place (or "seat") of arbitration, by contrast, is a legal concept which denotes the parties' selection of a particular jurisdiction "whose arbitration law governs proceedings, and under whose law the arbitral award is made": Born, vol. I, at pp. 206; Born, vol. II, *International Arbitral Procedures and Proceedings*, at p. 1596. The designation of a foreign jurisdiction as the place of arbitration is therefore akin to a choice of law clause for the procedural aspects of the arbitration process.

[274] However, the place of arbitration "is not synonymous with the location where arbitral hearings take place": *Alberta Motor Association Insurance Co. v. Aspen Insurance UK Limited*, 2018 ABQB 207, 17 C.P.C. (8th) 81, at para. 147. There is no obligation to actually conduct the arbitration at the place of arbitration. Article 20(2) of the UNCITRAL Model Law provides that an arbitral tribunal may meet, and hear witnesses or submissions from the parties, at any place it considers appropriate, regardless of the place of arbitration selected by the parties. The

Arbitration Act includes a substantively a similar provision: s. 22(2). Article 18 of the ICC Arbitration Rules provides that the arbitral tribunal may conduct hearings and meetings at any location it considers appropriate: p. 26. In addition, art. 3(5) of the ICC Expedited Rules provides that the arbitral tribunal may decide the dispute solely on the basis of documentary evidence and written submissions, and that it may conduct hearings "by videoconference, telephone or similar means of communication": p. 72. In practice, it often happens that, although the parties have agreed to arbitration in one jurisdiction, the arbitration proceedings are in fact conducted at other locations for the sake of convenience: McEwan and Herbst, at p. 7-1 to 7-8; Born, vol. II, at p. 1596.

[275] It is true that the UNCITRAL Model Law, the *Arbitration Act* and the ICC Arbitration Rules leave the decision regarding the location of the proceedings to the arbitral tribunal, but there is no reason to presume that an arbitral tribunal would act arbitrarily and callously by compelling a party to travel overseas unnecessarily and at great hardship. Indeed, there is good reason to assume otherwise. The *Arbitration Act* requires the arbitral tribunal to treat the parties equally and fairly: s. 19(1). Further, art. 22(1) and (4) of the ICC Arbitration Rules provide that the arbitral tribunal must make every effort to conduct the arbitration in an expeditious and cost-effective manner and must ensure that each party has a reasonable opportunity to present its case: pp. 27-28. I therefore see no basis for assuming that the arbitral tribunal would require Mr. Heller to travel to Amsterdam in order to participate in arbitration proceedings. Hearings, if any need to be conducted, can

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reasonably be expected either to be held in Ontario or to be conducted remotely. Further, this Court should take judicial notice of the fact that modern communications technology makes it unnecessary for an Ontario resident to travel overseas in order to pay the ICC Fees or to make initial representations to the arbitral tribunal.

[276] The Arbitration Clause thus cannot be impugned on the basis that the Place of Arbitration Clause would require Mr. Heller to travel to a foreign jurisdiction in order to initiate a claim or to participate in the hearings, thereby incurring expenses, and any arguments to that effect cannot stand. I therefore see no basis for concluding that the Place of Arbitration Clause favours Uber significantly at Mr. Heller's expense.

2. *Choice of Law Clause*

[277] In light of the separability doctrine, it is critical, for analytical purposes, to distinguish between the validity of the Service Agreement, or of one of its terms, and the validity of the Arbitration Clause: Born, vol. I, at pp. 401-2 and 834; see also *Fiona Trust*. The result is that the alleged invalidity of the Choice of Law Clause on the basis that it is unconscionable does not affect the validity of the Arbitration Clause. Arguments directed at the alleged unfairness, whether substantive or procedural, of having the Service Agreement governed by a foreign law are therefore analytically distinct from those concerning alleged unfairness arising from the Arbitration Clause itself. As a result, arguments directed at the Choice of Law Clause are not a bar to Uber's motion for a stay.

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[278] Approaching the validity of the Arbitration Clause in this fashion is consistent with this Court's jurisprudence. In *Seidel*, the arbitration agreement provided that "[a]ny claim, dispute or controversy . . . shall be determined by . . . arbitration" and that, "*[b]y so agreeing*, [Ms. Seidel] waive[d] any right [she] may have to commence or participate in any class action against TELUS Mobility": para. 13 (emphasis added; emphasis in original deleted). This Court declined to view the class action waiver as separate from the arbitration provision because the contract was "structured internally to make the class action waiver dependent on the arbitration provision": para. 46. By contrast, in the instant case, the Choice of Law Clause is not dependent on arbitration being the parties' chosen means to settle disputes. Despite the fact that the text of the Choice of Law Clause appears in the same paragraph of the Service Agreement as the text of the Arbitration Clause, the two clauses have very different legal effects and should be considered to be separate.

[279] It would be different if Mr. Heller was arguing that unfairness results from having the Arbitration Clause itself governed by Dutch law, but he has neither argued nor proven that to be the case. As with his arguments regarding the *ESA*, which I will address below, the alleged invalidity of the Choice of Law Clause has no bearing on the validity of the Arbitration Clause.

[280] Even if the separability doctrine did not apply, there is nothing unusual or offensive about a choice of law clause in an international contract. Uber is a company with global operations and is headquartered in the Netherlands. Its selection of Dutch

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law to govern the contract is merely an attempt at legal risk management designed to ensure a degree of certainty in its operations. For a company with global operations, this serves a valid commercial purpose which courts should not interfere with lightly. A court that does so risks undermining the certainty that is needed in conducting international commerce. Further, although the Choice of Law Clause does confer a benefit on Uber (namely, legal certainty in the company's global operations), it is unclear that it does so at any cost to Mr. Heller, given that neither party has proven the foreign law and, as I will explain below when I address Mr. Heller's arguments with respect to the *ESA*, it remains to be seen whether the arbitral tribunal would apply the *ESA* in any event.

3. *Selection of Institutional Procedural Rules*

[281] As I have refuted Mr. Heller's arguments about the effect of the Place of Arbitration Clause and the Choice of Law Clause, all that remains of his unconscionability argument is the submission that the selection of the ICC Rules imposes the payment of disproportionately high fees, which total US$14,500, or approximately CAN$19,000. This disproportionality argument has two branches: (1) the ICC Fees are a disincentive to pursue hypothetical claims for small amounts; and (2) the ICC Fees are disproportionate to Mr. Heller's ability to finance the pursuit of a claim for a larger amount, because his income as an Uber driver is approximately CAN$20,800-31,200 a year. I will address each of these branches in turn, as I consider them to be distinct arguments for analytical purposes.

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[282] In my view, any commitment to submit disputes to arbitration should be regarded as generally imposing mutual obligations on both parties. It does not impose an obligation on one party in favour of the other. Rather, "[i]t embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution": *Heyman*, at pp. 373-74, per Lord Macmillan. An arbitration agreement thus involves a mutuality of exchange.

[283] If an arbitration agreement involves a mutuality of exchange, I fail to see how mandatory fees which apply to disputes initiated by either party would not involve a similar mutuality of exchange. The ICC Fees make pursuing a claim for a small amount just as uneconomic for Uber as for Mr. Heller. By contrast, a one-sided arbitration clause which requires one party to submit disputes to arbitration while the other party retains the right to litigate might not involve a mutuality of exchange: see, e.g., *Houston v. Exigen (Canada) Inc.*, 2006 NBQB 29, 296 N.B.R. (2d) 112, at para. 12. Therefore, to the extent that any unfairness results from the imposition of high fees on hypothetical claims for small amounts, I do not consider this situation to be sufficiently unfair, given the mutuality of the exchange.

[284] In any event, the actual amount of Mr. Heller's claim is unknown. While it is possible — from the point of view that "anything can happen" — to discern from the Arbitration Clause itself that a dispute over a small amount could, in theory, arise, establishing that such a dispute is likely or foreseeable under the contract would

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require the production and review of testimonial evidence, thereby engaging the rule of systematic referral. To proceed otherwise would be to hold that a contract is invalid on the basis of speculation.

[285] An imbalance might be observed between the size of the fees and Mr. Heller's ability to finance a claim for a larger amount, because Uber clearly has greater financial resources than he does. However, this aspect of Mr. Heller's argument requires the production and review of testimonial evidence, which means that the rule of systematic referral applies.

[286] Even if this Court were to consider Mr. Heller's testimonial evidence, the improvidence of a transaction has to be measured as of the time the contract is formed: Abella and Rowe JJ.'s reasons, at para. 74. The Court has no evidence regarding Mr. Heller's financial position at the time he entered into the Service Agreement. The only information the Court has regarding his financial means is the income he derived as an Uber driver after entering into the Service Agreement. Additionally, the Court does not have any evidence before it regarding the availability of third party funding for arbitration or the comparable cost of, for example, pursuing a class proceeding. And, I repeat, the size of Mr. Heller's individual claim is unknown. There is simply no basis for concluding that the ICC Fees render his rights under the Service Agreement unenforceable.

(iii) Knowledge

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[287] A finding that Uber had, at a minimum, constructive knowledge of Mr. Heller's peculiar vulnerability is required in order for a court to conclude that the Arbitration Clause is unconscionable: *Downer*, at para. 47; *Input Capital*, at paras. 48 and 61-64. In the case at bar, the Court of Appeal found that Uber had such knowledge, but I am of the view that it erred in principle regarding the kind of vulnerability which would be sufficient to establish inequality in bargaining power and that this error tainted its finding with respect to knowledge. The Court of Appeal found that Uber knew its drivers were "vulnerable to the market strength of Uber": para. 68. Uber's knowledge that it is a large company which uses standard form contracts does not suffice in this regard because contracts of adhesion, including agreements to arbitrate, are generally enforceable: *Seidel*, at para. 2.

[288] The vulnerability alleged by Mr. Heller relates to his comparatively limited access to financial resources and the fact that he has only a high school education. Given that the Driver App is widely accessible to members of the public, it would have been impossible for Uber to be aware of Mr. Heller's specific income and education level when he first decided to become an Uber driver. Uber could not have known that he intended to use the Driver App as his primary source of income, given that Uber drivers are not required to use the App at any given time and may therefore use it casually as a means to supplement their income. There is a lack of evidence as to why Mr. Heller chose to sign up for the Driver App, and why he chose to adopt it as his primary source of income and not to seek other work. There is also no evidence of his income at the time he entered into the contract. In any event, such questions

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would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

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[289] Whether the unconscionability doctrine renders the Arbitration Clause unenforceable is thus a question of mixed law and fact that requires more than a superficial review of the documentary evidence. The parties should therefore be referred to arbitration.

(iv) Application of Unconscionability to Individual Terms of an Arbitration Agreement

[290] In a footnote to their reasons, Abella and Rowe JJ. assert a contested point of substantive law: that the unconscionability doctrine may be applied to individual terms of an agreement: fn. 8. I agree with Brown J. that the unconscionability doctrine should not be applied to individual terms of a contract, but I take issue with how Abella and Rowe JJ. apply their approach to the unconscionability of individual terms to the contractual arrangements now before the Court.

[291] If Abella and Rowe JJ.'s approach were to be applied in light of the separability doctrine, which, at para. 96, they purport to accept, they would be led to the conclusion that the Place of Arbitration Clause and the selection of the ICC Rules are individually unconscionable terms of the Arbitration Clause. In their opinion, this does not render the Arbitration Clause itself unenforceable, because they assert that

the unconscionability doctrine can be applied to individual terms without rendering the entire agreement unenforceable: fn. 8.

[292] Even if the separability doctrine did not apply, it would be arbitrary to conclude that the individual term committing the parties to submit disputes to arbitration is invalid on the basis that the clause providing for it is close to clauses providing for other supposedly unenforceable terms involving the selection of certain institutional procedural rules for arbitration proceedings, of a foreign seat for such proceedings and of a foreign law to govern their agreement. Abella and Rowe JJ. relieve Mr. Heller of his commitment to submit disputes to arbitration on the basis that they find the terms for the arbitration offensive even though the commitment to arbitrate is itself left unimpeached. This result is impractical from a commercial standpoint, as well as being unjustified by Abella and Rowe JJ.'s own approach to unconscionability.

[293] Therefore, it follows from Abella and Rowe JJ.'s approach to the doctrine of unconscionability that the Arbitration Clause is valid and enforceable. I will now consider whether Mr. Heller's other arguments relating to whether the Arbitration Clause is invalid under the *ESA* require more than a superficial review of the documentary evidence in the record.

(b) *The ESA*

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[294] My colleagues decline to address the *ESA* issue because they would decide the appeal on the basis of unconscionability or, in the case of Brown J., on the basis of public policy. As I do not agree with their disposition of those issues, and for the sake of completeness, I must also analyze Mr. Heller's arguments with respect to the question whether the Arbitration Clause is invalid under the *ESA*.

[295] Mr. Heller raises two arguments in support of his position that the Arbitration Clause is invalid under the *ESA*. First, he argues that the Arbitration Clause amounts to an unlawful contracting out of an employment standard because he says it prevents him from accessing the *ESA*'s statutory enforcement mechanisms. Second, he submits that the choice of Dutch law to govern the Service Agreement also amounts to an unlawful contracting out of an employment standard.

[296] Although these two arguments are distinct, they suffer from the same fatal flaw. For the purposes of both of them, Mr. Heller submits that it is appropriate to presume that he is an employee, which means that the *ESA* applies. In *Seidel*, this Court was able to apply the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), to find that the arbitration agreement at issue was partially invalid, because a superficial review of the documentary evidence was sufficient to establish the applicability of the legislation. By contrast, the Service Agreement expressly states that it is an agreement to access and license software and that it does not create an employment relationship: A.R., vol. II, pp. 34 and 109-10. The question whether Mr. Heller is an employee goes to the heart of the dispute between the

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parties. The Court of Appeal recognized that this issue was central to the dispute, as it repeatedly relied on an assumption that Mr. Heller is an employee in its analysis: paras. 24, 42, 45-46, 49-50 and 74. However, a court hearing a motion for a stay cannot make such an assumption without usurping the role of the arbitral tribunal.

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[297] This means that the provision of the *ESA* on which Mr. Heller relies in support of a determination of invalidity of the Arbitration Clause is unavailable to him for the purposes of this motion:

> **No contracting out**
>
> **5** (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

A court cannot determine that an arbitration agreement is invalid pursuant to s. 5 without first finding that the parties involved are an employer or agent of an employer and an employee or agent of an employee.[9] Whether Mr. Heller is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of the record before the court, nor should it be: the rule of systematic referral applies, and the parties should be referred to arbitration.

[9] Mr. Heller did not rest his argument on the common law doctrine of statutory illegality, and I decline to consider it in the absence of submissions from the parties: see *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249.

[298] Nonetheless, because the parties have made submissions on the merits of the challenge under the *ESA*, I find that it will be helpful to comment on some of the legal aspects of this challenge.

(i) Contracting out of the Enforcement Mechanisms by Means of an Arbitration Clause

[299] Mr. Heller argues that the Arbitration Clause amounts to a contracting out of an employment standard in that it precludes him from filing a complaint with the Ministry of Labour pursuant to s. 96 of the *ESA* in which he would allege that he has been misclassified. The flaw in his argument is that the ability to file a complaint under s. 96 of that Act is not an employment standard. An "employment standard" is a "requirement or prohibition [under the *ESA*] that applies to an employer for the benefit of an employee": *ESA*, s. 1(1). Even if I assume, without deciding, that s. 96 of the *ESA* operates "for the benefit of an employee", it clearly does not require an employer to do — or prohibit an employer from doing — anything. It therefore does not provide for an employment standard.

[300] In addition, nothing in the record indicates that Mr. Heller has attempted to make a complaint under s. 96 of the *ESA*. Instead, he filed a multi-million dollar class proceeding. It may be possible to interpret the Arbitration Clause such that it does not apply to s. 96 of that Act. As the parties expressly represented in the Service Agreement that they are not in an employment relationship, it may be open to a court or an arbitral tribunal to conclude that s. 96 of the *ESA* was not reasonably within

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their contemplation. I note in this regard that where a term of a contract is capable of two constructions, one which renders the term lawful and one which renders it unlawful, the construction which supports the validity and legality of the term is to be preferred: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 772-73.

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[301] Mr. Heller also argues that the *ESA* precludes arbitration as a means of pursuing claims under that Act. The opposite is true, however, as there is no express prohibition on arbitration in the *ESA* and the *ESA* "cannot be assumed to exclude arbitral jurisdiction unless it expressly so states": *Desputeaux*, at para. 42. When the legislature wants to exclude arbitration, it is able to express itself in very clear language, and it has in fact done so in other statutes: see, e.g., *Consumer Protection Act, 2002*, s. 7(2); *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2). Further, the objective of the *ESA*'s enforcement provisions is "to make redress available, where it is appropriate at all, expeditiously and cheaply": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 27. Arbitration is entirely consistent with this objective. Given arbitration's inherent flexibility, this Court's numerous statements encouraging and professing the benefits of arbitration, and the legislature's clear pro-arbitration stance as indicated in the *Arbitration Act* and the *International Act*, I would be very slow to conclude that arbitration is excluded as an acceptable means of dispute resolution under the *ESA*: *Seidel*, at para. 23; *Wellman*, at paras. 48-56.

(ii) Contracting out of the *ESA* by Means of a Choice of Law Clause

[302] Mr. Heller submits that the Arbitration Clause amounts to a contracting out of the entire *ESA* as a result of the Choice of Law Clause. However, in light of the separability doctrine, the Choice of Law Clause must be understood as a part of the Service Agreement, while the Arbitration Clause must be considered to be a separate contract which is independent of the Service Agreement. Therefore, even if I were to assume, without so deciding, that the Choice of Law Clause is invalid, a finding to that effect would not, on its own, render the Arbitration Clause invalid because an arbitration agreement generally survives the invalidity of the underlying contract, or of a term therein.

[303] Further, the *ESA* only renders invalid the individual terms of an employment agreement which amount to a contracting out of an employment standard, not the entire employment agreement: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1001. Therefore, this is not one of those cases in which the invalidity of the underlying contract also entails the invalidity of the arbitration agreement: *Fiona Trust*, para. 17, per Lord Hoffmann. The alleged invalidity of the Choice of Law Clause does not undermine the validity of the Arbitration Clause. Therefore, Mr. Heller's argument is not a bar to Uber's motion for a stay.

[304] In addition, since the Service Agreement expressly states that it is an agreement to license software and that it does not create an employment relationship, it may be open to the arbitral tribunal to find that the contracting parties did not intend to exclude the operation of mandatory employment legislation in the jurisdiction in

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which the contract was to be performed. Given that the contract did not purport to create an employment relationship, it is unlikely that the drafters contemplated the possibility that employment legislation would apply to the contract.

[305] In any event, the parties' choice of law does not oust mandatory rules, particularly mandatory statutory rules that are applicable in a jurisdiction with a strong nexus to the dispute (in this case, Ontario): S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at pp. 298-300; G. A. Bermann, "Mandatory rules of law in international arbitration", in F. Ferrari and S. Kröll, eds., *Conflict of Laws in International Arbitration* (2011), 325, at pp. 333-34; see also *Williams v. Amazon.com, Inc.*, 2020 BCSC 300, at paras. 61-71 (CanLII). While the parties produced no evidence on whether an arbitral tribunal seated in the Netherlands and applying Dutch law would apply the *ESA*, it does not follow merely from the choice of Dutch law that the *ESA* would not be applied in relation to the dispute. Simply assuming that the *ESA* will not apply smacks of the old common law mistrust of arbitration which the *Arbitration Act* was intended to put to rest: *Wellman*, at para. 49.

[306] In conclusion on the *ESA* issue, neither of Mr. Heller's arguments warrants holding that the Arbitration Clause is invalid, as the rule of systematic referral negates both of them and, in any event, the substance of his arguments does not justify the relief he seeks.

(c) *Doctrine of Public Policy*

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[307] My colleague Brown J. proposes to create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy: paras. 119-21 and 129-31. He concludes that the selection of the ICC Rules in this case is contrary to public policy, because the ICC Fees are disproportionate in light of the parties' relationship, and that this renders the Arbitration Clause itself invalid.

[308] Like Abella and Rowe JJ.'s unconscionability analysis, Brown J.'s approach is dependent on testimonial evidence for the purpose of establishing that the ICC Fees are disproportionate relative to the amount that would likely be at issue in a dispute under the Service Agreement and to the income Mr. Heller earns as an Uber driver: Brown J.'s reasons, at para. 132. His approach therefore requires more than a superficial review of the documentary evidence, and the parties should be referred to arbitration. Nonetheless, even if the rule of systematic referral did not apply, I also respectfully disagree with the legal and factual merits of the public policy analysis Brown J. expounds in his carefully drafted reasons.

[309] The common law of contracts is fundamentally committed to ensuring "the freedom of contracting parties to pursue their individual self-interest": *Bhasin*, at para. 70. Thus, the doctrine of public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds": *In re Estate of Millar (Charles), Deceased*, [1938] S.C.R. 1, at p. 7, quoting *Fender v. Mildmay*, [1937] 3 All E.R.

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402, at p. 407. This is a high hurdle to overcome. With respect, I am not persuaded that the public policy concerns my colleague identifies justify overriding the "very strong public interest in the enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123, per Binnie J. (dissenting, but not on this point). In this regard, I view the *Arbitration Act* and the *International Act* as strong statements of public policy which favour enforcing arbitration agreements: see *Haas*, at paras. 10, 40 and 58; *Wellman*, at para. 54.

[310] Deciding whether to submit disputes to arbitration or to pursue litigation in the courts involves trade-offs. In arbitration, the parties trade the procedural certainty of the courts and the opportunity to appeal an unfavorable decision for the procedural flexibility, expediency, and efficiency of arbitration. There is no guarantee that arbitration will always yield the correct decision, but the courts are equally unable to offer that guarantee: L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, my Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143. Deciding whether this trade-off is in the parties' best interests rests with them, not with the courts.

[311] Just as there are many valid commercial reasons for parties to use exclusion clauses, including to allocate risks, there are also many valid commercial reasons for parties to use an arbitration agreement in which they select a particular international arbitral institution's procedural rules: *Tercon*, at para. 102, per Binnie J.

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(dissenting). One such reason might be to have the parties share the risk that recourse to arbitration may not be economical in the case of a claim for a small amount, although Mr. Heller would of course be free to use Uber's internal dispute resolution procedure, as he already has many times. However, should a claim for a large amount arise, the parties would have access to a world-class institution to aid in resolving the dispute. This is a valid contractual arrangement with which courts should not interfere. Given the mutuality of exchange the Arbitration Clause involves, it bears no resemblance to the clause at issue in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.), which was clearly one-sided.

[312] In any event, the pursuit of access to justice and the enforcement of arbitration agreements are often complementary objectives. Indeed, one of the objectives of the *Arbitration Act* is to further access to justice by encouraging the use of arbitration: *Wellman*, at para. 135. Arbitration enhances access to justice because it can be more expedient and less costly than litigation: para. 135. The policy that parties to a valid arbitration agreement should abide by their agreement furthers access to justice by preventing delaying tactics which hamper access to dispute resolution: para. 135. By contrast, widening the grounds for judicial intervention, as Brown J. would do, is as likely to undermine access to justice as to promote such access, because it would incentivize litigation as a delaying tactic, thereby increasing the time for, and cost of, dispute resolution.

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[313] While it is often complementary to other legislative objectives, the pursuit of access to justice should not "be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*": *Wellman*, at para. 83. The Act also pursues another important objective: it gives effect to party autonomy by permitting parties to craft their own dispute resolution mechanism through consensual agreement: *Wellman*, at para. 52. Moreover, concluding that an arbitration agreement is invalid on public policy grounds without impeaching the parties' consent to the agreement undermines another objective of the *Arbitration Act*, that of holding parties to their commitment to submit disputes to arbitration where they have agreed to do so: *Wellman*, at para. 49, quoting *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.) (WL Can.).

[314] Similarly, the rule of law is not a "tool by which to avoid legislative initiatives of which one is not in favour": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 67. On the contrary, the rule of law requires courts to "give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text": *Imperial Tobacco*, at para. 67. As a motion for a stay in favour of arbitration does not impinge on the Governor General's power to appoint judges under s. 96 of the *Constitution Act, 1867*, I see no reason why this Court should not seek to give effect to the legislature's objectives as embodied in the *Arbitration Act* and the *International Act*.

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[315] Further, when considering whether, or how, to refashion old common law doctrines regarding arbitration, this Court should, in my view, follow its decision in *Wellman* to embrace a more modern approach to arbitration law. According to this approach, arbitration is "an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts": *Inforica*, at para. 14, quoted in *Wellman*, at para. 56. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. This Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration.

[316] I appreciate Brown J.'s able attempt to provide a new conceptual justification for the common law doctrine: paras. 111-14. However, when this new justification is considered alongside his reformulation of the substantive doctrine, these innovations cannot be said to amount to an incremental development in the law: paras. 119-21 and 129-31. Rather, in my view, this is an entirely new common law rule governing the validity of arbitration agreements.

[317] Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered

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by the courts, as they are instead matters for the elected policy-makers who sit in the legislature: *Wellman*, at para. 79.

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[318] My concerns about the limits of the courts' institutional capacity to fully consider questions in this regard are heightened by Brown J.'s reliance on s. 96 of the *Constitution Act, 1867*, which risks permanently restraining the legislature's competence in the future to enact policies which promote access to civil justice outside the courtroom context. Although I appreciate Brown J.'s attempt to corral his proposed rule, public policy is an "unruly horse", and I fear that once this Court sits astride that horse, judges may be led back to the days when they displayed overt hostility to arbitration, treating it as a second-tier method of dispute resolution: *Tercon*, at para. 116.

[319] Finally, while Brown J. maintains that the ICC Fees bar Mr. Heller from bringing a claim of any size against Uber, there is no evidence before this Court regarding the actual size of Mr. Heller's claim against Uber or the possible availability of third party funding for the pursuit of his claim: Brown J.'s reasons, at para. 132. Neither is there any evidence of his income at the time of the formation of the contract. There is, therefore, an insufficient evidentiary basis for Brown J.'s conclusion given the testimonial evidence in the record. The analysis requires an understanding of the parties' ability to finance the pursuit of arbitration proceedings, and of the comparative availability of litigation funding. As the record currently stands, it is difficult to accept that approximately CAN$19,000 in fees for the pursuit

of arbitration can be said to amount to a total bar on dispute resolution in this case when the costs awarded to Mr. Heller in the Court of Appeal amounted to CAN$20,000: C.A. reasons, at para. 75. Given the inadequacy of the record, this appeal differs markedly from *Lymer*, in which the Alberta Court of Appeal found that a court order barring an undischarged bankrupt from commencing or continuing court proceedings until he paid all costs awards against him in full constituted an insurmountable precondition to court access: para. 67. Therefore, I cannot conclude, as Brown J. does, that the ICC Fees act as an insurmountable precondition that prevent Mr. Heller from commencing a claim: Brown J.'s reasons, at para. 132.

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[320] I conclude that the selection of the ICC Rules in this case is not contrary to public policy. Because each of the arguments against the validity of the Arbitration Clause requires more than a superficial review of the documentary evidence in the record, the parties should be referred to arbitration. The remedial options available to a court on a motion for a stay remain to be considered, however.

E. *Possible Remedies on a Motion for a Stay*

[321] My colleagues put forward different theories to conclude that the Arbitration Clause is invalid. Even though none of their theories impugn the parties' basic commitment to submit disputes to arbitration, my colleagues find that that commitment is invalid. They appear to conceptualize the available relief as involving a stark choice between rigidly enforcing the arbitration agreement and finding that the entire arbitration agreement is invalid. In my view, the pro-arbitration stance that has

been taken by legislatures across Canada and which is embodied in this Court's jurisprudence supports a generous approach to remedial options which will facilitate the arbitration process. Two such options are (1) ordering a conditional stay of proceedings and (2) applying the doctrine of severance. I address each of these options below.

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(1) <u>Conditional Stay of Proceedings</u>

[322] If the exceptions in s. 7(2) of the *Arbitration Act* or art. 8(1) of the UNCITRAL Model Law do not apply, the legislation directs a stay of the proceedings: *Arbitration Act*, s. 7(1); *International Act*, s. 9; UNCITRAL Model Law, art. 8(1). A stay is mandatory in such circumstances, but the *Arbitration Act* and the *International Act* are silent as to what conditions, if any, may be imposed on the stay. However, s. 106 of the *Courts of Justice Act*, which Uber cited in its notice of motion, provides that a court may stay a proceeding on such terms as it considers just: A.R., vol. II, at p. 88. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. I caution that a court should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal: Born, vol. II, at p. 2196. Nonetheless, in the period before the appointment of the arbitral tribunal, a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration.

[323] Courts hearing motions for stays and for referral to arbitration have ordered conditional stays in the past: see, e.g., *Popack*; *Iberfreight*; *Continental Resources*; see also *Fuller Austin*. As was the case in *Iberfreight* and *Continental Resources*, such conditions support one of the purposes of arbitration agreements and of modern arbitration legislation, that of proceeding with dispute resolution in a timely manner rather than delaying progress in the courts. In this regard, I find that the following comments of Gerwing J.A. from *Fuller Austin* (C.A.), at para. 5, on the interpretation of Saskatchewan's legislation implementing the UNCITRAL Model Law are persuasive:

> In most stays the party requesting the extraordinary indulgence of the court must act with expedition to facilitate justice. Particularly where remedies of an unusual nature, such as commercial arbitration, are permitted to circumvent litigant's normal access to the court, or delay it, it is for the purpose of facilitating and not delaying justice. As in most stays, common sense indicates that the successful applicant for a stay cannot use it as it were as a permanent way of ending the matter by deliberate inattention to pursuing the course of action which justified the granting of the stay. While we did not indicate expressly in our reasons this requirement, that reasonable steps be taken, we agree with the interpretation placed by the chamber judge below that this is implicit. (Indeed, it might be noted that substantial argument can be made that in interpreting the *Act*, if principles of statutory interpretation would have to be called in aid, that the legislation was similarly intended to expedite the resolution of disputes and not to delay them.)

[324] Mr. Heller has given sworn evidence that he cannot afford the ICC Fees, which must be paid in order to initiate ICA proceedings. In light of Mr. Heller's particular circumstances, I would impose a condition that Uber advance the filing fees to enable him to initiate such proceedings. I would leave the decision as to who

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should ultimately bear those costs to the arbitral tribunal. In this regard, Rule 38 of the ICC Arbitration Rules empowers the arbitral tribunal to make decisions on costs at any time during the proceedings and to decide which party should bear the costs in the final award.

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[325] This condition would be consistent both with the principle of party autonomy and with the legislature's intent, because it would facilitate the arbitration process. As it would merely be an interim measure, it would not change the substantive rights and obligations of the parties pursuant to the Arbitration Clause. It would therefore be consistent with s. 17(1) of the *Arbitration Act* and art. 16(1) of the UNCITRAL Model Law, because it would leave the decision on the question of the validity of the Arbitration Clause to the arbitral tribunal.

(2) Doctrine of Severance

[326] While granting a conditional stay is sufficient for my purposes to decide the appeal, there is one further important aspect of Uber's submissions which Abella and Rowe JJ. do not address in their reasons. In oral argument, counsel for Uber suggested that, if part of the Arbitration Clause was found to be unenforceable, this Court should sever the unenforceable portions of the agreement and enforce the remainder: transcript, pp. 17 and 55-56. I agree. Compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be

unenforceable. Where doing so is practical, courts should strive to give effect to the parties' intentions by severing unenforceable terms and referring the parties to arbitration.

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[327] The doctrine of severance takes two forms: (1) notional severance and (2) blue-pencil severance. Notional severance involves reading down a contractual provision so as to make it legal and enforceable. Blue-pencil severance consists of removing the illegal part of a contractual provision: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 2 and 29-30. Whereas notional severance calls for the application of a bright line test of illegality, blue-pencil severance can be effected where the court can strike out the portion of the contract it wants to remove by drawing a line through it without affecting the meaning of the part that remains: *Shafron*, at paras. 29 and 31; *Transport North American Express*, at para. 34.

[328] In deciding whether to apply the doctrine of severance, a court should also consider whether it would be both commercially practical and consistent with the parties' intentions for it to enforce the remainder of the arbitration agreement: McCamus, at pp. 510-11. The fundamental aspect of an arbitration agreement is a clear commitment by both parties to settle any disputes by arbitration: see UNCITRAL Model Law, art. 7 (option 1); *Arbitration Act*, s. 1 "arbitration agreement". Therefore, where the parties' intention to submit disputes to arbitration is

clearly established, applying the doctrine of severance will usually be consistent with their intentions.

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[329] Further, courts will consider the context of the contract at issue and any relevant policy considerations when assessing whether and how to sever provisions: *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, at para. 37. The *Arbitration Act* and the *International Act* are both legislative statements of public policy which encourage the use of arbitration and favour holding parties to their commitment to submit disputes to arbitration: *Wellman*, at para. 49. The doctrine of severance advances these policies by ensuring that the parties' intentions are not defeated by shortcomings in their selection of the terms for the arbitration process.

[330] In *Shafron*, Rothstein J. cautioned courts to take a restrained approach to severance, because severance interferes with the right of parties to freely contract and to choose the words that determine their obligations and rights: para. 32. However, different considerations arise in assessing arbitration agreements because arbitration itself is a party-driven form of dispute resolution. Were an aspect of an arbitration agreement to be severed, the parties would still be free to agree on a replacement for it: for example, if certain procedural rules were severed, they could agree on other existing procedural rules or on a procedure of their own. Severance does not take that choice away. In fact, it furthers party autonomy by ensuring that the parties can have access to their chosen means of dispute resolution. Severance will rarely, if ever,

change the fundamental nature of the parties' agreement, which was to settle disputes by arbitration.

[331] The practice in other countries is to sever unenforceable provisions while still giving effect to the arbitration clause wherever possible. Thus, "[t]he overwhelming majority of national court decisions . . . uphold the validity of international arbitration agreements even after invalidating one (or more) term(s) of those agreement[s]": Born, vol. I, at p. 916; see, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

[332] This Court's jurisprudence supports upholding the validity of an arbitration clause where practical. In *Seidel*, this Court found that the arbitration clause at issue was inconsistent with the *BPCPA*. The consumer had commenced a proposed class proceeding in respect of claims under the *BPCPA* as well as other causes of action. The Court found the arbitration clause to be invalid only to the extent that it applied to the *BPCPA* claims, as the clause in question was barred by that Act, and ordered a stay in relation to the other claims, thereby referring them to arbitration: *Seidel*, at para. 50. The Court's remedial approach in *Seidel* may be viewed as an application of notional severance to the arbitration agreement because the Court in effect granted relief which was equivalent to writing in a term excluding the *BPCPA* claims from the scope of the arbitration agreement instead of holding that the entire agreement was invalid. Further, in *Wellman*, this Court stated that courts must show due respect for arbitration agreements and, more broadly, for arbitration,

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thus endorsing the view that the law should favour giving effect to arbitration agreements and that arbitration should be encouraged: para. 54.

[333] In the instant case, the parties' commitment to submit disputes to arbitration is clear. The selection of the ICC Rules is neither contrary to public policy nor unconscionable, but, if it were so, the appropriate remedy would be for the Court to apply blue-pencil severance and strike the selection of the ICC Rules, leaving it to Uber and Mr. Heller to agree on an arbitration procedure, or to the arbitral tribunal to decide how to proceed. The same would be the case for the Place of Arbitration Clause. This approach is more consistent with the parties' intentions and with the legislature's intent than simply holding that the entire arbitration agreement is invalid.

[334] Given that my colleagues do not seem to take issue with the actual selection of arbitration as a mode of dispute settlement or with the requirement to attempt mediation first, it would be inappropriate to sever those aspects of the Arbitration Clause. The substance of Mr. Heller's arguments, and of those of my colleagues, relates to the ICC Fees which result from the selection of the ICC Rules and to the designation of a foreign seat for the arbitration. I repeat that I find that the ICC Rules and the Place of Arbitration Clause are valid, but, if I had found that they were unenforceable, I would have applied blue-pencil severance to rewrite the Arbitration Clause as follows:

> Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first

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> mandatorily submitted to mediation proceedings ~~under the International Chamber of Commerce Mediation Rules ("*ICC Mediation Rules*")~~. If such dispute has not been settled within sixty (60) days after a Request for Mediation has been submitted ~~under such Mediation Rules~~, such dispute can be referred to and shall be exclusively and finally resolved by arbitration ~~under the Rules of Arbitration of the International Chamber of Commerce ("*ICC Arbitration Rules*"). The ICC Rules' Emergency Arbitrator provisions are excluded~~. The dispute shall be resolved by one (1) arbitrator ~~to be appointed in accordance with the ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands~~.

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[335] If the parties were then unable to agree on how to proceed, the *Arbitration Act* and the UNCITRAL Model Law contain detailed provisions to assist in the enforcement of an arbitration agreement where the parties are unable to agree on the details: see, e.g., *Arbitration Act*, ss. 9, 10, 20 and 22; UNCITRAL Model Law, arts. 10, 11(3), 19(2) and 20(1).

[336] The facts of this case illustrate a situation in which severance is needed in order to prevent commercially absurd results. My colleagues take issue with the ICC Fees in the context of a hypothetical dispute for a small amount. While I appreciate that such a dispute could arise from the Service Agreement, defeating the parties' commitment to submit disputes to arbitration on the basis of this hypothetical case is absurd given that the dispute actually before the Court concerns a proposed class proceeding for CAN$400,000,000 and that the amount of Mr. Heller's individual claim is as yet unknown. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their global operations. The commitment to submit disputes to arbitration should be upheld. Any other result would be commercially impractical.

[337] Finally, I note that, since Abella and Rowe JJ. would apply the unconscionability doctrine to individual terms, they are, in reality, applying blue-pencil severance by another name. However, they do not explain why they have chosen to strike the entire Arbitration Clause (and perhaps — although this is unclear — the Choice of Law Clause as well) instead of the specific individual terms they find to be unconscionable.

VI. Conclusion

[338] For these reasons, I would allow the appeal and order a conditional stay of proceedings.

Appeal dismissed with costs throughout, CÔTÉ J. *dissenting.*

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Para 46

Para 98

Most Negative Treatment: Distinguished
Most Recent Distinguished: Manufacturers Life Insurance Co. v. Pitblado & Hoskin | 2009 MBCA 83, 2009 CarswellMan 408, 77 C.C.L.I. (4th) 1, 245 Man. R. (2d) 111, 466 W.A.C. 111, 83 R.P.R. (4th) 159, 67 C.C.L.T. (3d) 192, 60 M.P.L.R. (4th) 192, [2009] M.J. No. 304, [2009] 12 W.W.R. 638, 180 A.C.W.S. (3d) 751 | (Man. C.A., Sep 1, 2009)

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2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, [2008] 11 W.W.R. 414, [2008] 3 S.C.R. 41, [2008] A.C.S. No. 54, [2008] S.C.J. No. 54, 169 A.C.W.S. (3d) 346, 260 B.C.A.C. 74, 297 D.L.R. (4th) 193, 380 N.R. 82, 439 W.A.C. 74, 60 C.C.L.T. (3d) 1, 61 C.R. (6th) 1, 61 C.P.C. (6th) 1, 83 B.C.L.R. (4th) 1, J.E. 2008-1864

F.H. (Appellant) and Ian Hugh McDougall (Respondent)

F.H. (Appellant) and The Order of the Oblates of Mary Immaculate in the Province of British Columbia (Respondent)

F.H. (Appellant) and Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development (Respondent)

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

Heard: May 15, 2008
Judgment: October 2, 2008*
Docket: 32085

* A corrigendum issued by the court on November 4, 2008 has been incorporated herein.

Proceedings: reversing *C. (R.) v. McDougall* (2007), 2007 CarswellBC 723, 2007 BCCA 212, 41 C.P.C. (6th) 213, 68 B.C.L.R. (4th) 203, (sub nom. *F.H. v. McDougall)* 396 W.A.C. 222, [2007] 9 W.W.R. 256, (sub nom. *F.H. v. McDougall)* 239 B.C.A.C. 222 (B.C. C.A.)**Proceedings: reversing in part *C. (R.) v. McDougall* (2005), 2005 BCSC 1518, 2005 CarswellBC 2578 (B.C. S.C.)**

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Peter Southey, Christine Mohr for Respondent, Her Majesty The Queen

Subject: Torts; Civil Practice and Procedure; Evidence; Family

Headnote

Torts --- Trespass — Trespass to person — Assault and battery — Sexual assault
Plaintiff had been resident student at residential school — Plaintiff claimed that while student he was sexually assaulted by supervisor at school — Plaintiff's action against supervisor and others was allowed — Trial judge concluded plaintiff had been sexually abused by supervisor and had been strapped by supervisor while at school — Court of Appeal allowed supervisor's appeal in part, concluding appeal from part of order finding he sexually assaulted plaintiff should be allowed — Court of Appeal found trial judge failed to consider serious inconsistencies in plaintiff's evidence in determining whether alleged sexual assaults had been proven to standard commensurate with allegation, and failed to scrutinize evidence in manner required — Plaintiff appealed — Appeal allowed — Decision of trial judge was restored — There is only one civil standard of proof at common law and that is proof on balance of probabilities — Judge should be mindful, where appropriate, of inherent probabilities or seriousness of allegations or consequences, but these considerations do not change standard of proof — While there had been some suggestion in case law that where criminal or morally blameworthy conduct was alleged criminal standard of proof or intermediate standard of proof applied, such alternatives were rejected — In all cases, evidence must be scrutinized with care by trial judge — Evidence must always be sufficiently clear, convincing and cogent to satisfy balance of probabilities test — Court of Appeal erred in holding trial judge to higher standard.

Civil practice and procedure --- Trials — General principles
Plaintiff had been resident student at residential school — Plaintiff claimed that while student he was sexually assaulted by supervisor at school — Plaintiff's action against supervisor and others was allowed — Trial judge concluded plaintiff had been sexually abused by supervisor and had been strapped by supervisor while at school — Court of Appeal allowed supervisor's appeal in part, concluding appeal from part of order finding he sexually assaulted plaintiff should be allowed — Court of Appeal found trial judge failed to consider serious inconsistencies in plaintiff's evidence in determining whether alleged sexual assaults had been proven to standard commensurate with allegation, and failed to scrutinize evidence in manner required — Plaintiff appealed — Appeal allowed — Decision of trial judge was restored — There is only one civil standard of proof at common law and that is proof on balance of probabilities — Judge should be mindful, where appropriate, of inherent probabilities or seriousness of allegations or consequences, but these considerations do not change standard of proof — While there had been some suggestion in case law that where criminal or morally blameworthy conduct was alleged

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criminal standard of proof or intermediate standard of proof applied, such alternatives were rejected — In all cases, evidence must be scrutinized with care by trial judge — Evidence must always be sufficiently clear, convincing and cogent to satisfy balance of probabilities test — Court of Appeal erred in holding trial judge to higher standard.

Evidence --- Proof — Standard — Balance of probabilities — Allegations of crime in civil actions
Plaintiff had been resident student at residential school — Plaintiff claimed that while student he was sexually assaulted by supervisor at school — Plaintiff's action against supervisor and others was allowed — Trial judge concluded plaintiff had been sexually abused by supervisor and had been strapped by supervisor while at school — Court of Appeal allowed supervisor's appeal in part, concluding appeal from part of order finding he sexually assaulted plaintiff should be allowed — Court of Appeal found trial judge failed to consider serious inconsistencies in plaintiff's evidence in determining whether alleged sexual assaults had been proven to standard commensurate with allegation, and failed to scrutinize evidence in manner required — Plaintiff appealed — Appeal allowed — Decision of trial judge was restored — There is only one civil standard of proof at common law and that is proof on balance of probabilities — Judge should be mindful, where appropriate, of inherent probabilities or seriousness of allegations or consequences, but these considerations do not change standard of proof — While there had been some suggestion in case law that where criminal or morally blameworthy conduct was alleged criminal standard of proof or intermediate standard of proof applied, such alternatives were rejected — In all cases, evidence must be scrutinized with care by trial judge — Evidence must always be sufficiently clear, convincing and cogent to satisfy balance of probabilities test — Court of Appeal erred in holding trial judge to higher standard.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Reversing findings of fact — Finding by judge alone — Finding based on credibility of witnesses
Where trial judge demonstrates that she is alive to inconsistencies in witness's evidence but still concludes that witness was nonetheless credible, in absence of palpable and overriding error, there is no basis for interference by appellate court.

Evidence --- Corroboration — When required — Primary witnesses in sexual offences cases
While corroborative evidence is always helpful and strengthens evidence of party relying on it, as matter of law, in cases of oath against oath, there is no requirement that sexual assault victim must provide independent corroborating evidence.

Evidence --- Proof — Standard — Balance of probabilities — Miscellaneous
In civil cases in which there is conflicting testimony, judge is deciding whether fact occurred on balance of probabilities — In such cases, provided judge has not ignored evidence, finding evidence of one party credible may well be conclusive of result because that evidence is inconsistent with that of other party.

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Civil practice and procedure --- Trials — Conduct of trial — Powers and duties of trial judge — Giving reasons for judgment
Where trial judge showed why she arrived at conclusion, reasons are not inadequate, even though it may be possible to say, in hindsight, that reasons were not as clear and comprehensive as they might have been — Failure to give adequate reasons is not freestanding basis for appeal — Where findings of credibility must be made, it must be recognized that it may be difficult for trial judge to put into words process by which decision is arrived at, but that does not make reasons inadequate — Where court of appeal expresses itself as being satisfied that it can discern why trial judge arrived at her conclusion, party faces serious obstacle to convince further appellate court that reasons are nonetheless inadequate.

Délits civils --- Atteinte directe — Atteinte directe à la personne — Voies de fait et batterie — Agression sexuelle
Plaignant avait été un pensionnaire dans un pensionnat — Plaignant a prétendu qu'un surveillant l'avait agressé sexuellement sur les lieux du pensionnat alors qu'il était étudiant — Action du plaignant déposée à l'encontre du surveillant et d'autres personnes a été accueillie — Juge du procès a conclu que le plaignant avait été agressé sexuellement et frappé à l'aide d'une ceinture par le surveillant sur les lieux du pensionnat — Cour d'appel a accueilli en partie l'appel interjeté par le surveillant, estimant que la partie de son appel interjetée à l'encontre de la conclusion à l'effet que le surveillant avait agressé sexuellement le plaignant devrait être accueillie — Cour d'appel a conclu que la juge du procès avait omis de prendre en considération les contradictions importantes du témoignage du plaignant pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve proportionnée aux circonstances et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû — Plaignant a formé un pourvoi — Pourvoi accueilli — Décision de la juge du procès a été rétablie — En common law, une seule norme de preuve s'applique dans les instances civiles, celle de la prépondérance des probabilités — Lorsque les circonstances s'y prêtent, le juge doit garder à l'esprit la probabilité intrinsèque des faits allégués ainsi que la gravité des allégations ou leurs conséquences; toutefois, ces considérations ne modifient en rien la norme de preuve — Bien qu'une certaine jurisprudence enseigne que lorsqu'une conduite criminelle ou moralement répréhensible est alléguée, la norme de preuve pénale ou une norme de preuve intermédiaire s'applique, ces avenues ont été rejetées — Dans tous les cas, la preuve doit être soigneusement examinée par le juge du procès — Preuve doit toujours être suffisamment claire et convaincante pour satisfaire au critère de la prépondérance des probabilités — Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte.

Procédure civile --- Procès — Principes généraux
Plaignant avait été un pensionnaire dans un pensionnat — Plaignant a prétendu qu'un surveillant l'avait agressé sexuellement sur les lieux du pensionnat alors qu'il était étudiant — Action du plaignant déposée à l'encontre du surveillant et d'autres personnes a été accueillie — Juge du procès a conclu que le plaignant avait été agressé sexuellement et frappé à l'aide d'une ceinture par le surveillant sur les lieux du pensionnat — Cour d'appel a accueilli en partie l'appel

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interjeté par le surveillant, estimant que la partie de son appel interjetée à l'encontre de la conclusion à l'effet que le surveillant avait agressé sexuellement le plaignant devrait être accueillie — Cour d'appel a conclu que la juge du procès avait omis de prendre en considération les contradictions importantes du témoignage du plaignant pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve proportionnée aux circonstances et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû — Plaignant a formé un pourvoi — Pourvoi accueilli — Décision de la juge du procès a été rétablie — En common law, une seule norme de preuve s'applique dans les instances civiles, celle de la prépondérance des probabilités — Lorsque les circonstances s'y prêtent, le juge doit garder à l'esprit la probabilité intrinsèque des faits allégués ainsi que la gravité des allégations ou leurs conséquences; toutefois, ces considérations ne modifient en rien la norme de preuve — Bien qu'une certaine jurisprudence enseigne que lorsqu'une conduite criminelle ou moralement répréhensible est alléguée, la norme de preuve pénale ou une norme de preuve intermédiaire s'applique, ces avenues ont été rejetées — Dans tous les cas, la preuve doit être soigneusement examinée par le juge du procès — Preuve doit toujours être suffisamment claire et convaincante pour satisfaire au critère de la prépondérance des probabilités — Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte.

Preuve --- Preuve — Norme — Prépondérance des probabilités — Allégations d'un crime dans des poursuites civiles
Plaignant avait été un pensionnaire dans un pensionnat — Plaignant a prétendu qu'un surveillant l'avait agressé sexuellement sur les lieux du pensionnat alors qu'il était étudiant — Action du plaignant déposée à l'encontre du surveillant et d'autres personnes a été accueillie — Juge du procès a conclu que le plaignant avait été agressé sexuellement et frappé à l'aide d'une ceinture par le surveillant sur les lieux du pensionnat — Cour d'appel a accueilli en partie l'appel interjeté par le surveillant, estimant que la partie de son appel interjetée à l'encontre de la conclusion à l'effet que le surveillant avait agressé sexuellement le plaignant devrait être accueillie — Cour d'appel a conclu que la juge du procès avait omis de prendre en considération les contradictions importantes du témoignage du plaignant pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve proportionnée aux circonstances et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû — Plaignant a formé un pourvoi — Pourvoi accueilli — Décision de la juge du procès a été rétablie — En common law, une seule norme de preuve s'applique dans les instances civiles, celle de la prépondérance des probabilités — Lorsque les circonstances s'y prêtent, le juge doit garder à l'esprit la probabilité intrinsèque des faits allégués ainsi que la gravité des allégations ou leurs conséquences; toutefois, ces considérations ne modifient en rien la norme de preuve — Bien qu'une certaine jurisprudence enseigne que lorsqu'une conduite criminelle ou moralement répréhensible est alléguée, la norme de preuve pénale ou une norme de preuve intermédiaire s'applique, ces avenues ont été rejetées — Dans tous les cas, la preuve doit être soigneusement examinée par le juge du procès — Preuve doit toujours être suffisamment claire et convaincante pour satisfaire au critère de la prépondérance des probabilités — Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte.

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Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Infirmer des conclusions de fait — Conclusion d'un juge seul — Conclusion tirée à partir de la crédibilité d'un témoin
Lorsque le juge du procès est conscient des contradictions dans le témoignage, mais qu'il arrive quand même à la conclusion que le témoin était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel.

Preuve --- Corroboration — Lorsque nécessaire — Principaux témoins dans les cas d'infractions de nature sexuelle
Bien qu'un élément de corroboration est toujours utile et étoffe la preuve offerte par une partie, dans les cas où c'est la parole de la victime contre celle du défendeur, légalement, aucune corroboration indépendante n'est exigée de la part de la victime d'une agression sexuelle.

Preuve --- Preuve — Norme — Prépondérance des probabilités — Divers
Au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités — Dans de tels cas, s'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive parce que ce témoignage contredit celui de la partie adverse.

Procédure civile --- Procès — Déroulement du procès — Pouvoirs et obligations du juge du procès — Rendre des motifs à l'appui du jugement
Lorsque la juge du procès a rendu les motifs sous-tendant sa conclusion, ces derniers ne sont pas insuffisants parce que, avec le recul, on pouvait dire qu'ils n'étaient pas aussi clairs et exhaustifs qu'ils auraient pu l'être — Omission de fournir des motifs suffisants ne constitue pas un motif d'appel distinct — Il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision mais ses motifs ne sont pas insuffisants pour autant — Dans la mesure où la Cour d'appel dit pouvoir discerner les raisons pour lesquelles la juge du procès a tiré sa conclusion, la partie qui souhaite convaincre le tribunal d'une instance supérieure que les motifs sont néanmoins insuffisants doit surmonter un obstacle de taille.

The plaintiff had been a resident student at a residential school. The plaintiff claimed that while a student, he was sexually assaulted by a supervisor at the school. The plaintiff's action against the supervisor and others was allowed. Despite inconsistencies in his evidence, the trial judge concluded that the plaintiff was a credible witness. The trial judge concluded that the plaintiff had been sexually abused by the supervisor and had been strapped by the supervisor while at the school. The Court of Appeal allowed the supervisor's appeal in part, concluding that his appeal from that part of the order finding that the supervisor had sexually assaulted the plaintiff should be allowed. The Court of Appeal found that the trial judge had failed to consider the serious inconsistencies in the plaintiff's evidence in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation", and failed to scrutinize the evidence in the manner required. The plaintiff appealed.

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Held: The appeal was allowed.

There is only one civil standard of proof at common law and that is proof on a balance of probabilities. A judge should be mindful, where appropriate, of inherent probabilities or the seriousness of the allegations or consequences, but these considerations do not change the standard of proof. While there had been some suggestion in case law that where criminal or morally blameworthy conduct was alleged the criminal standard of proof or an intermediate standard of proof applied, such alternatives were rejected. In all cases, evidence must be scrutinized with care by the trial judge. Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. The Court of Appeal erred in holding the trial judge to a higher standard. This was sufficient to decide the appeal.

Where the trial judge expressly states the correct standard of proof, or does not express a particular standard, it will be presumed that the correct standard was applied. In determining whether the correct standard has been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It was apparent from the reasons of the trial judge that she recognized this obligation. While the trial judge did not deal with every inconsistency in the plaintiff's evidence, she did address in a general way the arguments put forward by the defence. Where a trial judge demonstrates she is alive to the inconsistencies but still concludes that the witness was credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. In finding that the trial judge failed to scrutinize the plaintiff's evidence in the manner required by law, the Court of Appeal incorrectly substituted its credibility assessment for that of the trial judge.

While corroborative evidence is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim provide independent corroborating evidence.

In civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on the balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result. The trial judge did not ignore the supervisor's evidence or marginalize him.

Where the Court of Appeal is satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince a further appellate court that the reasons were inadequate. A failure to give adequate reasons is not a free standing basis for appeal. Where findings of credibility must be made, it may be very difficult for the trial judge to put into words the process by which the decision was arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say the reasons were not as clear and comprehensive as they might have been. The reasons of the trial

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judge were adequate.

The Court of Appeal erred in reversing the decision of the trial judge. The decision of the Court of Appeal was set aside and the decision of the trial judge restored.

Le plaignant avait été un pensionnaire dans un pensionnat. Le plaignant a prétendu qu'un surveillant du pensionnat l'avait agressé sexuellement alors qu'il était étudiant. L'action du plaignant déposée à l'encontre du surveillant et d'autres personnes a été accueillie. La juge du procès a conclu que le témoin était crédible, malgré la présence de contradictions dans son témoignage. La juge du procès a conclu que le plaignant avait été agressé sexuellement et frappé à l'aide d'une ceinture par le surveillant sur les lieux du pensionnat. La Cour d'appel a accueilli en partie l'appel interjeté par le surveillant, estimant que la partie de son appel interjetée à l'encontre de la conclusion à l'effet que le surveillant avait agressé sexuellement le plaignant devrait être accueillie. La Cour d'appel a conclu que la juge du procès avait omis de prendre en considération les contradictions importantes du témoignage du plaignant pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve « proportionnée aux circonstances » et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû. Le plaignant a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

En common law, une seule norme de preuve s'applique dans les instances civiles, celle de la prépondérance des probabilités. Lorsque les circonstances s'y prêtent, le juge doit garder à l'esprit la probabilité intrinsèque des faits allégués ainsi que la gravité des allégations ou leurs conséquences; toutefois, ces considérations ne modifient en rien la norme de preuve. Bien qu'une certaine jurisprudence enseigne que lorsqu'une conduite criminelle ou moralement répréhensible est alléguée, la norme de preuve pénale ou une norme de preuve intermédiaire s'applique, ces avenues ont été rejetées. Dans tous les cas, la preuve doit être soigneusement examinée par le juge du procès. La preuve doit toujours être suffisamment claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. La Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffisait pour statuer sur le pourvoi.

Lorsque le juge du procès énonce expressément la bonne norme de preuve ou lorsqu'il ne renvoie à aucune norme de preuve particulière, on présume qu'il a appliqué la bonne. Lorsqu'elle détermine si la bonne norme a effectivement été appliquée, la cour d'appel doit prendre garde de ne pas substituer son interprétation des faits à celle du juge du procès.

Le juge du procès ne devrait pas considérer le témoignage du plaignant en vase clos, mais il devrait plutôt examiner l'ensemble de la preuve pour déterminer l'incidence des contradictions sur les questions de crédibilité et de fiabilité touchant au coeur du litige. Il appert de ses motifs que la juge du procès a reconnu cette obligation. Bien qu'elle n'ait pas considéré chacune des contradictions du témoignage du plaignant, elle a examiné de façon générale les arguments de la défense. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand

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même à la conclusion que le témoin était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel. En concluant que la juge du procès avait omis d'examiner le témoignage du plaignant aussi attentivement qu'elle l'aurait dû légalement, la Cour d'appel a substitué à tort son appréciation de la crédibilité à celle de la juge du procès.

Bien qu'un élément de corroboration est toujours utile et étoffe la preuve offerte par une partie, dans les cas où c'est la parole de la victime contre celle du défendeur, légalement, aucune corroboration indépendante n'est exigée de la part de la victime d'une agression sexuelle.

Au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. Dans de tels cas, s'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive. La juge du procès n'a pas ignoré le témoignage du surveillant et ne l'a pas marginalisé.

Dans la mesure où la Cour d'appel dit pouvoir discerner les raisons pour lesquelles la juge du procès a tiré sa conclusion, la partie qui souhaite convaincre le tribunal d'une instance supérieure que les motifs sont insuffisants doit surmonter un obstacle de taille. L'omission de fournir des motifs suffisants ne constitue pas non plus un motif d'appel distinct. Il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision mais ses motifs ne sont pas insuffisants pour autant. De même, les motifs ne sont pas insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être. Les motifs de la juge du procès étaient suffisants.

La Cour d'appel a eu tort d'annuler la décision de la juge du procès. La décision de la Cour d'appel a été annulée, et celle de la juge du procès rétablie.

Annotation

The Supreme Court achieves welcome clarity in holding that in all civil cases there is only the one standard of proof on a balance of probabilities and that in any case the trial judge must scrutinise the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred [para 40]. The level of scrutiny does not, it is held, depend on the seriousness of the offence [para 45]. The Court does say, borrowing an approach developed in professional malpractice cases, that in all civil cases evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test [para 46]. This is the new standard which all judges from now on will be presumed to know.
In the course of his judgment Rothstein J. expressly rejects various approaches sometimes advanced in civil cases where criminal or morally blameworthy conduct is alleged. He lists them as follows:
(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the

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allegation;
(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;
(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test. [para. 39]
The Court squarely rejects the often-quoted approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (Eng. C.A.) that in civil cases the burden of proof must be "commensurate with the occasion" and within the standard of proof on a balance of probabilities "there may be degrees of probability within that standard depending on the subject matter". The Supreme Court does note that the Denning view was applied by Justice Dickson in *Oakes* to require a high degree of probability to demonstrably justify a *Charter* breach under section 1. That particular standard has not been overruled.
The advantage of the Rothstein approach is that in future, Canadian lawyers arguing, and judges deciding, any civil case will be using the same formula of a balance of probabilities. Note though this has been redefined and likely raised to one of "clear, convincing and cogent".
It was confusing for Lord Denning to use a shifting standard of proof depending on the case. I wonder though whether Lord Denning was not just being realistic rather than wrongheaded in suggesting that in both civil and criminal cases the degree of proof required is necessarily commensurate with the occasion. More proof is surely required to prove murder than a minor assault or a case of shoplifting?
Justice Rothstein makes it crystal clear that in civil sexual assault cases the complex *W. (D.)* approach (substantially undermined but not abolished in criminal cases in *R. v. S. (J.H.)*, [2008] 2 S.C.R. 152) is NOT an appropriate tool [para. 86]. More good news there.

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Table of Authorities

Cases considered by *Rothstein J.*:

B (Children), Re (2008), [2008] 3 W.L.R. 1, [2008] 4 All E.R. 1, [2008] 2 F.L.R. 141, [2008] 2 F.C.R. 339, [2008] Fam. Law 619, [2008] Fam. Law 837 (U.K. H.L.) — considered

Bater v. Bater (1950), [1951] P. 35, [1950] 2 All E.R. 458 (Eng. C.A.) — considered

Continental Insurance Co. v. Dalton Cartage Co. (1982), 25 C.P.C. 72, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559, (sub nom. *Dalton Cartage Ltd. v. Continental Insurance Co.)* 40

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> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *B (Children), Re* at para. 72:

> ... Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *B (Children), Re*:

> ... Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

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> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues, but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

96 I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. Were the Reasons of the Trial Judge Adequate?

97 The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that lead to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this court that the reasons are nonetheless inadequate.

98 The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (S.C.C.). In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34 (S.C.C.), Binnie J. summarized the duty to give adequate reasons:

> (1) To justify and explain the result;
>
> (2) To tell the losing party why he or she lost;
>
> (3) To provide for informed consideration of the grounds of appeal; and
>
> (4) To satisfy the public that justice has been done.

99 However, an appeal court cannot intervene merely because it believes the trial judge did a

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Para 23

Para 29

COURT OF APPEAL FOR ONTARIO

CITATION: Dovbush v. Mouzitchka, 2016 ONCA 381
DATE: 20160520
DOCKET: C59791

2016 ONCA 381 (CanLII)

Hoy A.C.J.O., Blair and Roberts JJ.A.

BETWEEN

Vitaliy Dovbush and Alexander Faltschuk

Plaintiffs (Appellants)

and

Bogdan Mouzitchka, Alexandra Mouzitchka and IMB+Records Inc.

Defendants (Respondents)

Sergiy Timokhov, for the appellants

Stephen M. Werbowyj, for the respondents

Heard: April 21, 2016

On appeal from the Judgment of Justice K. Whitaker of the Superior Court of Justice, dated December 1, 2014, with reasons reported at 2014 ONSC 6480.

By the Court:

Overview

[1] Vitaliy Dovbush and his brother, Alexander Faltschuk, entered into negotiations with Bogdan and Alexandra Mouzitchka regarding the purchase of a certain percentage of IMB+Records Inc. Dovbush made several payments to the

Mouzitchkas totalling $600,000. When the relationship fell apart, Dovbush and Faltschuk sued to recover those payments. The trial judge held the payments were a non-refundable down payment on the brothers' investment and dismissed their action.

[2] The brothers seek to set aside that decision, although only Dovbush is actively pursuing the appeal.

[3] We agree that a new trial must be ordered. It appears that the trial judge may have mischaracterized the central issue for determination. We have concluded that, unfortunately, his reasons do not permit us to conduct a meaningful appellate review to assess whether that was the case or to understand why he arrived at the findings and conclusions he did.

[4] Accordingly, for the reasons that follow, the appeal is allowed, the judgment is set aside, and a new trial is ordered.

Factual Background

[5] The Mouzitchkas are the principals and shareholders of IMB, a telecom-based corporation that brings Eastern European cable network signals to North America. Dovbush and Faltschuk were interested in IMB and negotiated with the respondents to acquire a 20-25% interest in it.

[6] At the end of the day, however – after the exchange of various draft letters of intent and at least one meeting of the parties alone – the relationship between

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the parties fell apart. The trial judge found that an oral agreement for the purchase and sale of shares had been reached. In the course of their dealings, the appellants paid the respondents a total of $600,000 on the potential payment of $1,000,000 for a 25% interest.

[7] At trial, the issues centred on whether the appellants were entitled to the return of the $600,000 when the relationship fell apart. Dovbush and Faltscuk say that the monies were advanced for two purposes: (i) to demonstrate their financial wherewithal to complete the transaction; and (ii) to allow them to commence their due diligence exercise by obtaining access to IMB's financial and other records. The reason for obtaining access was to confirm IMB's worth of at least $4 million, as they say the respondents represented. They characterized the payments variously as a refundable deposit or down payment, or a loan to the respondents repayable if the transaction did not close. The Mouzitchkas, on the other hand, characterized the advances as a non-refundable partial payment of the purchase price for their shares of IMB.

[8] There appears to be little dispute that the parties were contemplating an agreement whereby the appellants would purchase what ultimately became a 25% shareholding position in IMB for $1 million. On other aspects of the proposed transaction, they differed. In any event, the appellants made an initial payment of $100,000 in early January 2012 and subsequent payments for a total of $600,000 by early March.

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[9] On March 3, 2012, the respondents and the appellant Dovbush signed a document, witnessed by the appellant Faltschuk and the respondents' son, Oleg Mouzitchka (the "March 3 Receipt"), which stated:

> We, Bogdan and Alexandra Mouzitchka, have received $600,000 from Vitaliy Dovbush as down payment of $1,000,000 total for 25% of IMB+Records.

[10] The parties were represented by solicitors throughout. During this period there were a number of draft letters of intent exchanged between the solicitors, seemingly reflecting a different understanding of the proposed transaction (including with respect to the treatment of the funds to be advanced by the appellants). The Mouzitchkas maintained that an oral agreement was reached at their lawyer's office at a meeting between the parties, but without the lawyers, on January 19, 2012.[1] At that meeting, the Mouzitchkas say, an agreement was finalized whereby: (i) the appellants would purchase 25% of the shares of IMB for a purchase price of $1 million, with the business being valued at $4 million; (ii) the appellants would work for the company for $100,000 a year; and, (iii) $400,000 of the purchase price would be loaned back to the company by the Mouzitchkas as a shareholders loan. The monies advanced were to be non-refundable payments made on account of the purchase price.

---

[1] It is accepted that: the parties arrived at the respondent's solicitor's offices unannounced and their solicitor refused to meet without the appellants' lawyer being present; the respondents' solicitor called the appellants' solicitor, and the appellants spoke to their solicitor; and the meeting proceeded with the parties only present.

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[11] With very brief reasons, the trial judge dismissed the action. He rejected what he characterized as the appellants' claim that the monies advanced constituted a loan transaction and accepted the respondent's position that the transaction involved an agreement to purchase shares in which the monies advanced were invested as a non-refundable down payment. Dovbush and Faltschuk have appealed that decision, although only Dovbush is actively pursuing the appeal. They seek to set aside the judgment and ask that this Court either grant judgment in the appellants' favour or order a new trial.

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Discussion

[12] There are two particular bases for our conclusion that a new trial must be ordered. First, from a review of the brief reasons delivered by the trial judge, it appears that he may have mischaracterized the central issue to be determined. Secondly, the reasons provided do not permit us to conduct a meaningful appellate review to determine whether that was indeed the case and, if so, whether the mischaracterization undermined the trial judge's ultimate determination. We do not know the basis for his findings, including his credibility findings that were central to the resolution of the dispute. We have no satisfactory explanation for his conclusions or the reasons for them.

[13] The appellants sued to recover the $600,000 they had advanced to the respondents during the course of their dealings, less the sum of $190,000 that

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the respondents had returned. They also claimed relief under the oppression remedy provisions, and other sections of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"). By way of counterclaim, the respondents sought injunctive relief restraining the appellants from soliciting business from IMB customers and from competing with IMB's business, damages, and in the alternative, specific performance of the alleged agreement of purchase and sale.

[14] The trial lasted five days. It involved complex and conflicting evidence concerning a failed share purchase transaction. The trial judge dismissed the appellants' claim in very brief reasons. The counterclaim, although not part of these appeal proceedings, was dismissed in one line: "The cross claim is dismissed."

<u>The Mischaracterization of the Issue</u>

[15] To the extent they permit review, the trial judge's brief reasons suggest that he may well have mischaracterized the central issue he was to determine and that this mischaracterization may have skewed his assessment of the case by leading him to focus on the wrong question. At paras. 3-6 of his reasons, the trial judge said:

> [3] The issue between the parties is the correct characterization of the transaction.
>
> [4] The plaintiffs say they advanced a loan to the defendants, on demand and at their discretion.

> [5] The defendants say the plaintiffs invested money in their company and the funds invested cannot be recalled under the agreement.
>
> [6] I find the financial transaction is a share and purchase agreement and not a loan.

[16] The central issue for determination by the trial judge was not “the correct characterization of the transaction”, however. The central issue was the correct characterization of the monies advanced by the appellants during the parties’ dealings in connection with the transaction. Were those advances (i) non-refundable partial payments on account of the purchase price, as the respondents contended, or (ii) a refundable deposit/down payment or a loan pending completion of the transaction repayable in the event of non-completion, as the appellants submitted?

[17] No one disputed that the contemplated transaction was a share purchase transaction. The appellants never argued that the monies were being advanced to either the Mouzitchkas or IMB by way of a “loan transaction” in the sense that they were to be creditors rather than shareholders. Yet the trial judge appears to have treated the dispute as if it were a resolution of that dichotomy, placing some emphasis, at paras. 14-15, on the fact that “no loan documents were prepared or executed” while omitting the fact that neither was any share purchase agreement documentation prepared or executed. This turned his attention away from the real question: the characterization of the advances.

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[18] Moreover, even if an oral agreement for the purchase and sale of shares had been reached by the parties on January 19, as the trial judge accepted, the question still remained: how were the funds that had been advanced to be treated if the transaction of purchase and sale did not close? By focussing on whether there was an oral agreement reached, the trial judge appears to have lost sight of the principal question that remained to be determined.

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The Insufficiency of Reasons

[19] While the trial judge expressed conclusions and made findings that may or may not have been open to him on the record, we reluctantly conclude that his reasons are insufficient to permit meaningful appellate review and that appellate intervention is warranted in the circumstances.

The Applicable Principles

[20] Trial judges are called upon to make difficult decisions, often in difficult circumstances. They preside as the particular dynamics of the trial unfold. Inadequate reasons therefore pose a particular challenge for appellate review.

[21] On the one hand, as Rothstein J. noted in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 99, "an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is the failure to give adequate reasons a free standing basis for appeal." On the other hand, beginning with the companion cases of *R. v. Sheppard*, 2002 SCC 26,

[2002] 1 S.C.R. 869, and *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, Canadian jurisprudence has confirmed the importance of trial judges providing adequate reasons for their decisions, and accepted that if the insufficiency of the reasons prevents meaningful appellate review, appellate intervention may be justified: see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 10-35.

[22] Although originally developed in the criminal law context, the same rationale that underpins the duty to provide adequate reasons applies in the civil context as well, with necessary modifications: *Canadian Broadcasting Pension Plan v. BF Realty Holdings Ltd.* (2002), 160 O.A.C. 72 (C.A.), at paras. 64 and 114; *Diamond Auto Collision Inc. v. The Economical Insurance Group*, 2007 ONCA 487, 227 O.A.C. 51, at paras. 10-14; and *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at paras. 62-64. The rationale is that reasons are necessary (i) to justify and explain the result; (ii) to tell the losing party why he or she lost; (iii) to provide public accountability and satisfy the public that justice has been done and is seen to have been done; and (iv), to permit effective appellate review: *F.H. v. McDougall*, at para. 98.

[23] What makes reasons run afoul of this rationale? In the end, for purposes of appellate intervention, it turns on the overarching principle of whether the reasons permit meaningful and effective appellate review. Appellate courts will take a contextual and functional approach to addressing whether reasons meet this standard. The exercise has been variously described as one of determining

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whether the reasons demonstrate: “the path taken by the trial judge through confused or conflicting evidence” (*Sheppard*, at para. 46); or that “the trial judge came to grips with the issues and explained sufficiently his … conclusions and the reasons and basis for them” (*Canadian Broadcasting Corporation Pension Plan*, at para. 114); or, the “what” and the “why” of the result (*R.E.M.*, at paras. 17-20).

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[24] In *R.E.M.*, at paras. 17-18, the Supreme Court of Canada adopted the reasoning of Doherty J.A. in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), with respect to the object of a trial judge’s reasons. The Court said:

> Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.
>
> Explaining the "why" and its logical link to the "what" does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. Doherty J.A. in *Morrissey*, at p. 525, states:
>
>> A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she

> arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict. [Emphasis added.]

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[25] In *R.E.M.* as well, at para. 29, the Court underlined its earlier comment in *Sheppard*, at para. 55, emphasizing the importance of the need for adequate reasons when "a trial judge is called upon to address troublesome principles of unsettled law or to resolve confused and contradictory evidence on a key issue" (emphasis added).

The Principles Applied

[26] Here, there was confused and contradictory evidence on a number of key issues, with no explanation of the basis upon which those conflicts were resolved, if at all. These included, amongst others, the following questions:

> (i) whether an oral agreement for purchase and sale of the shares had in fact been reached on January 19, 2012 at the lawyer's office – as the trial judge found, accepting the respondents' position;
>
> (ii) why, if that were the case, the appellants' solicitor prepared two further draft letters of intent setting out differing versions of the transaction (the first on January 19 – the same day the Mouzitchkas insist an oral

agreement was reached – and the second on July 27), why they elicited no response, and what impact, if any, they had on the trial judge's decision;

(iii) whether the advances made were contingent upon the appellants being satisfied as to the financial value of IMB (said to have been represented by the respondents to be $4 million);

(iv) whether the share certificate for 100 common shares, apparently issued to Dovbush and Faltschuk on January 19, was intended to be an outright transfer of the shares to them as shareholders, or simply a transfer to provide security for repayment of the advances if the transaction were not completed;

(v) whether the corporate documentation and the respondents' subsequent treatment of the appellants properly reflected the appellants "share certificate as security" claim or the respondents "partial purchase price of issued shares" claim (e.g., the appellants were not provided with notice of shareholders meetings or with audited financial statements prior to the

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> commencement of the litigation, nor were they paid dividends); and
>
> (vi) whether the appellants had been "oppressed" as that term is understood in the *OBCA*.

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[27] The trial judge did not address questions (ii), (v) and (vi) at all and only indirectly dealt with questions (iii) and (iv). Each party submitted lengthy written submissions addressing these and other issues – not surprisingly, from differing perspectives. The trial judge did not refer to them. The trial judge's reasons needed to show that he had at least applied his mind to, and come to grips with these various questions. Regrettably, they do not.

[28] In the face of these conflicts and the contradictory testimony relating to them, his entire consideration of the central credibility issues consisted of the following, at para. 13:

> I found the Mouzitchkas credible. On the contrary, I found Dovbush and his brother, Faltschuk, to be incredible. They (the brothers) made assertions of fact which simply made no sense in the normal course of business conduct. Where the evidence differs as between the brothers and the Mouzichaka's, I prefer the latter.

[29] Generic boiler-plate findings of credibility of that nature are not helpful. A trial judge owes the losing party an explanation for rejecting the evidence of a key witness or witnesses (particularly when the key witnesses are, themselves,

the losing parties), and, while the absence of such an explanation is not necessarily dispositive, it may go a long way toward putting the reasons beyond the reach of meaningful appellate review: *R. v. J.J.R.D.* (2006), 218 O.A.C. 37 (C.A.), at para. 36, citing *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247, at paras. 26-29 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 340.

[30] The terse comment the "[t]hey (the brothers) made assertions of fact which simply made no sense in the normal course of business conduct" does not assist without some indication of what those assertions were and why they made no business sense. If the reference is to the appellants' position that the monies advanced were by way of a loan repayable in the event that the transaction were not completed because the purchasers were not satisfied following due diligence inquiries, we do not think this "[makes] no sense in the normal course of business conduct". A share purchase transaction could be structured in such a fashion. The assertion makes no less business sense than the respondents' contention that the appellants advanced $600,000 on account of a $1,000,000 purchase price with no prospect of recovering any of that 60% amount if the transaction failed and without any due diligence or other conditions in favour of the appellants – factors not alluded to by the trial judge.

[31] The Mouzitchkas and Dovbush signed the March 3 Receipt characterizing the $600,000 as "a down payment" on the $1 million purchase price. The trial judge does not refer to this document. There are authorities to the effect that a

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down payment is generally refundable, in the absence of evidence to the contrary: see *Conner v. Bulla*, 2010 BCCA 457, at para. 10; *Stephenson v. Bromley*, [1928] 4 D.L.R. 737 (Man. C.A.). Even if the amount paid is characterized as a non-refundable deposit, where the sum of the deposit is out of all proportion to the losses suffered, the court may order the deposit be returned: *Stockloser v. Johnson*, [1954] 1 All E.R. 630 (C.A.); *869163 Ontario Ltd v. Torrey Springs II Associates Ltd Partnership* (2005), 76 O.R. (3d) 362, at para. 25; *Tang v. Zhang*, 2013 BCCA 52, 41 B.C.L.R. (5th) 69, at para. 27; *Pleasant Developments Inc. v. Iyer* (2006), 210 O.A.C. 90 (Div. Ct.), at para. 13.

[32] In their closing submissions at trial, the appellants cited an old decision of this court in *DePalma v. Runnymede Iron & Steel Company*, [1950] 1 D.L.R. 557, which discusses the distinction between down payments or part payments and deposits and the ordinary assumptions that apply to each. This issue was not addressed by the trial judge and we do not know how the interplay between the principles applying to refundable and non-refundable down payments, and returnable and non-returnable deposits, would have played out on the record had he done so.

[33] Indeed, at para. 15, the trial judge appears to have been under the impression that "the only paper suggesting this was a loan was written by the plaintiff just prior to the commencement of the litigation", a reference to a demand letter sent by the appellants' solicitor at that time. However, each of the January

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12, January 19 and July 27 draft Letters of Intent prepared by that solicitor makes specific reference to the monies advanced being loans made personally to the Mouzitchkas. The trial judge does not refer to any of these draft Letters of Intent or explain why they did not have a bearing on his decision.

Conclusion and Disposition

[34] On the bases outlined above, we conclude that the judgment below must be set aside. The trial judge may have mischaracterized the central issue that he was to determine and this mischaracterization may have undermined his ultimate determination. We cannot tell on the record, however, because the reasons provided do not show us the pathway taken through the conflicting evidence to arrive at his result or provide an adequate explanation for the “why” of the result. In the same way, the reasons do not show that the trial judge came to grips with the other important issues dividing the parties, including the central credibility issues. In the end, they do not permit us to conduct a meaningful and effective appellate review.

[35] For those reasons, the appeal must be allowed, the judgment below set aside in its entirety, and a new trial ordered.

[36] At the very close of argument, following an exchange as to costs, the respondents’ counsel submitted that even if the appeal is allowed and the judgment below set aside, the decision should only affect the appellant Dovbush

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and the judgment should remain in effect as it relates to the appellant Faltschuk. This submission was based on the fact that only Dovbush was actively pursuing the appeal. We reject it. While Dovbush may have been the only active appellant, the Notice of Appeal was filed on behalf of both appellants and no Notice of Abandonment was ever filed on behalf of Faltschuk. In any event, we see no basis on which the judgment below could be set aside on the grounds set out above in favour of one of the appellants/plaintiffs and not the other.

[37] In accordance with the agreement of counsel, costs of the appeal are awarded to the appellants as the successful party, fixed in the amount of $20,000 inclusive of disbursements and HST. The costs of the trial are remitted to the judge hearing the new trial.

Released: May 20, 2016

“Alexandra Hoy A.C.J.O.”

“R.A. Blair J.A.”

“L.B. Roberts J.A.”

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Enercraft Silva-Saw Ltd. v. Millward | 1998 CarswellOnt 2400, 71 O.T.C. 238, 80 A.C.W.S. (3d) 394 | (Ont. Gen. Div., Jun 3, 1998)

1992 CarswellBC 513
Supreme Court of Canada/Cour suprême du Canada

Pax Management Ltd. v. Canadian Imperial Bank of Commerce

1992 CarswellBC 2422, 1992 CarswellBC 513, [1992] 2 S.C.R. 998, [1992] 6 W.W.R. 289, [1992] S.C.J. No. 78, 141 N.R. 324, 14 C.B.R. (3d) 145, 15 B.C.A.C. 81, 27 W.A.C. 81, 35 A.C.W.S. (3d) 712, 6 B.L.R. (2d) 1, 71 B.C.L.R. (2d) 164, 95 D.L.R. (4th) 1, J.E. 92-1466, EYB 1992-67040

CANADIAN IMPERIAL BANK OF COMMERCE v. PAX MANAGEMENT LTD., LEADER INVESTMENT CORP., WESSON HOLDINGS LTD., THOMAS ANTHONY BRUCE, KEITH WILFRED DIXON, JONATHAN EDMUND JONES, RICHARD GAGE MOODY, JACK JONES TEMPLE, WILLIAM GORDON WATT, GARY GROVES WESTOVER, DAVID GARTH WORTMAN, GLEN DONALD ROST, GLENONNE HOLDINGS LTD. and ROST ENTERPRISES LTD.

La Forest, Sopinka, Cory, Stevenson* and Iacobucci JJ./MM. les juges La Forest, Sopinka, Cory, Stevenson** et Iacobucci.

Heard: March 26, 1992/Le 26 mars 1992
Judgment: September 24, 1992/Le 24 septembre 1992
Docket: Doc./N[o] 22194

* Stevenson J. took no part in the judgment/M. le juge Stevenson n’a pas pris part au jugement.

** Stevenson J. took no part in the judgment/M. le juge Stevenson n’a pas pris part au jugement.

Counsel: *D. Ross Clark* and/et *Rhys Davies*, for appellant/pour l’apelante.
Richard R. Sugden, Q.C./c.r., and/et *Peter A. Spencer*, for respondent/pour les intimés.

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Subject: Corporate and Commercial; Insolvency

Headnote

Creditors and Debtors --- Payment by debtor — Circumstances of payment — Time for payment — Payment on demand

Guarantee and Indemnity --- Guarantee — Grounds for termination of guarantee — Misrepresentation — Fraudulent misrepresentation — Materiality

Guarantee and indemnity — Guarantee — Deceit of bank in obtaining consent of debtor company for investigation of financial affairs and in appointing receiver constituting misrepresentation — Misrepresentation not causing prejudice to guarantors and not entitling them to release from obligations under guarantees.

Receivers — Appointment under instrument — Appointment of receiver 24 hours after demand to repay loans being reasonable where debtor company would not have been able to repay loan even if given more time.

Cautionnements et indemnités — Cautionnement — Conduite trompeuse de la banque dans l'obtention du consentement de la société débitrice à l'examen de sa situation financière, ainsi que dans la nomination d'un séquestre, constituant une déclaration inexacte — Déclaration inexacte ne causant aucun préjudice aux cautions et ne les libérant pas de leurs obligations en vertu des cautionnements.

Séquestres — Nomination en vertu d'un acte — Nomination d'un séquestre 24 heures après la demande de remboursement des emprunts étant raisonnable dans la mesure où la société débitrice aurait été incapable de rembourser les emprunts même si elle avait disposé de plus de temps.

The appellant bank financed the purchase of shares of a company by the individual respondents' holding company on the security of the guarantees of the respondents. When the bank became concerned about the company's financial status, it considered calling the loans. Before doing so, it obtained the company's consent to an investigation of the company's affairs by a firm of chartered accoun tants. The bank told the company that the investigation was necessary to assist with the relationship between the bank and the company. Before receiving the final report of the accountants, the bank called the loans and appointed a receiver. The company was actually insolvent at the time, but the bank was not aware of this. The bank obtained the company's consent to the receivership, as it could not appoint the receiver without evidence of insolvency. In order to convince the company's directors to sign the consent, the bank's agent told them that if they did not do so the bank would commence proceedings the next day, although the bank had no such intention. The bank made a demand the day after the consent was signed and placed the company into receivership the day after that.

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The respondents sued the bank for wrongfully putting the company into receivership. The bank counterclaimed for the balance due on the loans and personal guarantees. At trial, the bank's counterclaim was allowed and the respondents' claims were allowed in part. The trial judge found that the bank had been deceitful in obtaining the consent to the receivership and that the appointment of the receiver was invalid as a result. The misrepresentation did not, however, entitle the respondents to be released from their guarantees. The trial judge also found that the company's insolvency entitled the bank to call the loans, even though it was not aware of the insolvency, and that the 24-hour notice to repay the loans was sufficient time in the circumstances as the company could not have repaid the loans even if it had been given more time.

The respondents appealed with respect to the finding on the guarantees. The Court of Appeal refused to interfere with the trial judge's findings of deceit but found that it was sufficient to discharge the respondents from their obligations under their guarantees. The respondents' claim for damages against the bank was dismissed as the Court of Appeal agreed with the trial judge's finding that they had suffered no damages from the receivership and that the quick winding-up of the company was in their best interests.

The bank appealed and the respondents cross-appealed on the issue of damages for the bank's deceit.

Held:

The appeal was allowed and the cross-appeal dismissed.

There was no ground to interfere with the finding of deceit as it was based on the trial judge's assessment of the credibility of a number of witnesses. There was no palpable error on the part of the trial judge.

There was also no need to interfere with the trial judge's findings that the 24-hour notice period was reasonable in the circumstances. Given that the trial judge found that the early receivership reduced the respondents' liability on their guarantees, there was no damage resulting from the immediate appointment of a receiver. The respondents' claim for damages was dismissed.

The Court of Appeal's decision that the guarantors should be discharged from their obligations under the guarantees was overturned. In general, a guarantor will be discharged only when acts of the creditor have prejudiced the guarantor. A guarantor's liability will be fully discharged if a materially different risk from that originally agreed to is imposed on the guarantor as a result of a variation or breach of the terms of the principal contract. Where the creditor breaches the principal contract but no prejudice to the guarantor results, the guarantor will not be discharged. No discharge will result from acts that have no impact on the magnitude or likelihood of the materialization of the risk. As the bank made misrepresentations that led to a consent that, given the company's actual insolvency, was superfluous and that caused the guarantors no prejudice, no discharge should be granted.

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. . . . .

La banque appelante a financé l'achat des actions d'une société par la société de portefeuille des personnes physiques intimées, qui ont cautionné la transaction. Lorsque la banque en est venue à s'inquiéter de la situation financière de la société, elle a envisagé de demander le remboursement des emprunts. Auparavant, elle a obtenu le consentement de la société afin de faire examiner les affaires de cette dernière par une firme de comptables agréés. La banque a affirmé à la société que cette démarche visait à aider la relation en cours entre elles. Avant que les comptables n'aient présenté leur rapport final, la banque a demandé le remboursement des emprunts et nommé un séquestre. La société était alors insolvable mais la banque l'ignorait. La banque a obtenu le consentement de la société à la mise sous séquestre, ne pouvant nommer un séquestre sans avoir de preuve de l'insovabilité. Afin d'amener les administrateurs de la société à signer ce consentement, le représentant de la banque leur a dit que s'ils refusaient, la banque intenterait des procédures judiciaires dès le lendemain, bien qu'en fait, la banque n'avait aucune telle intention. La banque a demandé le remboursement des emprunts le lendemain de la signature du consentement, et a procédé à la mise sous séquestre de la société le surlendemain.

Les intimés ont poursuivi la banque au motif qu'elle avait eu tort de mettre la société sous séquestre. En demande reconventionnelle, la banque a réclamé le solde exigible en vertu des prêts et des cautionnements personnels. En première instance, la demande reconventionnelle de la banque a été accueillie, alors que les demandes principales des intimés n'ont été accueillies qu'en partie. Le premier juge a conclu que la banque s'était conduite de façon trompeuse en incitant la société à consentir à la mise sous séquestre et que, par conséquent, la nomination du séquestre n'était pas valide. La déclaration inexacte de la banque ne libérait cependant pas les intimés de leurs cautionnements. Le juge de première instance a aussi conclu que l'insolvabilité de la société donnait à la banque le droit de demander le remboursement des emprunts, même si elle ne savait pas que la société était insolvable, et que le délai de 24 heures accordé pour le paiement était suffisant dans les circonstances, étant donné que la société n'aurait pas été en mesure de rembourser les emprunts même si elle avait disposé de plus de temps.

Les intimés ont interjeté appel des conclusions relatives aux cautionnements. La Cour d'appel a refusé de modifier les conclusions du juge de première instance quant à la conduite trompeuse de la banque, mais a cependant jugé que ces conclusions suffisaient à libérer les intimés des obligations qui leur incombaient en vertu des cautionnements. La demande de dommages-intérêts des intimés à l'encontre de la banque a été rejetée, la Cour d'appel confirmant la conclusion du juge de première instance à l'effet que la mise sous séquestre ne leur avait causé aucun préjudice, et qu'une liquidation rapide de la société était dans leur meilleur intérêt.

La banque a formé un pourvoi, et les intimés ont formé un pourvoi incident quant à la question des dommages-intérêts résultant de la conduite trompeuse de la banque.

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Le pourvoi a été accueilli et le pourvoi incident rejeté.

Il n'y avait pas lieu de réexaminer la conclusion de conduite trompeuse, laquelle était fondée sur l'appréciation de la crédibilité d'un certain nombre de témoins par le juge de première instance, qui n'a commis aucune erreur manifeste à cet égard.

De même, il n'y avait pas lieu de modifier la conclusion du juge de première instance à l'effet que le délai de paiement de 24 heures était raisonnable dans les circonstances. Puisque le premier juge a conclu que la mise sous séquestre hâtive avait permis de réduire la responsabilité assumée par les intimés aux termes de leurs cautionnements, aucun préjudice n'avait résulté de la nomination immédiate d'un séquestre. La demande de dommages-intérêts des intimés devait donc être rejetée.

La décision de la Cour d'appel de libérer les cautions de leurs obligations en vertu des cautionnements a été infirmée. En général, une caution ne sera libérée que lorsque les agissements du créancier lui ont porté préjudice. Une caution sera libérée de toute responsabilité si on lui impose un risque sensiblement différent de celui qu'elle a assumé à l'origine, en modifiant ou violant les termes du contrat principal. Lorsque le créancier viole le contrat principal mais qu'il n'en résulte aucun préjudice pour la caution, cette dernière ne sera pas libérée. Aucune libération ne découlera d'agissements qui n'ont pas quelque incidence sur l'amplitude du risque assumé ou sur la probabilité qu'il se matérialise. La banque a fait des déclarations inexactes afin d'obtenir un consentement que l'insolvabilité de la société rendait superflu, et qui n'a causé aucun préjudice aux cautions. La libération ne devait donc pas être accordée.

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Royal Bank v. Coastal Music Distributors Ltd. (1982), 16 B.L.R. 289, (sub nom. *Nobes v. Royal Bank)* 49 N.S.R. (2d) 634, 96 A.P.R. 634 (C.A.) — *applied/appliqué*

Appeal and cross-appeal from decision reported at (1990), 1 C.B.R. (3d) 1, [1991] 1 W.W.R. 74, 49 B.C.L.R. (2d) 195, 2 B.L.R. (2d) 81 (C.A.), setting aside decision reported at (1988), 1 C.B.R. (3d) at 31, additional reasons 1 C.B.R. (3d) at 70 (B.C. S.C.), dismissing guarantors' action for wrongful appointment of receiver and granting counterclaim/Pourvoi et pourvoi incident contre un arrêt rapporté à (1990), 1 C.B.R. (3d) 1, [1991] 1 W.W.R. 74, 49 B.C.L.R. (2d) 195, 2 B.L.R. (2d) 81 (C.A.), infirmant un jugement rapporté à (1988), 1 C.B.R. (3d) 31 et 70 (B.C. S.C.), rejetant une action pour nomination injustifiée d'un séquestre et accueillant une demande reconventionnelle.

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

1 This appeal [from (1990), 1 C.B.R. (3d) 1, [1991] 1 W.W.R. 74, 49 B.C.L.R. (2d) 195, 2 B.L.R. (2d) 81 (C.A.)] raises the issue of whether a guarantor will be discharged because of misrepresentations made to the guarantor by the creditor in the absence of any prejudice to the interests of the guarantor.

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I. Facts

2 In 1980, all of the individual respondents except Glen Donald Rost purchased 90 per cent of the shares of Beaver Transport Ltd. (”Beaver”), through their holding company, the respondent Pax Management Ltd. (”Pax”). Beaver was a trucking company located in Fort St. John, British Columbia. The individual respondents, except Rost and Wortman, were doctors who practised together. Wortman is their business manager and manager of Pax. Rost is the operations manager of Beaver. The respondents Leader Investment Corp. (”Leader”) and Wesson Holdings Ltd. (”Wesson”) were owned by Pax. The remaining 10 per cent of Beaver's shares were purchased by the respondent Rost through his company, the respondent Glenonne Holdings Ltd. (”Glennone”).

3 The purchase of the shares was financed by the appellant, Canadian Imperial Bank of Commerce (the “bank”). The loan agreement, and subsequent operating and capital loans made by the bank, were structured as loans to Beaver with guarantees of its indebtedness by the respondents. The guarantees were general guarantees on the bank's standard form providing for the guarantee of current and future liabilities to the bank.

4 The bank subsequently became concerned with the financial health of Beaver, and by 1983 was considering calling the loans. On March 1, 1983, Mr. Holford, the Fort St. John branch manager of the bank, wrote to his regional office recommending that the loans be called and demand be made on the guarantees. The regional office referred the matter to the head office of the bank in Toronto. The bank's head office decided that it should have a firm of chartered accountants examine Beaver's affairs before making the decision to call the loans and appoint a receiver. The local branch of the bank in Fort St. John was given the task of persuading Beaver to accept an independent review of its affairs. The assistant manager of the branch, Mr. Arthur, told Wortman that the reason for the investigation was to assist with the ongoing relationship between Beaver and the bank. On that belief, Beaver agreed to the review and agreed to pay the investigation fees of approximately $10,000. Mr. Meikle, of the accounting firm of Samson, Belair began conducting the review.

5 After Meikle had begun his investigation, but before he had submitted any formal report to the bank, the bank made the decision to call its loans and to appoint a receiver. The bank made this decision on the basis of an initial oral report from Meikle that Beaver was in financial difficulty and also on the belief that, if a receiver was appointed at this time, any deficiency would be smaller than if the appointment was delayed since Beaver's receivables were at their highest point. Although Beaver was in fact insolvent at the time, the bank did not know this. Beaver was not behind in its payments to the bank. The bank knew there were problems with the wording of its loan agreement which made it difficult to justify a demand for the loans if Beaver was not in fact insolvent. The crucial section of the contract between the bank and Beaver was in the following language:

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> 5. The Principal Sum, interest and any other moneys advanced by the Bank hereunder shall become immediately payable and the security taken by the Bank from the Companies shall become enforceable in each and every of the following events:
>
> . . . . .
>
> (d) if the Companies or either of them shall commit or threaten to commit any act of bankruptcy *or shall become insolvent* or shall make an assignment or proposal under the Bankruptcy Act or a general assignment in favour of their or its creditors or a bulk sale of their or its assets, or if a bankruptcy petition shall be filed or presented against the Companies or either of them.

[Emphasis added.]

6 As Beaver was not in default of payment on the loan, and as the bank had received legal advice that a demand could not be justified on the basis of the existing loan agreement, there being a question as to whether Beaver was actually insolvent, the bank decided to seek Beaver's consent to a receivership.

7 The bank's solicitors were instructed to prepare the following document, which Meikle was to take to a meeting of all the shareholders on April 4, 1983:

> We are writing on behalf of the members and directors of Beaver Transport Ltd., Pax Management Ltd., Leader Investment Corp. and Wesson Holdings Limited. As of March 31, 1983, we confirm that the direct principal indebtedness of Pax Management Ltd. stands at $300,000.00 and the direct principal indebtedness of Beaver Transport Ltd. stands at $1,700,495.00. We recognize that if a demand for payment of these sums is made, we will be unable to satisfy it, either now or in the foreseeable future.
>
> We acknowledge that Beaver Transport Ltd. and Pax Management Ltd. are insolvent, and that therefore we consent to the appointment, which may be contemplated by you to be made in the immediate future, of a receiver or receiver-manager under the terms of your debenture security with respect to the assets of any or all the issuers of the debentures. We also acknowledge that it would be pointless to delay the making of the appointment once demand for the repayment of your accounts has been made and we therefore waive any complaint we might have, if any, regarding the promptness of the appointment.

____
Beaver Transport Ltd.

____
Pax Management Ltd.

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8 Although this document contained an acknowledgement that Beaver was insolvent, the subject of insolvency was not discussed at the shareholders' meeting. In convincing Beaver's directors (Drs. Dixon and Temple) to sign the consent and waiver, Holford emphasized the benefit to the guarantors of a speedy wind-up of the failing company and the immediate appointment of a receiver; i.e., such a course would reduce the guarantors' liability by ensuring that incoming accounts receivable would be applied directly to the principal loan with the bank, which was the subject of the guarantee, rather than to pay trade and other unsecured creditors. On being asked by the directors as to the consequences of failing to sign the consent, Holford said that the bank would "commence proceedings the next day."

9 On April 5, 1983, the bank formally served its demand for repayment of the loan on Beaver. As a result, Beaver was placed in receivership on April 6 and its assets liquidated, leaving a balance in excess of $1 million owing to the bank.

10 The respondents sued the bank for, among other things, wrongfully putting Beaver into receivership. The bank counterclaimed for the balance due on the loans and personal guarantees. The bank's counterclaim was allowed by the trial judge and the primary claims of the respondents dismissed. The respondents' appeal from the judgment on the guarantees was allowed by the British Columbia Court of Appeal.

II. Judgments

A. British Columbia Supreme Court

11 After a 38-day trial, Spencer J. delivered an exhaustive and carefully reasoned judgment [(1988), 1 C.B.R. (3d) at 31]. The learned trial judge held that the bank's conduct had been deceitful, and that Beaver was entitled to damages as a result, but that the respondents were liable to the bank on their guarantees. I will review only those parts of Spencer J.'s judgment (including a supplementary judgment (1988), 1 C.B.R. (3d) at 70) which are germane to the present appeal.

12 Spencer J. held that Beaver had been misled by the bank as to the reason for the independent review of its finances, and that the bank's actions were deceitful (at p. 41):

> The Fort St. John branch [of the bank] was given the task of persuading Beaver to accept an independent review of its financial affairs. Mr. Arthur did that. In this case, I find that Mr. Wortman was misled about the reason why the bank wanted an independent accountant to investigate Beaver's affairs. He tes tified, and I accept, that Arthur told him the reason for the investigation was to assist with the ongoing relationship between Beaver and the bank. Mr. Arthur testified that the bank's reason for the investigation was to see if Beaver was

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> viable and could continue in operation, but that was not what he told Wortman. This was at a time when Arthur knew the branch had recommended liquidation, and knew that his head office wanted to know what effect that would have on the rest of the connection before making its decision. *It was deceitful of him to persuade Wortman to agree to an investigation of Beaver's affairs on the basis that it was to assist with an ongoing relationship*.

[Emphasis added.] As there was no valid consent to the review by the accountants, their attendance at Beaver's office amounted to a trespass. The trial judge awarded damages against the bank in the amount of the fees paid by Beaver to the accounting firm which conducted the review.

13 The trial judge then turned to the question of the receivership. Under the terms of its contract with Beaver, one of the circumstances which entitled the bank to call its loans was if Beaver was insolvent. The trial judge found as a fact that Beaver was insolvent on April 4, 1983, and that Beaver continued to be insolvent to and beyond April 6, 1983, when the receiver was appointed. However, the trial judge found that, at the time that the bank called the loan, it did not know that Beaver was insolvent. The bank called the loan because it was in its financial interest to do so (at pp. 45-46):

> Beaver was insolvent, as I shall discuss later, but I find as a fact that the bank decided to call its loans and appoint a receiver not because of any insolvency, but because it could see that Beaver was in financial difficulty and it foresaw, correctly, that Beaver's business cycle had led it to the point in time when its receivables were at their highest point and must [sic] be used, as they came into the company, to meet the accounts payable, which were also at a high point. The Fort St. John branch knew that Beaver's business and income would drop sharply during the spring break-up, and that historically it would not reach a high point again until the following winter. It foresaw, correctly in my opinion, that Beaver would have great difficulty in paying back the bank loan, which was not then in arrears, unless the full measure of its receivables were to be applied to it. ... The bank knew that all Beaver's loan payments were up to date, and knew, from its solicitor's advice, that its loan agreement had problems in its wording which made it difficult to justify a demand of the loan.

However, Spencer J. held that under the terms of the loan agreement, Beaver's insolvency entitled the bank to call the loans, even though the bank did not know that Beaver was insolvent at the time it called the loan (at p. 49):

> I have found that the bank did not know Beaver to be insolvent when it called the loan but that it took action because of its assessment of Beaver's business risk. The question arises, can the bank rely on insolvency if it is later discovered. In my opinion it can. Paragraph 5(d) of the loan agreement, Exhibit 1.12, gave the bank the right to call Beaver's loan and to appoint a receiver if it became insolvent in fact. It would not be a defence to the bank

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> that it thought Beaver to be insolvent if in fact it was not. Honest belief in insolvency is no defence. The issue is to be judged objectively. The corollary is that even if the bank did not think Beaver to be insolvent and did not rely upon insolvency at the time, it may plead the fact of insolvency to justify calling the loan if that is later discovered.

14 Spencer J. held that the waiver signed by the directors at the April 4 meeting was invalid. Consequently, the bank's attempt to have Beaver waive any complaint arising from the short period of time between the demand for payment and the appointment of the receiver was of no effect. Spencer J. found that the bank's representative, Holford, had placed himself in a fiduciary relationship to the directors and to Beaver, by purporting to advise them as to their best business interests. Spencer J. further found that Holford was in breach of his fiduciary duty, and that this breach rendered the waiver invalid. Holford withheld information about the potential liability of the guarantors and about the likely cost of the receivership (at p. 55):

> [Holford] did not explain the difficulty Beaver would have in carrying on business in the hands of a receiver, nor, I find, did he tell them [the directors] the likely cost of a receivership. Meikle testified that he did that, and that he warned the shareholders there might be as much as a $600,000 deficiency facing them as guarantors. I find him to be mistaken. I reject both his and Holford's evidence on that score. I accept the evidence of the shareholders, particularly Drs. Temple, Moody, Watt and Jones, that they walked out of that meeting with a sense of relief that their exposure would probably be limited to about $60,000. They had been given the bank's washdown sheet that said so.

Further, Holford lied about the bank's intention to commence proceedings against Beaver the next day. This misrepresentation was relied upon by the directors who signed the consent and waiver form (at pp. 57-58):

> When Dr. Dixon asked what would happen if they did not sign that evening, Holford replied to the effect that the bank would commence proceedings the next day. Dr. Dixon testified that he therefore remarked there was no point in refusing, and he and Dr. Temple accordingly signed. Others at the meeting confirm his recollection, and Holford belatedly admitted he spoke words to that effect. But Holford knew the decision for a receivership lay in Mr. Ellwood's hands at regional office, and that it rested upon the directors consenting. *In saying that the bank would commence proceedings the next day, he knew he was lying*. It was more than a misrepresentation of the future, it was clearly an implied misrepresentation of the bank's present intention, done to force the directors to sign. Drs. Dixon and Temple relied upon it.

[Emphasis added.]

15 In summary, the consent form prepared by the bank was invalid for all purposes, whether as an admission of insolvency and consent to a receiver or as a waiver of time to pay following

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the bank's demand for payment of the loan.

16 In the absence of a valid waiver, the bank's actions in calling the loan and appointing a receiver could only be justified if Beaver was in fact given the proper time to pay following the demand. After an exhaustive review of the authorities and the facts, Spencer J. concluded that 24 hours was sufficient time to pay in the circumstances. He relied on his finding that Beaver could not have met the demand even if it had been given a month (at p. 63):

> Under all of those circumstances, I find that the lapse of time between the bank's demand, formally served on April 5, 1983, and the entry of the receiver into Beaver's business on April 6, 1983, was sufficient. A longer notice would have made no difference ...

Moreover, Spencer J. found that Beaver was bound to fail, and that the rapid winding up of Beaver was in the best interests of the guarantors (at p. 57):

> But I think the advice to liquidate Beaver was good advice to the shareholders. Beaver, in my opinion, was bound to fail, probably before the summer. To fail sooner rather than later and apply the receivables to the bank's debt would, to that extent, save the directors and their other companies, Pax, Leader and Wesson, from some liability on their guarantees.

17 Spencer J. gave judgment against the corporate and personal guarantors (except for the respondents Rost, Rost Enterprises Ltd. and Glenonne, whose liability was limited to $100,000) for the net amount of Beaver's debt owing to the bank.

B. British Columbia Court of Appeal

18 The British Columbia Court of Appeal (Macdonald, Cumming and Hinds JJ.A.), unanimously allowed the respondents' appeal with respect to the bank's claim against the respondents on their guarantees. Again, I will confine my review to those parts of the Court of Appeal's reasons which bear on the present appeal.

19 The Court of Appeal largely upheld the trial judge's findings. The Court of Appeal noted that the trial judge had made two findings of deceit against the bank, and that it was not for an appellate court to interfere with such findings (at p. 18 [C.B.R.]):

> We intend no disrespect to Mr. Clark [counsel for the bank] in declining to review his submissions in detail. The learned trial Judge made two separate and specific findings of deceit against the officers of the bank. Both findings were the result of his assessment of the credibility of a number of witnesses. Such findings of fact are not to be disturbed by an appellate Court unless it be shown that some palpable or overriding error occurred. We can find none. The respondents in this argument seek to have this Court review the evidence at

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> the trial, and substitute our assessment for that of the trial Judge. Such a course is not open to us ...

20 Nonetheless, the Court of Appeal allowed the appeal and dismissed the bank's claim against the respondents on their guarantees of the liability of Beaver. The court found that the two deceits committed by the bank were "acts of bad faith and concealment amounting to misrepresentation" (p. 19), which had the effect of discharging the respondents from their obligations under their guarantees. The Court of Appeal relied on *Bank of India v. Trans Continental Commodity Merchants Ltd.*, [1982] 1 Lloyd's Rep. 506 (Q.B. Com. Ct.) (particularly the passage at p. 515) to support their conclusion.

21 The Court of Appeal declined to interfere with the finding of Spencer J. that there had been sufficient time to pay after the demand for payment had been made. The Court of Appeal upheld the finding of the trial judge that the respondents had in fact suffered no damages from the receivership, given that "as a result of consenting to the receivership the guarantors minimized their exposure and Beaver ended its ongoing loss" (p. 20). Therefore the claim for damages against the bank on this ground failed.

22 The bank sought and was granted leave to appeal from the judgment of the Court of Appeal. The respondents sought and were granted leave to cross-appeal on the issue of damages for the bank's deceit.

III. Issues

A. Issues on the appeal

23

> 1. Whether the learned trial judge and the Court of Appeal erred in finding that the Bank had been deceitful when its officer told the respondents that, if the consent form were not signed, the Bank would commence proceedings the next day.
>
> 2. Whether the Court of Appeal erred in holding that the effect of the deceitful acts was to discharge the guarantors in the absence of any prejudice to the guarantors.

B. Issue on the cross-appeal

24

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> 1. Whether the learned trial judge and the Court of Appeal erred, in light of the improperly obtained consent and waiver, in finding that there was a reasonable period of time given for repayment of the loan before a receiver was appointed and in therefore holding no claim for damages exists.

IV. Analysis

25 I am of the opinion that the appeal should be allowed, and the cross-appeal dismissed. Briefly put, I agree with the courts below that there was deceit by the bank but disagree with the Court of Appeal that the effect of the deceit was to discharge the guarantors.

26 I will deal first with the question of deceit, which is raised as the first issue on the appeal, and also on the cross-appeal, as I am of the view that this issue can and should be quickly disposed of. I will then go on to consider the question of the discharge of the guarantors.

A. Deceit

27 Counsel for the bank made a valiant attempt in argument to encourage us to reconsider the issue of deceit. However, I would not interfere with the trial judge's findings of fact, upheld by the Court of Appeal, on this issue. I would adopt the following passage from the judgment of the Court of Appeal (at p. 18):

> The learned trial Judge made two separate and specific findings of deceit against officers of the bank. Both findings were the result of his assessment of the credibility of a number of witnesses. Such findings of fact are not to be disturbed by an appellate Court unless it be shown that some palpable or overriding error occurred. We can find none. The respondents in this argument seek to have this Court review the evidence at the trial, and substitute our assessment for that of the trial Judge. Such a course is not open to us ...

28 This court has indicated on numerous occasions that an appellate court should not interfere with findings of fact in the absence of some palpable and overriding error. As we said recently in *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, 20 R.P.R. (2d) 50, [1991] 3 C.N.L.R. 79, 127 N.R. 147, 83 D.L.R. (4th) 381, 46 O.A.C. 396, at p. 574 [S.C.R.]:

> ... the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts: *Stein v. The Ship 'Kathy K'*, [1976] 2 S.C.R. 802; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2. The

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> rule is all the stronger in the face of concurrent findings of both courts below.

(See also *Lapointe c. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, 10 C.C.L.T. (2d) 101, 9 C.P.C. (3d) 78, 90 D.L.R. (4th) 27, (sub nom. *Lapointe c. Chevrette)* 133 N.R. 116, 45 Q.A.C. 262.)

29 I am in complete agreement with the Court of Appeal that there was no palpable and overriding error in this case on the finding of facts and the application of the principles of law governing the assessment of the evidence involved.

30 On the cross-appeal, the respondents argued that the trial judge and the Court of Appeal erred in not awarding damages for the bank's deceit, since the deceit denied Beaver the opportunity of a reasonable time to pay after the bank called the loans. The trial judge found that the notice period of 24 hours was sufficient based on the relevant factors prescribed by the authorities on the issue, including *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 42 N.R. 181, 135 D.L.R. (3d) 1, 18 B.L.R. 1, 65 C.P.R. (2d) 1, and *Mister Broadloom Corp. (1968) v. Bank of Montreal* (1979), 32 C.B.R. (N.S.) 241, 25 O.R. (2d) 198, 7 B.L.R. 222, 101 D.L.R. (3d) 713 (H.C.). Moreover, the trial judge found that the respondents' liability on their guarantees was reduced by the early receivership of Beaver so it is difficult to see any damage resulting from the immediate appointment of a receiver assuming the demand to be invalid because it was tainted by the deceitfully obtained consent. The Court of Appeal declined to interfere with either of these findings. I agree with the Court of Appeal that it is inappropriate to interfere with the trial judge's findings in light of the principles for appellate review which I have just set out. Consequently, the cross-appeal should be dismissed.

B. Discharge of the guarantors

31 In holding that the guarantors should be discharged, the Court of Appeal relied on this passage of Bingham J. in *Bank of India*, supra, at p. 515, affirmed [1983] 2 Lloyd's Rep. 298 (C.A.) [at p. 18 C.B.R.]:

> 'Leaving aside what may be the special case of fidelity guarantees, I consider the true principle to be that while *a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation* or causes or connives at the default by the principal debtor in respect of which the guarantee is given or varies the terms of the contract between him and the principal debtor in a way which could prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interests of the surety in a general sense, does not discharge the surety.' [Emphasis added.]

This same passage was quoted with approval by Wilson J. in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, [1987] 1 W.W.R. 289, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290, 32 D.L.R. (4th) 9, 70

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N.R. 341, at p. 567 [S.C.R.].

32 In my view, neither *Bank of India* nor *Wilder* support the conclusion of the Court of Appeal in the case at bar that, once there is a misrepresentation by the creditor, it is not necessary for there to be any prejudice, actual or potential, to the guarantors for them to be discharged. I find this especially so when one views these decisions in the light of the case law on the discharge of a guarantor's liability resulting from the conduct of the creditor.

33 With respect to *Bank of India*, looking at the judgment of Bingham J. as a whole, it is clear that, in the emphasized passage of the quotation above, Bingham J. was referring to concealment amounting to misrepresentations *at the formation of the contract of guarantee*. Bingham J. was not concerned with misrepresentations by the creditor subsequent to the formation of the contract. On the page previous to that from which the quotation in question is taken, Bingham J. said this about misrepresentations by the creditor (at p. 514):

> Certain principles are well-established ... Non-disclosure *at the time when the guarantee is given* of facts potentially prejudicial to the surety may be held to amount to and to have the consequences of misrepresentation. (*Lee v. Jones* (1864), 17 C.B.N.S. 482).

[Emphasis added.]

34 An examination of the case relied upon by Bingham J. to support this proposition, *Lee v. Jones* (1864), 17 C.B. (N.S.) 482, 144 E.R. 194 (Ex. Ch.), settles the question. In that case, the defendant had executed a guarantee. The plaintiff sued the defendant on the guarantee. The defendant pleaded by way of defence that he had been induced to make the contract of guarantee by the fraudulent concealment by the plaintiff of a material fact. The Exchequer Chamber, by a majority, affirmed the judgment of the court below that the guarantor was discharged by the concealment. The following passage from the judgment of Blackburn J. makes it clear that the issue in *Lee v. Jones* was whether the misrepresentation was such that the guarantor would not have entered into the agreement had he known the truth (at p. 507 [C.B. (N.S.)]):

> The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it: and, if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive.

35 Moreover it is clear from the passage excerpted by the British Columbia Court of Appeal that Bingham J.'s main point in *Bank of India*, and in fact the basis on which that case was decided, was that there is no general principle that irregular conduct which is prejudicial to the surety discharges him or her from liability. The "irregular" conduct in *Bank of India* which was held not to discharge the guarantor was the creditor bank's delay in delivery of written

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confirmations of the principal contract. This position was affirmed on appeal, supra. Goff L.J. stated (at p. 302):

> ... there is no general principle that "irregular" conduct on the part of the creditor, even if prejudicial to the interests of the surety, discharges the surety, though there are particular circumstances in which the surety may be discharged, of which the instances specified by the learned Judge provide certainly the most significant, and possibly the only, examples ... *But that merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety, does not discharge the surety, there can in my judgment be no doubt.*

[Emphasis added.]

36 In *Wilder*, supra, Wilson J. was faced with the question of the effect on the surety's liability of a *breach* of the principal contract between the creditor and the debtor. Wilson J. began by observing that a *variation* in the principal contract which prejudices the guarantor will discharge the guarantor (at p. 562):

> It is trite law that any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor without the guarantor's consent will discharge the guarantor.

Wilson J. emphasized that a guarantor gives his or her guarantee on the basis of the risk inherent in the contract which is being guaranteed, and that equity will intervene if the guarantor's right of subrogation is impaired by a variation by the creditor of the risk assumed by the guarantor without the guarantor's consent (at p. 566):

> In the case of a specific contract it is to be assumed that the guarantor gave his guarantee in contemplation of an ascertainable and clearly identified risk inherent in the contract. The guarantor in such a case is discharged because he is powerless to protect against variation of the principal contract by the parties to that contract. Once he has given his guarantee on the basis of that particular risk equity protects him against any variation of it to which he was not a party.

37 Wilson J. held therefore that the question to be asked in determining whether a *breach* of the principal contract discharges the guarantor is whether the breach materially changed the risk assumed by the guarantor, to the guarantor's detriment (at p. 569):

> ... the key question becomes whether the subsequent breach [of the principal contract] by the Bank materially changed the risk assumed by the guarantors to the guarantors' detriment. I think there can be no doubt that it did. I agree with Lambert J.A. that the Bank's breach caused the Company's default. It materially impaired the value of the security it held for the Company's indebtedness by preventing the Company from

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> continuing as a viable commercial operation. As a consequence, the guarantors' equitable rights of subrogation and indemnity were seriously interfered with if not effectively destroyed.

Thus the guarantors were discharged in *Wilder* because of the finding of prejudice to them.

38 I should now like to turn to a brief discussion of other relevant case law on discharge of sureties. In general, once a contract of guarantee has been made, the surety will be discharged entirely only if the principal contract is varied without the guarantor's consent, in a manner not obviously to the benefit of the guarantor, or if the creditor breaches the contract of guarantee. The surety will be partially discharged from his or her obligation under the guarantee if the creditor impairs the value of the security, but only to the extent that the surety's rights of subrogation under the contract of guarantee are affected. This was the position summarized by Laskin J.A. (as he then was) in *Rose v. Aftenberger*, [1970] 1 O.R. 547, 9 D.L.R. (3d) 42 (C.A.) (at p. 554 [O.R.]):

> In my view, the encompassing principle to be applied is that a surety is discharged if either the principal contract to which he gave his guarantee is varied without his consent in a matter (as the Supreme Court of Canada said in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165 at p. 172 ...), not plainly unsubstantial or necessarily beneficial to the guarantor; or, if the terms of the contract of guarantee between the creditor and the surety are breached by the creditor. Where, as here, there is simply a wrongful dealing with the security taken by the creditor, and it is not shown that the taking (and hence the keeping as well) of the security was a condition of the giving of the guarantee, then the surety cannot be relieved beyond the value of the security lost to him.

39 To the same effect is the following summary from K.P. McGuinness, *The Law of Guarantee* (Toronto: Carswell, 1986), at p. 282:

> ... a surety is entitled to a full release from liability only in two situations: (1) where the effect of the conduct or dealing of the creditor is to vary the risk of default by the principal; and (2) where the creditor violates a condition of surety's liability. Where an act by the creditor merely affects the amount for which the surety will be liable in the event of default, discharge is available only to the extent of the prejudice actually suffered.

40 It is clear therefore that the existing authorities base discharge from liability on two principles. First, that the guarantor has undertaken a particular risk, and should not have a materially different risk imposed upon him or her by the variation or breach of the terms of the principal contract. In such situations, since it should be left to the surety to decide whether to continue as a surety and bear the new risk, he or she is entitled to be discharged absolutely if his or her consent was not obtained. Second, where the surety's risk of being called upon remains

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the same, but the amount for which he or she will be liable is increased by an act of the creditor, the surety may be entitled to be discharged to the extent of that increase.

41 However, where the creditor breaches the principal contract but the breach does not prejudice the guarantor, the guarantor will not be discharged. So, in *Royal Bank v. Coastal Music Distributors Ltd.* (1982), 16 B.L.R. 289, (sub nom. *Nobes v. Royal Bank)* 49 N.S.R. (2d) 634, 96 A.P.R. 634 (C.A.), the Nova Scotia Supreme Court, Appeal Division, held that even if the creditor had breached the principal contract by giving the debtor inadequate time to respond to the demand for payment, the guarantor would not have been entitled to be discharged because the debtor could not have responded to the demand in any event. That is, the breach of the principal contract in no way prejudiced the guarantors (at p. 643 [N.S.R.]):

> Even assuming that no notice of the demand was given to Coastal [the debtor] or, alternatively, that it was not given reasonable time to respond to the demand before the receiver was appointed and that the latter's entry into Coastal's premises was therefore both premature and wrongful, such, under the circumstances, is not in my opinion the kind of interference with the security arrangement that should discharge the guarantors. I say this because it is clear from the findings of fact of Chief Justice Cowan that it would not have made any practical difference as far as the guarantors and Coastal were concerned if the demand for payment was unobjectionable ... Coastal just couldn't respond to a payment demand.

42 See also McGuinness, at p. 257:

> Despite dicta to the contrary in a number of early cases, it now seems fairly clear that an alteration of the principal contract which clearly is not material to the surety's risk and which therefore cannot prejudice the surety, or a departure from the terms of the principal contract which is necessarily beneficial to the surety, will not relieve the surety from liability. As noted above, there would appear to be no doctrinal basis that would justify release in such a case. By definition, a surety is a person who has agreed to assume the risk of the default of another person. If that obligation is changed in such a way that the risk is necessarily reduced, then the burden of the surety is not increased. However, in order for the surety to continue to be bound where the principal contract has been altered, the lack of prejudice or immateriality of the alteration must be self-evident.

43 Finally, if the creditor impairs the value of the security held in respect of the guarantee, then the surety is entitled to be discharged to the extent of the prejudice which he or she suffers as a result of the loss of the security: *Bank of Nova Scotia v. Ham*, [1986] 5 W.W.R. 249, 49 Sask. R. 36, 29 D.L.R. (4th) 427 (C.A.), and *Rosemex Inc. v. Banque de Montréal*, 78 C.B.R. (N.S.) 54, [1990] R.J.Q. 344 (C.A.). To quote McGuinness, at p. 282:

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> Where an act by the creditor merely affects the amount for which the surety will be liable in the event of a default, discharge is available only to the extent of the prejudice actually suffered. Consequently, an act or default by a creditor that interferes with the right of the surety to the transfer of the security will usually discharge the surety from liability only to the extent of any loss suffered by the surety, since the value of a security (and therefore the prejudice suffered by the surety as a result of its loss or impairment) is in most cases readily capable of measurement.

44 As I understand their argument, the respondents do not really dispute the above summary of the case law in so far as it relates to conduct of the creditor directed towards the principal debtor affecting a surety. However, they submit that these principles do not apply where the creditor's wrongful conduct is against the *surety* directly. In cases where there has been an act of bad faith against the surety, they submit that the surety should be automatically discharged without having to decide what damage or prejudice was suffered. As I have already stated, this position is not supported by the cases cited by the Court of Appeal or the respondents (*Bank of India* and *Wilder*), so the question becomes whether it is a desirable extension of the principles of discharge of a guarantor's liability? In my view it is not.

45 Simply put, no serious or compelling reason has been advanced to justify departing from the current state of law in the manner proposed by the respondents. A guarantor should not be discharged from the obligation which he or she has undertaken except by acts which have some impact on the magnitude or likelihood of the materialization of that risk. Other objectionable or wrongful conduct by the creditor towards the guarantor should be dealt with by causes of action that are otherwise appropriate such as the tort of deceit or breach of fiduciary duty. In this respect, the respondents sought to further justify the Court of Appeal's discharge of the impugned guarantees on the basis of a breach of fiduciary duty by the bank's representative to Beaver's directors. Accepting for the sake of argument that there was a breach of fiduciary duty as found by the trial judge, I do not agree that it should be given the effect proposed by the respondents. In my opinion, the trial judge gave proper effect to the alleged breach of fiduciary duty by the bank in finding invalid the impugned waiver and consent obtained at the April 4, 1983 meeting.

46 The conduct of the bank in this case consisted of misrepresentations made to individuals who were both the principals of the debtor, Beaver, and the guarantors. The result of the misrepresentations was that these individuals consented to placing Beaver in receivership. The misrepresentations had the effect of rendering the consent thereby obtained invalid. If Beaver had not in fact been insolvent at the time the consent was obtained (a finding which is not challenged before this court), then the ensuing demand and receivership would have constituted a breach of the principal loan agreement. However, I agree with Spencer J. that his finding that Beaver was insolvent at that time provided a justification for the bank's calling the loan and, when Beaver failed to pay, appointing a receiver.

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47 Spencer J. repeatedly emphasized that not only did placing Beaver in receivership *not* operate to the detriment of the guarantors, but in fact it was also *advantageous* to them. For example, he stated (at pp. 57 and 68):

> Beaver ... was bound to fail, probably before the summer. To fail sooner rather than later and apply the receivables to the bank's debt would, to that extent, save the directors and their other companies ... from some liability on their guarantees.
>
> . . . . .
>
> Because of [the misrepresentation], the receivership probably commenced earlier than it otherwise would have done, with the result that the bank was able to reduce the shortfall and therefore the liability on the guarantees by the amount recovered from the accounts receivable which would otherwise have gone to pay down Beaver's trade creditors.

48 The respondents argue that it is simplistic to assert that, since Beaver was insolvent, the bank's actions did not either cause damage to or increase the risk of the guarantors. They emphasize that the guarantors were doctors and that they could have personally raised the funds so as to avoid receivership, or attempted to sell the business. In my view, these arguments cannot succeed because they are simply attempts to set aside reasonably supportable findings of facts of the trial judge. The trial judge found not only that Beaver was insolvent, but also that its failure was inevitable. He also addressed the possibility of the guarantors being able to do anything to improve this situation, stating (at p. 62):

> Beaver's attempts to raise money, or be sold or find new business had met with failure. At trial, Wortman admitted it would have been difficult to find alternative financing as of April 4, 1983 ... Although the shareholders say now that they could have raised money themselves to add to the company's equity, none of them could have done so without borrowing or negotiating a sale of assets. Most of the shareholders deny that Holford or Meikle suggested that they put in more equity during the April 4 meeting, but I believe there was mention of that and that the suggestion was met with silence.

49 In short, what occurred in this case was that the bank made misrepresentations which led to a consent that, as a result of Beaver's insolvency, was superfluous, and which caused no prejudice to the guarantors.

C. Conclusion

50 In light of the principles that I have reviewed, I conclude that the respondents are not entitled to be discharged on their guarantees. Since the respondents have not alleged that misrepresentations were made at the time the contracts of guarantee were made (nor is there any

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evidence of any such misrepresentations), the passage they rely on from *Bank of India* is of no assistance to them. There was no variation of the principal contract between the bank and Beaver. Even assuming that the bank did breach the principal contract by giving insufficient time to Beaver to comply with the demand (which is not the case), the respondents suffered no prejudice as a result of such a breach and so *Wilder* does not help their cause. There was no material alteration to their detriment of the risk that they had assumed. In *Royal Bank v. Coastal Music Distributors Ltd.*, supra, the Nova Scotia Supreme Court, Appeal Division, held that a guarantor should not be discharged in such circumstances, even assuming there was a breach of the principal contract, because the debtor could not have complied with the demand for payment even if it had been in accordance with the contract. The same argument applies a fortiori where not only could the debtor not have complied with the demand for payment, but also any breach of the contract by way of insufficient time to pay subsequent to the demand actually *increased* the value of the security held by the creditor and *reduced* the risk assumed by the guarantors.

51 I therefore conclude that the respondents should not be dis charged from their guarantees.

V. Disposition

52 Accordingly, the appeal is allowed, the judgment of the British Columbia Court of Appeal dismissing the appellant's claim against the respondents on their guarantees is set aside, and the judgment of the trial judge is restored. The cross-appeal is dismissed.

53 Under the circumstances, the parties should bear their own costs in this court and in the British Columbia Court of Appeal. I would not disturb the orders made by Spencer J. with respect to costs at trial.

Le jugement de la cour a été rendu par M. le juge *Iacobucci*:

54 Le présent pourvoi [à l'encontre de (1990), 1 C.B.R. (3d) 1, 49 B.C.L.R. (2d) 195, [1991] 1 W.W.R. 74, 2 B.L.R. (2d) 81 (C.A.)] porte sur la question de savoir si des déclarations inexactes faites par le créancier à la caution ont pour effet de libérer cette dernière en l'absence de tout préjudice causé à ses intérêts.

I. Les Faits

55 En 1980, toutes les personnes physiques intimées sauf Glen Donald Rost ont acheté 90 pour cent des actions de Beaver Transport Ltd. ("Beaver") par l'entremise de leur société de portefeuille, l'intimée Pax Management Ltd. ("Pax"). Beaver était une entreprise de camionnage située à Fort St. John (Colombie-Britannique). Exception faite de Rost et de Wortman, les personnes physiques intimées étaient des médecins qui pratiquaient ensemble. Wortman est leur

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gérant d'affaires et gestionnaire de Pax. Rost est le directeur de l'exploitation de Beaver. Pour ce qui est des intimées Leader Investment Corp. ("Leader") et Wesson Holdings Ltd. ("Wesson"), il s'agissait de sociétés appartenant à Pax. Le 10 pour cent restant des actions de Beaver avait été acheté par l'intimé Rost, par l'intermédiaire de sa société, l'intimée Glenonne Holdings Ltd. ("Glenonne").

56 L'appelante, la Banque canadienne impériale de commerce (la "banque"), avait financé cet achat d'actions. Le contrat de prêt et les prêts d'exploitation et de capital consentis subséquemment par la banque se présentaient sous la forme de prêts à Beaver, assortis de cautionnements de la part des intimés. Il s'agissait de cautionnements généraux, constatés sur une formule type de la banque, qui visaient les dettes actuelles et futures envers la banque.

57 La banque vint par la suite à s'inquiéter de la santé financière de Beaver et, en 1983, elle envisagea de demander le remboursement des emprunts. Le 1[er] mars 1983, M. Holford, le directeur de la succursale de Fort St. John a, dans une lettre au bureau régional de la banque, recommandé de procéder à la demande de remboursement des emprunts et à l'exécution des contrats de cautionnement. Le bureau régional renvoya la question au siège social de la banque, à Toronto, où il fut décidé de faire examiner les affaires de Beaver par un cabinet de comptables agréés, avant de déterminer s'il convenait de demander le remboursement des emprunts et de nommer un séquestre. La succursale de Fort St. John fut chargée de persuader Beaver de consentir à ce qu'on procède à un examen indépendant de ses affaires. Le directeur-adjoint de la succursale, M. Arthur, expliqua à Wortman que cette démarche visait à aider la relation en cours entre Beaver et la banque. Croyant que c'était le cas, Beaver acquiesça à l'examen et accepta d'en acquitter les frais qui étaient d'environ 10 000 $. Monsieur Meikle, du cabinet Samson, Bélair, commença l'examen.

58 Après que Meikle eut commencé son examen, mais avant qu'il ait soumis un rapport officiel à la banque, cette dernière décida de demander le remboursement des emprunts et de nommer un séquestre. La banque a pris cette décision en se fondant sur un premier rapport que lui avait fait oralement Meikle et aussi parce qu'elle croyait que si un séquestre était nommé à ce moment-là, tout déficit serait moindre que si la nomination était retardée étant donné que Beaver était au point où ses comptes débiteurs étaient les plus élevés. À ce moment, Beaver était, en fait, insolvable, mais la banque l'ignorait car Beaver n'accusait aucun retard dans ses paiements à la banque. La banque savait que le texte de son contrat de prêt posait des problèmes qui rendaient une demande de remboursement difficile à justifier si Beaver n'était pas effectivement insolvable. La clause fondamentale du contrat passé entre la banque et Beaver était ainsi rédigée :

> [Traduction]
>
> 5. Le capital, les intérêts et toute autre somme avancée par la banque en vertu du présent contrat deviennent immédiatement exigibles et la banque peut se prévaloir du

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> cautionnement que lui ont consenti les sociétés si l'un ou l'autre des événements suivants se produit: [
>
> . . . . .
>
>]
>
> d) si les sociétés ou l'une d'entre elles commettent ou menacent de commettre un acte de faillite, *deviennent insolvables*, font une cession ou une proposition concordataire en vertu de la Loi sur la faillite, font une cession générale de leurs biens en faveur de leurs créanciers ou procèdent à une vente en bloc de leurs actifs, ou si une pétition en faillite est déposée ou présentée contre les sociétés ou l'une d'entre elles.

[Italique ajouté.]

59 Étant donné que Beaver n'avait pas cessé de rembourser son emprunt et que la banque avait reçu une opinion juridique l'informant que le contrat de prêt existant ne pouvait justifier une demande de remboursement parce que l'insolvabilité de Beaver n'était pas établie, la banque décida de demander à Beaver de consentir à une mise sous séquestre.

60 Les avocats de la banque se virent chargés de préparer le document suivant, que M. Meikle devait apporter à une assemblée des actionnaires prévue pour le 4 avril 1983:

> [TRADUCTION]
>
> Nous établissons le présent document au nom des membres et des administrateurs de Beaver Transport Ltd., de Pax Management Ltd., de Leader Investment Corp. et de Wesson Holdings Limited. Nous confirmons qu'en date du 31 mars 1983, le montant en capital de la dette directe de Pax Management Ltd. se chiffre à 300 000 $ et que le montant en capital de la dette directe de Beaver Transport Ltd. est de 1 700 495 $. Nous reconnaissons que si le paiement de ces sommes est demandé, nous serons incapables de l'effectuer, maintenant ou dans un avenir prévisible.
>
> Nous reconnaissons que Beaver Transport Ltd. et Pax Management Ltd. sont insolvables. En conséquence, nous consentons, conformément aux débentures qui vous ont été données en garantie, à la nomination d'un séquestre ou d'un administrateur séquestre, nomination que vous pouvez envisager de faire sous peu, à l'égard des actifs de l'un ou de l'ensemble des émetteurs des débentures. Nous reconnaissons aussi qu'il ne servirait à rien de retarder la nomination une fois faite la demande de remboursement de vos prêts, et nous renonçons, en conséquence, à toutes doléances que nous pourrions avoir concernant la célérité de la nomination.

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Pax Management Ltd.

61 Même si ce document comportait une reconnaissance que Beaver était insolvable, la question de l'insolvabilité ne fut pas abordée à l'assemblée des actionnaires. Pour convaincre les administrateurs de Beaver (les D[rs] Dixon et Temple) de signer le consentement et la renonciation, Holford souligna l'avantage que comportaient, pour les cautions, la liquidation rapide de la société en déclin et la nomination immédiate d'un séquestre, à savoir qu'une telle ligne de conduite diminuerait la responsabilité des cautions en assurant que les comptes débiteurs perçus ssrvent directement à rembourser le prêt principal contracté avec la banque et faisant l'objet du cautionnement, plutôt qu'à payer les fournisseurs et les autres créanciers non garantis. Interrogé par les administrateurs sur les conséquences de l'omission de signer le consentement, Holford répondit que la banque [TRADUCTION] “engagerait des procédures le lendemain”.

62 Le 5 avril 1983, la banque signifia à Beaver une demande officielle de remboursement du prêt, ce qui entraîna la mise sous séquestre de la société le 6 avril et la liquidation de ses actifs, après quoi il restait encore plus d'un million de dollars à payer à la banque.

63 Les intimés poursuivirent la banque en faisant valoir notamment qu'elle avait eu tort de mettre Beaver sous séquestre. La banque réclama, dans une demande reconventionnelle, le solde exigible en vertu des prêts et des cautionnements personnels. Le juge de première instance accueillit cette dernière demande et rejeta les demandes principales des intimés. La Cour d'appel de la Colombie-Britannique accueillit l'appel interjeté par ces derniers contre la décision relative aux cautionnements.

II. Les jugements

A. Cour suprême de la Colombie-Britannique

64 Après 38 jours de procès, le juge Spencer a rendu une décision complète et soigneusement motivée [(1988), 1 C.B.R. (3d) à la p. 31]. Il a jugé que la banque s'était conduite de façon trompeuse et que, par conséquent, Beaver avait droit à des dommages-intérêts, mais que les intimés étaient responsables envers la banque en vertu de leurs cautionnements. Je n'examinerai que les parties de la décision du juge Spencer (y compris un jugement supplémentaire [1 C.B.R. (3d) à la p. 70]) qui se rapportent au présent pourvoi.

65 Le juge Spencer a conclu que la banque avait induit Beaver en erreur quant à la raison de l'examen indépendant des finances de l'entreprise et que les actes de la banque avaient été

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trompeurs (à la p. 41):

> [TRADUCTION]
>
> La succursale de Fort St. John [de la banque] fut chargée de persuader Beaver de consentir à ce qu'on procède à un examen indépendant de sa situation financière. Monsieur Arthur obtint le consentement. En l'espèce, j'estime qu'on a trompé M. Wortman au sujet des raisons pour lesquelles la banque voulait qu'un comptable indépendant examine les affaires de Beaver. Ce dernier a témoigné que M. Arthur lui a expliqué que l'enquête avait pour but d'aider la relation en cours entre la banque et Beaver, ce que j'accepte. Monsieur Arthur a témoigné qu'en effectuant cette enquête la banque voulait savoir si Beaver était une entreprise viable qui pouvait continuer ses opérations, mais il a indiqué que ce n'était pas ce qu'il a dit à Wortman. Monsieur Arthur était au courant, à ce moment-là, de la recommandation de liquidation faite par la succursale et il savait que le siège social voulait connaître les conséquences que cela aurait sur le reste de la relation avant de prendre une décision. *Le fait de convaincre Wortman de consentir à un examen des affaires de Beaver pour le motif que cela aiderait une relation en cours constituait une tromperie de sa part*.

[Italique ajouté.] Comme il n'existait pas de consentement valide à l'examen des comptables, leur présence au bureau de Beaver constituait une intrusion. Le juge de première instance a condamné la banque à payer des dommages-intérêts équivalant au montant des honoraires versés par Beaver au cabinet d'experts-comptables qui avait effectué l'examen.

66 Le juge de première instance a ensuite abordé la question de la mise sous séquestre. Aux termes du contrat passé avec Beaver, l'insolvabilité de cette dernière constituait l'une des circonstances qui permettaient à la banque de demander le remboursement de ses prêts. Le juge de première instance a constaté que Beaver était insolvable le 4 avril 1983 et qu'elle l'était toujours lorsque le séquestre a été nommé le 6 avril suivant, et par la suite. Il a cependant conclu qu'au moment où elle a demandé le remboursement des prêts, la banque ignorait que Beaver était insolvable. Elle a demandé le remboursement des prêts parce qu'il était dans son intérêt de le faire sur le plan financier (aux pp. 45 et 46):

> [TRADUCTION]
>
> Comme nous le verrons plus loin, Beaver était insolvable, mais je constate que la banque a décidé de demander le remboursement de ses prêts et la nomination d'un séquestre non pas pour cette raison, mais parce qu'elle pouvait voir que Beaver éprouvait des difficultés financieres et qu'elle avait prévu, correctement d'ailleurs, que l'entreprise se trouvait au point de son cycle financier où ses comptes débiteurs étaient les plus élevés et qu'ils devaient être utilisés, au fur et à mesure de leur perception, pour acquitter les comptes créditeurs qui étaient également élevés. La succursale de Fort St. John savait que les affaires et les revenus de Beaver diminueraient radicalement à l'arrivée du printemps pour ne remonter, ainsi que l'expérience l'avait démontré, que l'hiver suivant. Elle prévoyait,

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> avec raison selon moi, qu'il serait très difficile à Beaver de rembourser le prêt bancaire, à l'égard duquel il n'y avait alors aucun arriéré, si elle n'appliquait pas la totalité de ses comptes débiteurs au remboursement. [...] La banque savait que Beaver était à jour dans ses remboursements de prêt, et son avocat l'avait informée que le texte de son contrat de prêt posait des problèmes qui rendaient une demande de remboursement du prêt difficile à justifier.

Le juge Spencer a toutefois statué que, suivant les modalités du contrat de prêt, la banque pouvait, en raison de l'insolvabilité de Beaver, demander le remboursement des sommes prêtées, même si celle-ci ne savait pas que Beaver était insolvable au moment où elle a demandé ce remboursement (à la p. 49):

> [TRADUCTION]
>
> J'en suis venu à la conclusion que la banque ne savait pas que Beaver était insolvable lorsqu'elle a demandé le remboursement du prêt, mais qu'elle a agi ainsi après avoir évalué le risque que Beaver présentait sur le plan commercial. Il convient alors de se demander si la banque peut invoquer l'insolvabilité découverte par la suite. Je suis d'avis qu'elle le peut. L'alinéa 5d) du contrat de prêt [précité], constituant la pièce 1.12, autorisait la banque à demander le remboursement du prêt consenti à Beaver et à nommer un séquestre si l'entreprise devenait effectivement insolvable. La banque ne pourrait pas invoquer comme moyen de défense qu'elle croyait que Beaver était insolvable alors qu'elle ne l'était pas. La croyance sincère qu'il y avait l'insolvabilité ne constitue pas un moyen de défense. Cette question doit être tranchée objectivement. Il s'ensuit que la banque peut invoquer l'insolvabilité découverte ultérieurement pour justifier sa demande de remboursement, même si elle ne pensait pas que Beaver était insolvable et n'avait pas agi pour ce motif à l'époque.

67 Le juge Spencer a déclaré nulle la renonciation signée par les administrateurs à l'assemblée du 4 avril. Par conséquent, la tentative de la banque d'obtenir que Beaver renonce à toute plainte découlant du bref intervalle entre la demande de remboursement et la nomination du séquestre était sans effet. Le juge Spencer a conclu qu'en prétendant conseiller les administrateurs et Beaver quant à leur meilleur intérêt sur le plan commercial, le représentant de la banque, Holford, avait engagé avec eux une relation fiduciaire. Il a jugé, en outre, que Holford avait manqué à son obligation fiduciaire et que ce manquement avait rendu nulle la renonciation. Holford a dissimulé des renseignements au sujet de la responsabilité potentielle des cautions et du coût probable de la mise sous séquestre (à la p. 55):

> [TRADUCTION]
>
> [Holford] n'a pas expliqué la difficulté qu'éprouverait Beaver à exploiter son entreprise lorsqu'elle serait sous séquestre, pas plus qu'il ne leur a révélé [aux administrateurs] le coût

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probable d'une mise sous séquestre. Meikle a témoigné l'avoir fait et avoir averti les actionnaires qu'ils pourraient, en leur qualité de cautions, devoir assumer jusqu'à 600 000 $ de déficit. J'estime qu'il fait erreur. À cet égard, je ne retiens ni son témoignage ni celui de Holford. J'accepte les dépositions des actionnaires, particulièrement celles des D[rs] Temple, Moody, Watt et Jones, selon lesquelles ils sont sortis soulagés de cette assemblée, en pensant que leur responsabilité en qualité de caution se limiterait probablement à 60 000 $ environ. Ils avaient reçu une estimation de la banque en ce sens.

68 De plus, Holford avait menti à propos de l'intention de la banque d'engager des procédures contre Beaver le lendemain. Les administrateurs se sont fondés sur cette déclaration inexacte pour signer la formule de consentement et de renonciation (aux pp. 57 et 58):

> [TRADUCTION]
>
> Lorsque le D[r] Dixon a demandé ce qui arriverait s'ils ne signaient pas ce soir-là, Holford a répondu que la banque engagerait des procédures le lendemain. Suivant le témoignage du D[r] Dixon, celui-ci a donc fait remarquer qu'il ne servait à rien de refuser et, en conséquence, le D[r] Temple et lui-même ont signé le document. Les autres personnes présentes à l'assemblée ont corroboré cette version des faits, et Holford a reconnu, un peu tard, avoir tenu des propos de ce genre. Mais Holford savait que la décision de mettre sous séquestre incombait à M. Ellwood, du bureau régional, et qu'elle dépendait du consentement des administrateurs. *En disant que la banque engagerait des procédures le lendermain, il savait qu'il mentait.* Cela constituait quelque chose de plus qu'une description inexacte de ce que réservait l'avenir. Il s'agissait nettement d'une déclaration inexacte implicite de l'intention actuelle de la banque, destinée à forcer les administrateurs à signer. Les D[rs] Dixon et Temple se sont fiés à cette déclaration.

[Italique ajouté.]

69 Bref, la formule de consentement préparée par la banque était nulle à toutes fins, que ce soit comme aveu d'insolvabilité et comme consentement à la mise sous séquestre ou comme renonciation à un délai de paiement à la suite de la demande de remboursement du prêt de la banque.

70 En l'absence de renonciation valide, les actes de la banque consistant à demander le remboursement du prêt et à nommer un séquestre ne pouvaient se justifier que si Beaver se voyait effectivement accorder un délai de paiement suffisant suite à la demande. Après avoir effectué un examen approfondi de la jurisprudence et des faits, le juge Spencer a conclu qu'un délai de paiement de 24 heures était suffisant dans les circonstances. Il s'est appuyé, en cela, sur sa conclusion voulant que Beaver n'aurait pas pu satisfaire à cette demande même si on lui avait accordé un délai d'un mois (à la p. 63):

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> [TRADUCTION]
>
> Compte tenu de toutes ces circonstances, j'estime que le délai qui s'est écoulé entre la signification en bonne et due forme de la demande de la banque, le 5 avril 1983, et la prise en main des affaires de Beaver par le séquestre le 6 avril suivant, était suffisant. Un préavis plus long n'aurait rien changé.

71 Le juge Spencer a conclu en outre que Beaver était vouée à l'échec et qu'il était dans le meilleur intérêt des cautions qu'il y ait liquidation rapide de l'entreprise (à la p. 57):

> [TRADUCTION]
>
> Je pense toutefois qu'il était judicieux de conseiller aux actionnaires de liquider Beaver. À mon avis, l'entreprise était vouée à l'échec et aurait probablement fermé ses portes avant l'été. Sa fermeture hâtive et l'emploi des comptes débiteurs pour rembourser le montant dû à la banque permettraient, dans cette mesure, de réduire la responsabilité assumée par les administrateurs et leurs autres sociétés, Pax, Leader et Wesson, en vertu de leurs cautionnements.

72 Le juge Spencer a condamné les cautions, tant les personnes morales que physiques (à l'exception des intimés Rost, Rost Enterprises Ltd. et Glenonne, dont la responsabilité était limitée à 100 000 $) à payer le montant net dû à la banque par Beaver.

B. Cour d'appel de la Colombie-Britannique

73 La Cour d'appel de la Colombie-Britannique (les juges Macdonald, Cumming et Hinds) a accueilli à l'unanimité l'appel interjeté par les intimés relativement à l'action fondée sur les cautionnements qu'ils avaient consentis, que la banque avait intentée contre eux [(1990), 1 C.B.R. (3d) 1, 49 B.C.L.R. (2d) 195, [1991] 1 W.W.R. 74, 2 B.L.R. (2d) 81]. Encore une fois, je restreindrai mon analyse aux parties de l'arrêt de la Cour d'appel qui se rapportent au présent pourvoi.

74 La Cour d'appel a, dans une large mesure, maintenu les conclusions du juge de première instance. Elle a souligné que ce dernier avait conclu à deux reprises que la banque avait eu une conduite trompeuse et qu'il n'appartenait pas à un tribunal d'appel de modifier ces conclusions (à la p. 18 [C.B.R.]):

> [TRADUCTION]
>
> Nous ne voulons pas manquer de respect envers M[e] Clark [l'avocat de la banque] en refusant d'examiner en détail ses arguments. Le juge de première instance a, à deux

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> occasions distinctes, conclu que les préposés de la banque s'étaient rendus coupables de tromperie. Dans les deux cas, il l'a fait après avoir évalué la crédibilité d'un certain nombre de témoins. Une cour d'appel ne saurait modifier de telles conclusions de fait, à moins qu'il ne soit établi qu'une erreur manifeste et dominante a été commise. Nous n'en voyons aucune. Les intimés cherchent, par cet argument, à obtenir de la cour qu'elle examine la preuve présentée au procès et qu'elle substitue son appréciation à celle du juge de première instance, ce qu'il ne nous est pas loisible de faire...

75 La Cour d'appel a néanmoins accueilli l'appel et rejeté l'action de la banque contre les intimés, fondée sur les cautionnements qu'ils avaient consentis à l'égard de la dette de Beaver. La cour a jugé que la conduite trompeuse adoptée à deux reprises par la banque consistait en des [TRADUCTION] "actes de mauvaise foi et de dissimulation équivalant à des déclarations inexactes" (p. 19), ce qui avait pour effet de libérer les intimés des obligations qui leur incombaient en vertu de leurs cautionnements. À l'appui de sa conclusion, la Cour d'appel a cité la décision *Bank of India v. Trans Continental Commodity Merchants Ltd.*, [1982] 1 Lloyd's Rep. 506 (Q.B. Com. Ct.), et en particulier le passage qui se trouve à la p. 515.

76 La Cour d'appel a refusé de modifier la conclusion du juge Spencer selon laquelle on avait disposé de suffisamment de temps pour payer après que la demande de remboursement eut été faite. Elle a également maintenu la conclusion du juge de première instance voulant que la mise sous séquestre n'ait en fait causé aucun préjudice aux intimés, étant donné que [TRADUCTION] "le consentement à la mise sous séquestre avait eu pour effet de réduire le risque assumé par les cautions et de mettre fin à la perte que subissait alors Beaver (p. 20). Elle a conséquemment rejeté l'action en dommages-intérêts contre la banque, fondée sur ce motif.

77 La banque a demandé et obtenu l'autorisation de se pourvoir contre l'arrêt de la Cour d'appel. Les intimés ont demandé et obtenu l'autorisation de former un pourvoi incident sur la question des dommages-intérêts découlant de la conduite trompeuse de la banque.

III. Les Questions

A. Les questions soulevées dans le pourvoi

78 1. Le juge de première instance et la Cour d'appel ont-ils commis une erreur en statuant que la banque s'était rendue coupable de tromperie lorsque son préposé avait dit aux intimés que s'ils ne signaient pas la formule de consentement, la banque engagerait des procédures le lendemain?

79 2. La Cour d'appel a-t-elle conclu à tort que les actes trompeurs avaient pour effet de libérer les cautions en l'absence de tout préjudice causé à celles-ci?

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B. La question soulevée dans le pourvoi incident

80 1. Le juge de première instance et la Cour d'appel ont-ils commis une erreur, compte tenu de l'obtention irrégulière du consentement et de la renonciation, en jugeant que le délai accordé pour rembourser le prêt avant la nomination d'un séquestre était raisonnable et, par conséquent, que la demande de dommages-intérêts n'était pas fondée?

IV. Analyse

81 Je suis d'avis d'accueillir le pourvoi et de rejeter le pourvoi incident. En résumé, je suis d'accord avec les tribunaux d'instance inférieure pour dire qu'il y a eu tromperie de la part de la banque mais, contrairement à la Cour d'appel, je ne pense pas que cette tromperie a eu pour effet de libérer les cautions.

82 J'examinerai d'abord la question de la tromperie, qui est le premier point soulevé dans le pourvoi et dont il est également question dans le pourvoi incident, car j'estime qu'elle peut et doit être réglée rapidement. J'examinerai ensuite la question de la libération des cautions.

A. La tromperie

83 Dans sa plaidoirie, l'avocat de la banque nous a incités avec ardeur à réexaminer la question de la tromperie. Je suis toutefois d'avis de ne pas toucher aux conclusions de fait que le juge de première instance a tirées sur ce point et qui ont été maintenues par la Cour d'appel. J'adopte le passage suivant de l'arrêt de la Cour d'appel (à la p.18):

> [Traduction]
>
> Le juge de première instance a, à deux occasions distinctes, conclu que les préposés de la banque s'étaient rendus coupables de tromperie. Dans les deux cas, il l'a fait après avoir évalué la crédibilité d'un certain nombre de témoins. Une cour d'appel ne saurait modifier de telles conclusions de fait, à moins qu'il ne soit établi qu'une erreur manifeste et dominante a été commise. Nous n'en voyons aucune. Les intimés cherchent, par cet argument, à obtenir de la cour qu'elle examine la preuve présentée au procès et qu'elle substitue son appréciation à celle du juge de première instance, ce qu'il ne nous est pas loisible de faire ...

84 Notre cour a indiqué à maintes reprises qu'une cour d'appel ne devrait pas modifier des conclusions de fait en l'absence d'une erreur manifeste et dominante. Comme elle l'affirmait

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tout récemment dans l'arrêt *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570, 20 R.P.R. (2d) 50, [1991] 3 C.N.L.R. 79, 127 N.R. 147, 83 D.L.R. (4th) 381, 46 O.A.C. 396, à la p.574 [R.C.S.]:

> ... la règle veut qu'un tribunal d'appel n'infirme pas la décision du juge de première instance en l'absence d'une erreur manifeste et prépondérante qui ait influé sur son appréciation des faits : *Stein c. Le navire 'Kathy K'*, [1976] 2 R.C.S. 802; *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2. La règle a d'autant plus de force en présence de conclusions concourantes de deux cours d'instance inférieure.
>
> (Voir aussi *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351, 10 C.C.L.T. (2d) 101, 9 C.P.C. (3d) 78, 90 D.L.R. (4th) 27, (sub nom. *Lapointe c. Chevrette)* 133 N.R. 116, 45 Q.A.C. 262.)

85 Je suis entièrement d'accord avec la Cour d'appel pour dire qu'aucune erreur manifeste et dominante n'a été commise en l'espèce relativement aux conclusions de fait tirées et à l'application qui a été faite des principes de droit régissant l'appréciation de la preuve présentée.

86 Dans leur pourvoi incident, les intimés soutiennent que le juge de première instance et la Cour d'appel ont commis une erreur en n'accordant pas des dommages-intérêts pour la conduite trompeuse de la banque, étant donné que cette conduite trompeuse a eu pour effet d'empêcher Beaver de disposer d'un délai de paiement raisonnable après que la banque eut demandé le remboursement des prêts. Le juge de première instance a décidé que le préavis de 24 heures était suffisant, compte tenu des facteurs pertinents prescrits par la jurisprudence en la matière, dont l'arrêt *Ronald Elwyn Lister Ltd. c. Dunlop Canada Ltd.*, [1982] 1 R.C.S. 726, 41 C.B.R. (N.S.) 272, 42 N.R. 181, 135 D.L.R. (3d) 1, 18 B.L.R. 1, 65 C.P.R. (2d) 1, et la décision *Mister Broadloom Corp. (1986) v. Bank of Montreal* (1979), 32 C.B.R. (N.S.) 241, 25 O.R. (2d) 198, 7 B.L.R. 222, 101 D.L.R. (3d) 713 (H.C.). Il a en outre conclu l'avis que la mise sous séquestre hâtive de Beaver a eu pour effet de réduire la responsabilité assumée par les intimés aux termes de leurs cautionnements, de sorte qu'il est difficile de constater qu'un préjudice quelconque a résulté de la nomination immédiate d'un séquestre, en supposant que l'obtention du consentement par la tromperie a rendu nulle la demande de remboursement. La Cour d'appel a refusé de modifier l'une ou l'autre de ces conclusions. Compte tenu des principes que je viens d'exposer à l'égard du contrôle par un tribunal d'appel, je partage l'avis de la Cour d'appel qu'il ne convient pas de modifier les conclusions du juge de première instance. En conséquence, le pourvoi incident est rejeté.

B. La libération des cautions

87 En statuant qu'il y avait lieu de libérer les cautions, la Cour d'appel a invoqué l'extrait

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suivant des motifs du juge Bingham dans la décision *Bank of India*, précitée, à la p.515, confirmée par [1983] 2 Lloyd's Rep. 298 (C.A.) [à la p.18 C.B.R.]:

> [Traduction]
>
> 'Si on laisse de côté ce qui peut être le cas spécial des assurances de cautionnement, je considère que le principe véritable qu'il faut appliquer est celui qui veut que, bien qu'*une caution soit libérée si le créancier agit de mauvaise foi envers elle ou est coupable de dissimulation qui équivaut à une déclaration inexacte* ou cause ou contribue à causer le défaut du débiteur principal à l'égard duquel la caution est donnée ou modifie les conditions d'un contrat entre lui et le débiteur principal d'une manière qui pourrait nuire aux intérêts de la caution, une autre conduite de la part du créancier qui n'a pas ces caractéristiques, même si elle est irrégulière et même si elle nuit aux intérêts de la caution dans un sens général, n'a pas pour effet de libérer la caution.' [Italique ajouté.]

Le même passage est cité et approuvé par le juge Wilson dans l'arrêt *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, [1987] 1 W.W.R. 289, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290, 32 D.L.R. (4th) 9, 70 N.R. 341, à la p. 567 [R.C.S.].

88 À mon avis, ni la décision *Bank of India* ni l'arrêt *Wilder* n'appuient la conclusion tirée par la Cour d'appel en l'espèce, à savoir que du moment que le créancier fait une déclaration inexacte, il n'est pas nécessaire que les cautions aient subi ou risquent de subir un préjudice pour qu'elles soient libérées. Cela est particulièrement vrai si on considère ces décisions à la lumière de la jurisprudence relative à la libération d'une caution par suite de la conduite du créancier.

89 En ce qui concerne la décision *Bank of India*, il ressort clairement de l'ensemble des motifs du juge Bingham que, dans le passage souligné de l'extrait précité, il était question d'actes de dissimulation équivalant à des déclarations inexactes commis *au moment de la formation du contrat de cautionnement*. Le juge Bingham ne s'intéressait pas à des déclarations inexactes faites par le créancier après la formation du contrat. À la page qui précède celle d'où provient l'extrait en question, le juge Bingham affirme ceci au sujet des déclarations inexactes faites par le créancier (à la p. 514):

> [Traduction]
>
> Certains principes sont bien établis [...] On peut conclure que le fait de ne pas divulguer, *au moment où le cautionnement est consenti*, des faits susceptibles de causer un préjudice à la caution équivaut à une déclaration inexacte et en a les conséquences. (*Lee v. Jones* (1864), 17 C.B.N.S. 482).

[Italique ajouté.]

90 L'examen de la décision invoquée par le juge Bingham à l'appui de cette proposition,

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savoir *Lee v. Jones* (1864), 17 C.B. (N.S.) 482 (Ex. Ch.), règle la question. Dans cette affaire, le défendeur avait signé un cautionnement. Le demandeur l'a poursuivi en exécution de la garantie donnée. Le défendeur plaida, en défense, que c'était par suite de la dissimulation frauduleuse d'un fait substantiel par le demandeur qu'il avait passé le contrat de cautionnement. L'Exchequer Chamber confirma à la majorité la décision du tribunal d'instance inférieure, selon laquelle la dissimulation avait pour effet de libérer la caution. L'extrait suivant des motifs du juge Blackburn établit clairement que, dans l'affaire *Lee v. Jones*, il s'agissait de déterminer si la déclaration inexacte était telle que la caution n'aurait pas conclu le contrat si elle avait su la vérité (à la p. 507 [C.B. (N.S.)]:

> [Traduction]
>
> Il est si improbable que quelqu'un pouvait supposer que les cautions auraient conclu un tel contrat si elles avaient su la vérité, que le jury pourrait bien penser que les demandeurs savaient que le défendeur l'ignorait; et, si telle était l'opinion du jury, il pourrait conclure, sur ce seul fondement, que la déclaration a été faite dans l'intention frauduleuse de tromper.

91 De plus, il ressort clairement de l'extrait cité par la Cour d'appel de la Colombie-Britannique que ce que le juge Bingham a dit essentiellement dans l'affaire *Bank of India* et, en fait, ce qui constituait le fondement de la décision, était qu'il n'existe pas de principe général voulant qu'une conduite irrégulière préjudiciable à une caution ait pour effet de la libérer. Dans l'affaire *Bank of India*, la conduite "irrégulière" qui, a-t-on conclu, ne libérait pas la caution était le retard de la banque créancière à délivrer les confirmations écrites du contrat principal. Ce point de vue a été confirmé en appel, précité. Le lord juge Goff affirme, à la p. 302:

> [Traduction]
>
> ... il n'y a aucun principe général selon lequel la conduite 'irrégulière' du créancier, même si elle nuit aux intérêts de la caution, a pour effet de la libérer, quoique la caution puisse être libérée dans des circonstances particulières dont les exemples donnés par le juge sont certainement les plus importants et, peut-être même, les seuls ... *Mais il ne fait aucun doute, dans mon esprit, que la simple conduite irrégulière du créancier, même si elle nuit aux intérêts de la caution, n'a pas pour effet de la libérer*.

[Italique ajouté.]

92 Dans *Wilder*, précité, le juge Wilson devait se prononcer sur l'effet qu'une *violation* du contrat principal liant le créancier et le débiteur a sur la responsabilité de la caution. Elle a commencé par faire observer qu'une *modification* du contrat principal qui préjudicie à la caution a pour effet de la libérer (à la p. 562):

> Il est bien établi en droit que toute modification importante des conditions d'un contrat

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> conclu entre le créancier et le débiteur principal au préjudice du garant sans le consentement de ce dernier a pour effet de libérer le garant.

Le juge Wilson a insisté sur le fait que le cautionnement donné par la caution repose sur le risque inhérent au contrat garanti et que les principes de l'equity s'appliquent si une modification par le créancier du risque assumé par la caution, sans le consentement de cette dernière, porte atteinte au droit de subrogation que possède la caution (à la p. 566):

> Dans le cas d'un contrat spécifique, il faut présumer que le garant a donné son cautionnement en fonction d'un risque vérifiable et clairement identifié qui est inhérent au contrat. Le garant dans une telle affaire est libéré parce qu'il n'est pas en mesure d'assurer une protection contre la modification du contrat principal par les parties à ce contrat. Lorsqu'il a donné sa garantie en fonction de ce risque particulier, l'equity le protège contre toute modification de ce risque à laquelle il n'a pas participé.

Le juge Wilson a donc conclu que, pour déterminer si une *violation* du contrat principal libère la caution, il faut se demander si cette violation a sensiblement modifié, à son détriment, le risque assumé par la caution (à la p. 569):

> ... la question principale est de savoir si sa violation subséquente [du contrat principal] par la banque a sensiblement modifié les risques assumés par les garants. Je crois qu'il n'y a aucun doute que cela a été le cas. Je conviens avec le juge Lambert que la violation par la banque a causé le défaut de la société. Elle a diminué sensiblement la valeur de la garantie qu'elle détenait à l'égard de la dette de la société en empêchant la société de continuer à exister comme entreprise commerciale viable. Par conséquent, les droits en equity que possèdent les garants en matière de subrogation et d'indemnisation ont été gravement compromis, voire même éliminés.

Dans l'affaire *Wilder*, les cautions ont donc été libérées parce qu'on a conclu qu'elles avaient subi un préjudice.

93 J'aimerais maintenant examiner brièvement d'autres décisions pertinentes relativement à la libération des cautions. En général, une fois qu'un contrat de cautionnement est conclu, la caution n'est libérée complètement que si le contrat principal est modifié, sans son consentement, d'une façon qui ne lui est pas manifestement profitable ou si le créancier viole le contrat de cautionnement. La caution sera partiellement libérée de sa responsabilité en vertu du cautionnement si le créancier diminue la valeur de la garantie, mais seulement dans la mesure où il y a atteinte aux droits de subrogation que la caution possède aux termes du contrat de cautionnement. Tel est le point de vue résumé par le juge Laskin (plus tard Juge en chef du Canada), dans l'affaire *Rose v. Aftenberger*, [1970] 1 O.R. 547, 9 D.L.R. (3d) 42 (C.A.) (à la p. 554 [O.R.]):

> [Traduction]

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> À mon avis, le principe général qui doit être appliqué porte qu'une caution est libérée si le contrat principal à l'égard duquel elle a donné son cautionnement est modifié sans son consentement dans une affaire (comme la Cour suprême du Canada l'a dit dans l'arrêt *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, à la p. 172 ...) qui n'est pas clairement insuffisante ou nécessairement avantageuse pour le garant; ou si les conditions du contrat de cautionnement entre le créancier et la caution sont violées par le créancier. Lorsque, comme en l'espèce, on traite simplement de la garantie prise par le créancier de manière injustifiée et qu'il n'est pas démontré que le fait de prendre une garantie (et même de la garder) était une condition de la garantie, alors la caution ne peut être libérée au-delà de la valeur de la garantie qu'elle a perdue.

94 L'ouvrage de K.P. McGuinness, intitulé *The Law of Guarantee*, Toronto, Carswell, 1986, contient un résumé similaire, à la p. 282:

> [Traduction]
>
> ... la caution ne peut être entièrement libérée que dans deux cas : (1) lorsque le créancier a modifié, par sa conduite ou ses actes, le risque de défaut de la part du débiteur principal et (2) lorsque le créancier viole une condition du contrat de cautionnement. Si un acte du créancier n'a d'incidence que sur le montant dont répondra la caution en cas de défaut, celle-ci n'est libérée que dans la mesure du préjudice réellement subi.

95 Il est donc clair que la jurisprudence et la doctrine existantes fondent sur deux principes la libération de la caution. Le premier veut que la caution ait assumé un risque donné et qu'on ne doive pas lui en imposer un sensiblement différent en modifiant ou en violant les conditions du contrat principal. Comme il devrait appartenir à la caution de décider si elle maintient son cautionnement et assume le nouveau risque, elle a donc droit, dans une telle situation, à une libération totale si elle n'a pas consenti à la modification. Selon le deuxième principe, lorsque le risque assumé par la caution demeure le même, mais que le montant de sa responsabilité augmente par suite d'un acte du créancier, elle peut avoir droit à une libération dans la mesure de cette augmentation.

96 Toutefois, la caution n'est pas libérée lorsque le créancier viole le contrat principal, mais que cette violation ne préjudicie pas à la caution. C'est ainsi que la Section d'appel de la Cour suprême de la Nouvelle-Écosse a jugé, dans l'affaire *Royal Bank v. Coastal Music Distributors Ltd.* (1982), 16 B.L.R. 289, (sub nom. *Nobes v. Royal Bank)* 49 N.S.R. (2d) 634, 96 A.P.R. 634 (C.A.), que même si le créancier avait violé le contrat principal en ne donnant pas au débiteur un délai suffisant pour répondre à la demande de paiement, les cautions n'auraient pas eu droit à une libération parce que le débiteur aurait de toute façon été incapable de répondre à cette demande. Autrement dit, la violation du contrat principal n'a d'aucune manière préjudicié aux cautions (à la p. 643 [N.S.R.]):

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[Traduction]

Même en supposant que Coastal [la débitrice] n'ait reçu aucun avis de la demande ou, subsidiairement, qu'on ne lui ait pas accordé un délai raisonnable pour répondre à la demande avant la nomination du séquestre, et qu'en conséquence l'entrée de ce dernier dans les locaux de la société ait été à la fois prématurée et préjudiciable, je ne crois pas qu'il s'agit du genre d'atteinte au contrat de cautionnement qui devrait libérer les cautions. J'affirme cela parce qu'il ressort clairement des conclusions de fait tirées par le juge en chef Cowan que même si la demande de paiement avait été inattaquable, cela n'aurait fait aucune différence pratique en ce qui concerne les cautions et Coastal [...] Coastal n'était tout simplement pas en mesure de répondre à une demande de paiement.

97 Voir aussi McGuinness, à la p. 257:

[Traduction]

Malgré les opinions incidentes contraires que l'on trouve dans un certain nombre de décisions anciennes, il semble maintenant assez évident qu'une modification du contrat principal qui est manifestement sans importance en ce qui concerne le risque assumé par la caution et qui ne saurait donc préjudicier à cette dernière, ou qu'une dérogation aux conditions du contrat principal qui bénéficie nécessairement à la caution, ne libérera pas la caution de sa responsabilité. Tel que souligné plus haut, il ne semblerait y avoir aucun fondement doctrinal qui justifierait la libération en pareil cas. La caution est, par définition, une personne qui a accepté d'assumer le risque de défaut d'une autre personne. Si cette obligation est modifiée au point que le risque assumé est nécessairement réduit, alors il n'y a pas augmentation du fardeau de la caution. Cependant, pour que la caution continue d'être liée lorsqu'il y a eu modification du contrat principal, l'absence de préjudice ou le peu d'importance de la modification doivent être évidents en soi.

98 Finalement, si le créancier réduit la valeur de la garantie détenue à l'égard du cautionnement, la caution a le droit d'être libérée dans la mesure du préjudice qu'elle subit par suite de la perte de garantie: *Bank of Nova Scotia v. Ham*, [1986] 5 W.W.R. 249, 49 Sask. R. 36, 29 D.L.R. (4th) 427 (C.A.), et *Rosemex Inc. c. Banque de Montréal*, 78 C.B.R. (N.S.) 54, [1990] R.J.Q. 344 (C.A.). Pour citer McGuinness, à la p. 282:

[Traduction]

Si un acte du créancier n'a d'incidence que sur le montant dont répondra la caution en cas de défaut, celle-ci ne peut être libérée que dans la mesure du préjudice réellement subi. En conséquence, un acte ou un manquement du créancier qui porterait atteinte au droit de la caution à la cession de la garantie aura habituellement pour effet de libérer la caution dans la seule mesure de la perte qu'elle a subie, puisque la valeur d'une garantie (et, par

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conséquent, le préjudice subi par la caution du fait de cette perte ou de cette atteinte) peut, dans la plupart des cas, être déterminée facilement.

99 Si je comprends bien leur argument, les intimés ne contestent pas vraiment le résumé donné plus haut de la jurisprudence, dans la mesure où il se rapporte à la conduite du créancier envers le débiteur principal, qui touche une caution. Ils soutiennent toutefois que ces principes ne s'appliquent pas lorsque la conduite répréhensible du créancier vise directement la *caution*. Les intimés font valoir que lorsque la caution a été victime de la mauvaise foi du créancier, elle devrait être automatiquement libérée sans qu'il soit nécessaire de déterminer le préjudice qu'elle a subi. Comme je l'ai déjà dit, ce point de vue n'est pas étayé par la jurisprudence citée par la Cour d'appel ou par les intimés (*Bank of India* et *Wilder*), de sorte qu'il faut se demander s'il est souhaitable d'étendre ainsi l'application des principes régissant la libération des cautions. À mon avis, ça ne l'est pas.

100 On n'a tout simplement soumis aucune raison sérieuse de déroger à l'état actuel du droit de la manière proposée par les intimés. Une caution ne devrait être libérée de l'obligation contractée que s'il y a eu perpétration d'actes ayant une incidence quelconque sur l'amplitude du risque assumé ou sur la probabilité qu'il se matérialise. Toute autre conduite inacceptable ou répréhensible du créancier envers la caution devrait être traitée au moyen de causes d'action par ailleurs appropriées, comme le délit de tromperie ou le manquement à une obligation fiduciaire. À cet égard, les intimés ont cherché à justifier davantage la décision de la Cour d'appel d'annuler les cautionnements contestés en raison d'un manquement de la part du représentant de la banque à l'obligation fiduciaire qu'il avait envers les administrateurs de Beaver. Tout en acceptant pour les fins de la discussion que le manquement à une obligation fiduciaire dont le juge de première instance a conclu à l'existence a bel et bien eu lieu, je n'accepte pas qu'il devrait avoir l'effet que proposent les intimés. À mon avis, le juge de première instance a eu raison de conclure que le manquement à une obligation fiduciaire qu'aurait commis la banque a eu pour effet de rendre nuls la renonciation et le consentement contestés qui avaient été obtenus à l'assemblée du 4 avril 1983.

101 La conduite de la banque, en l'espèce, a consisté à faire des déclarations inexactes à des personnes qui étaient à la fois les dirigeants de la débitrice, Beaver, et les cautions. Les déclarations inexactes ont amené ces personnes à consentir à la mise sous séquestre de Beaver. Ces déclarations inexactes ont eu pour effet d'annuler le consentement ainsi obtenu. Si Beaver n'avait pas été vraiment insolvable à la date du consentement (une conclusion qui n'est pas contestée devant notre cour), la demande de paiement et la mise sous séquestre qui ont suivi auraient constitué une violation du contrat de prêt principal. Je conviens toutefois avec le juge Spencer que sa conclusion que Beaver était insolvable à l'époque justifiait la banque de demander le remboursement du prêt et de nommer un séquestre par suite du défaut de paiement de Beaver.

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102 Le juge Spencer a souligné à maintes reprises non seulement que la mise sous séquestre de Beaver n'avait *pas* nui aux cautions, mais encore qu'elle avait en fait été *avantageuse* pour eux. Il affirme, par exemple (aux pp. 57 et 68):

> [Traduction]
>
> Beaver [...] était vouée à l'échec et aurait probablement fermé ses portes avant l'été. Sa fermeture hâtive et l'emploi des comptes débiteurs pour rembourser le montant dû à la banque permettraient, dans cette mesure, de réduire la responsabilité assumée par les administrateurs et leurs autres sociétés [...] en vertu de leurs cautionnements. [
>
> . . . . .
>
>]
>
> À cause [de la déclaration inexacte], le séquestre est probablement entré en fonction plus tôt qu'il ne l'aurait fait autrement, ce qui a permis à la banque de réduire le déficit et, par conséquent, la responsabilité relative aux cautionnements du montant des comptes débiteurs perçus qui, autrement, aurait servi à payer les fournisseurs de Beaver.

103 Selon les intimés, il est simpliste d'affirmer que, puisque Beaver était insolvable, les actes de la banque n'ont causé aucun préjudice aux cautions et ni augmenté le risque qu'elles assumaient. Ils font valoir que les cautions étaient des médecins et qu'elles auraient pu réunir personnellement les fonds nécessaires pour éviter la mise sous séquestre, ou encore tenter de vendre l'entreprise. À mon avis, ces arguments ne sauraient être retenus, car ils constituent de simples tentatives de faire infirmer des conclusions de fait du juge de première instance que celui-ci était raisonnablement fondé à tirer. Le juge de première instance a non seulement conclu que Beaver était insolvable, mais encore qu'elle était vouée à l'échec. Il a également étudié la possibilité que les cautions aient été en mesure de faire quoi que ce soit pour améliorer cette situation, affirmant (à la p. 62):

> [Traduction]
>
> Les tentatives de Beaver de recueillir des fonds, de vendre l'entreprise ou d'attirer de nouveaux clients n'avaient pas réussi. Au procès, Wortman a reconnu qu'il aurait été difficile de trouver d'autres sources de financement le 4 avril 1983 [...] Bien que les actionnaires affirment maintenant qu'ils auraient pu réunir eux-mêmes des fonds pour aug menter les capitaux propres de la société, aucun d'eux n'aurait pu le faire sans emprunter ou négocier une vente d'actifs. La plupart d'entre eux nient qu'au cours de l'assemblée du 4 avril, Holford ou Meikle leur ait proposé d'injecter plus de capitaux propres, mais je crois qu'il en a été fait mention et que l'on n'a pas répondu à la proposition.

104 Bref, ce qui s'est produit en l'espèce, c'est que la banque a fait des déclarations inexactes qui ont amené les intimés à donner un consentement que l'insolvabilité de Beaver

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rendait superflu et qui n'a causé aucun préjudice aux cautions.

C. Conclusion

105 Compte tenu des principes que j'ai examinés, je conclus que les intimés n'ont pas le droit d'être libérés de leurs cautionnements. Comme les intimés n'ont pas soutenu que la banque avait fait des déclarations inexactes au moment de la conclusion des contrats de cautionnement (et il n'existe pas non plus de preuve que de telles déclarations inexactes ont été faites), l'extrait de la décision *Bank of India* qu'ils invoquent ne leur est d'aucun secours. Le contrat principal conclu entre la banque et Beaver n'a pas été modifié. Même à supposer que la banque ait violé le contrat principal en n'accordant pas à Beaver un délai suffisant pour satisfaire à la demande de remboursement (ce qui n'est pas le cas), cette violation n'a causé aucun préjudice aux intimés et ainsi l'arrêt *Wilder* ne leur est d'aucune utilité. Le risque qu'ils avaient assumé n'a pas été modifié sensiblement à leur détriment. Dans l'affaire *Royal Bank v. Coastal Music Distributors Ltd.*, précitée, la Section d'appel de la Cour suprême de la Nouvelle-Écosse a jugé que, dans de telles circonstances, il n'y a pas lieu de libérer la caution, même en supposant qu'il y a eu violation du contrat principal, car le débiteur n'aurait pas pu se conformer à une demande de remboursement, même faite conformément au contrat. Le même argument s'applique à plus forte raison lorsque le débiteur n'aurait pas pu satisfaire à la demande de remboursement et qu'en plus une violation du contrat, commise en accordant un délai insuffisant pour payer suite à cette demande, a réellement *augmenté* la valeur de la garantie détenue par le créancier et *réduit* le risque assumé par les cautions.

106 Je conclus donc qu'il n'y a pas lieu de libérer les intimés de leurs cautionnements.

V. Dispositif

107 En conséquence, le pourvoi est accueilli, l'arrêt de la Cour d'appel de la Colombie-Britannique rejetant l'action de l'appelante contre les intimés, fondée sur les cautionnements qu'ils avaient consentis, est infirmé et la décision du juge de première instance est rétablie. Le pourvoi incident est rejeté.

108 Il y a lieu, dans les circonstances, que chaque partie assume ses propres dépens en notre cour et en Cour d'appel de la Colombie-Britannique. Je suis d'avis de ne pas modifier les ordonnances du juge Spencer concernant les dépens au procès.

Appeal allowed; cross-appeal dismissed.
Pourvoi accueilli; pourvoi incident rejeté.

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Para 8

Para 9

Manulife Bank of Canada *Appellant*

v.

John Joseph Conlin *Respondent*

INDEXED AS: MANULIFE BANK OF CANADA *v.* CONLIN

File No.: 24499.

1996: May 30; 1996: October 31.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages — Guarantee — Renewal agreement — Release of guarantor from liability — Mortgagor's husband guaranteeing mortgage — Mortgage clause providing that guarantors liable "as principal debtors and not as sureties" — Guarantee to remain binding "notwithstanding the giving of time for payment . . . or the varying of the terms of payment" — Mortgagor renewing mortgage at different interest rate — Renewal agreement not signed by guarantor — Whether guarantor waived equitable right to be released when principal loan renewed.

Courts — Jurisdiction — Mortgagor defaulting on mortgage — Bank obtaining summary judgment against mortgagor and guarantor — Whether Court of Appeal exceeded its jurisdiction in setting aside judgment and dismissing action against guarantor.

The respondent guaranteed a mortgage for a three-year term with an interest rate of 11.5 percent per annum which his wife had provided as security for a loan from the appellant bank. In clause 34 of the mortgage agreement, the guarantors promised, as "principal debtors and not as sureties", to pay the money secured by the mortgage. The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". Shortly before the mortgage was to mature, the mortgagor and the bank executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but

Banque Manuvie du Canada *Appelante*

c.

John Joseph Conlin *Intimé*

RÉPERTORIÉ: BANQUE MANUVIE DU CANADA *c.* CONLIN

N° du greffe: 24499.

1996: 30 mai; 1996: 31 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Hypothèques — Cautionnement — Convention de renouvellement — Libération de la caution — Cautionnement de l'hypothèque par l'époux de la débitrice hypothécaire — Clause de l'hypothèque prévoyant que les cautions sont responsables «à titre de débiteurs principaux et non de cautions» — Cautionnement devant demeurer valide «nonobstant l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» — Débitrice hypothécaire renouvelant l'hypothèque à un taux d'intérêt différent — Convention de renouvellement non signée par la caution — La caution a-t-elle renoncé à son droit en equity d'être libérée lorsque le prêt principal a été renouvelé?

Tribunaux — Compétence — Défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire — Banque obtenant un jugement sommaire contre la débitrice hypothécaire et la caution — La Cour d'appel a-t-elle excédé sa compétence en infirmant le jugement et en rejetant l'action intentée contre la caution?

L'intimé s'est porté garant d'une hypothèque de trois ans, portant intérêt au taux de 11,5 pour 100 par année, que sa femme avait offerte en garantie de remboursement d'un prêt obtenu auprès de la banque appelante. À la clause 34 de la convention hypothécaire, les cautions se sont engagées, «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Le cautionnement devait demeurer valide «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Peu avant que l'hypothèque vienne à échéance, la débitrice hypothécaire et la banque ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année.

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the agreement was signed only by the mortgagor. The mortgagor defaulted on the mortgage, and the bank obtained a summary judgment against the mortgagor and the guarantors for the principal owing under the mortgage with interest at 13 percent per annum. The Court of Appeal, in a majority decision, set aside the judgment and dismissed the action against the respondent guarantor. This appeal is to determine (1) whether the Court of Appeal exceeded its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial, and (2) whether under the terms of the loan agreement, the respondent was released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased, without notice to him.

Held (L'Heureux-Dubé, Gonthier and Iacobucci JJ. dissenting): The appeal should be dismissed.

(1) *Jurisdiction*

The Court of Appeal has jurisdiction to make any order or decision that ought to or could have been made by the court or tribunal appealed from. Considered in light of Rule 1.04(1), which provides that the rules are to be liberally construed, Rules 20.04(2) and (4) of the *Rules of Civil Procedure* gave the motions court judge the jurisdiction to dismiss the action against the respondent. The judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing the appellant's claim. The appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence. Under Rule 39.02(1), a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. The appellant chose not to exercise this right and left the respondent's evidence unchallenged.

(2) *Release from liability*

Per La Forest, Sopinka, Cory and Major JJ.: It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. A surety can contract out of the protection provided to a guarantor by the common

Les formules de renouvellement comportaient un espace pour la signature du «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par la débitrice hypothécaire. Il y a eu défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire et la banque a obtenu un jugement sommaire contre la débitrice hypothécaire et les cautions pour le capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La Cour d'appel à la majorité a infirmé le jugement et rejeté l'action intentée contre la caution intimée. Le présent pourvoi vise à déterminer (1) si la Cour d'appel a excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès, et (2) si, en vertu des conditions de la convention de prêt, l'intimé a été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé.

Arrêt (les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents): Le pourvoi est rejeté.

(1) *Compétence*

La Cour d'appel a compétence pour rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre. À la lumière du par. 1.04(1) des Règles, qui prévoit que les règles doivent recevoir une interprétation large, les par. 20.04(2) et (4) des *Règles de procédure civile* conféraient au juge des requêtes compétence pour rejeter l'action intentée contre l'intimé. Le juge aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de l'appelante. On n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé. En vertu du par. 39.02(1) des Règles, une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. L'appelante a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de l'intimé.

(2) *Libération de responsabilité*

Les juges La Forest, Sopinka, Cory et Major: Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Une caution peut renoncer par contrat à la protection que lui accorde la

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law or equity, but any contracting out of the equitable principle must be clear. The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole. If there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. The guarantor in this case comes within the class of accommodation sureties, or those who enter into the guarantee in the expectation of little or no remuneration. The law has protected such guarantors by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

Clause 34 and clause 7, dealing with renewal or extension of time, unambiguously indicate that the respondent was not bound by the renewal agreement. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. Moreover, even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. Two aspects of the renewal agreement itself lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. Secondly, the renewal agreement states that the terms of the old mortgage will form part of the agreement, and by doing so indicates that this is a new agreement rather than merely an extension of an old agreement. Further, clause 7 of the original mortgage specifically distinguishes between extensions and renewals both in its heading and in its text. The failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. The words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. If the wording of the two clauses should be found to be ambiguous, the *con-*

common law ou l'*equity*, mais toute renonciation par contrat au principe d'*equity* doit être claire. Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération. Il y a lieu d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. La caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance, ou de celles qui ont conclu le contrat de cautionnement en espérant peu de rétribution, si ce n'est aucune. La loi a protégé ces cautions en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

La clause 34 et la clause 7, qui porte sur le renouvellement ou la prorogation de délai, indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. De plus, même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Deuxièmement, la convention de renouvellement prévoit que les conditions de l'ancienne hypothèque feront partie de la convention, indiquant ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. En outre, la clause 7 de l'hypothèque initiale distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. L'absence de mention d'une convention de renouvellement ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Les mots utilisés dans les clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que

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tra proferentem rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Per Gonthier and Iacobucci JJ. (dissenting): Clause 34 amounts to a waiver of the respondent's right to be discharged as a result of a material variation of the principal contract. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is plainly repugnant to the intention of the parties. By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest. While clause 34 does not refer to "renewal" agreements by name, it does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest. The plain ordinary meaning of the words "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. While the parties used a renewal agreement, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34. Under clause 34, the bank did not have to notify the guarantors of the renewal agreement. The language of the clause is clear, and it would be odd to infer a condition of notice when the undertaking is so clear and unambiguous. As "principal debtors", the guarantors would not be expected to sign the renewal agreement. The evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable. The space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract, since the wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the

l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. Si l'on conclut que le texte des deux clauses est ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Les juges Gonthier et Iacobucci (dissidents): La clause 34 équivaut à une renonciation par l'intimé au droit d'être libéré en raison d'une modification importante du contrat principal. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat nettement inconciliable avec l'intention des parties. À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt. Bien qu'elle ne mentionne pas expressément les conventions de «renouvellement», la clause 34 contient une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt. Le sens clair et ordinaire des mots «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Bien que les parties aient conclu une convention de renouvellement, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34. En vertu de la clause 34, la banque n'était pas tenue d'aviser les cautions de la convention de renouvellement. Le texte de cette clause est clair et il serait étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. On ne s'attendrait pas à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. Les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée. L'espace prévu pour la signature de la caution dans la con-

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original agreement. The respondent promised to guarantee the payment of the money secured by the original mortgage, and the terms of that mortgage thus determine the extent of his liability. The respondent is not liable for interest at the increased rate of 13 percent, but simply to repay the balance owing on the principal sum with interest charged at 11.5 percent per annum.

vention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement, puisque le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque initiale, et les conditions de cette hypothèque déterminent donc l'étendue de sa responsabilité. L'intimé est responsable non pas des intérêts calculés au taux majoré de 13 pour 100 par année, mais simplement du remboursement du solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Per L'Heureux-Dubé J. (dissenting): Subject to the following comment, Iacobucci J.'s reasons are substantially agreed with. Courts should generally use the "modern contextual approach" as the standard, normative approach to judicial interpretation, and may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. To determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment" in the present context, Iacobucci J. reviewed the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids. This process is not an application of the "plain meaning" approach but rather an application of the "modern contextual approach" to judicial interpretation. The rules which govern the interpretation of deeds and contracts generally are essentially the same as the rules for statutory interpretation. The "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. Here, the resulting interpretation did not come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense, and this is the presumption that is resorted to by Iacobucci J. when he makes use of admissible external aids in determining the correct meaning of the phrase "to give time".

Le juge L'Heureux-Dubé (dissidente): Sous réserve du commentaire suivant, il y a accord, pour l'essentiel, avec les motifs du juge Iacobucci. Les tribunaux doivent généralement utiliser la «méthode contextuelle moderne» comme méthode normative standard d'interprétation judiciaire et ils peuvent exceptionnellement recourir à l'ancienne règle du «sens ordinaire» quand les circonstances s'y prêtent. Pour définir l'expression «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» dans le présent contexte, le juge Iacobucci a examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure. Cette démarche est une application non pas de la méthode du «sens ordinaire», mais plutôt de la «méthode contextuelle moderne» d'interprétation judiciaire. Les règles qui régissent l'interprétation des actes et des contrats en général sont essentiellement les mêmes que les règles d'interprétation des lois. La «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, l'interprétation qui a résulté découlait non pas du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact, et c'est la présomption à laquelle recourt le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure pour déterminer le sens exact de l'expression «accorder un délai».

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By Cory J.

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By Iacobucci J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143, reversing a decision of the Ontario Court (General Division) finding the respondent liable to pay under a mortgage. Appeal dismissed, L'Heureux-Dubé, Gonthier and Iacobucci JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143, qui a infirmé une décision de la Cour de l'Ontario (Division générale) qui avait conclu que l'intimé était responsable du paiement d'une hypothèque. Pourvoi rejeté, les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents.

H. Stephen Lee, for the appellant.

H. Stephen Lee, pour l'appelante.

Raymond F. Leach and *Barbara F. Fischer*, for the respondent.

Raymond F. Leach et *Barbara F. Fischer*, pour l'intimé.

The judgment of La Forest, Sopinka, Cory and Major JJ. was delivered by

Version française du jugement des juges La Forest, Sopinka, Cory et Major rendu par

CORY J. — I have read with great interest the clear and concise reasons of Justice Iacobucci. I am in agreement with his finding that the Court of Appeal had jurisdiction to make the order dismissing the action against the respondent. However, I must differ with his conclusion that by the terms of the guarantee, the respondent waived the equitable right of a guarantor to be released upon renewal of the mortgage loan with a different term and interest rates to which the guarantor did not consent.

LE JUGE CORY — J'ai lu avec grand intérêt les motifs clairs et concis du juge Iacobucci. Je suis d'accord avec sa conclusion que la Cour d'appel avait compétence pour délivrer l'ordonnance rejetant l'action contre l'intimé. Toutefois, je dois exprimer mon désaccord avec sa conclusion qu'en vertu des conditions du cautionnement l'intimé a renoncé au droit qu'une caution possède en *equity* d'être libérée en cas de renouvellement du prêt hypothécaire où l'échéance et le taux d'intérêt sont modifiés sans son consentement. 1

The Position of a Guarantor as Defined by Equity and the Common Law

La situation de la caution en vertu de l'*equity* et de la common law

It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), at pp. 505-6, in this way:

Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Ce principe est énoncé ainsi par le lord juge Cotton dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), aux pp. 505 et 506: 2

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The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court . . . will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based

[TRADUCTION] La véritable règle est, à mon avis, la suivante: s'il y a une convention entre les parties principales quant au contrat cautionné, la caution doit être consultée et, si elle n'a pas consenti à la modification, même dans le cas où il est parfaitement évident que la modification n'est pas importante ou qu'elle ne peut que lui être profitable, la caution ne peut être libérée; cependant, s'il n'est pas évident en soi que la modification n'est pas importante ou qu'elle n'est pas susceptible de porter préjudice à la caution, la cour [. . .] statuera alors qu'il revient à la caution elle-même de décider si elle consent à rester liée nonobstant la modification, et si elle ne donne pas ce consentement, elle sera libérée.

Cette règle a été adoptée dans un certain nombre de décisions canadiennes. Voir, par exemple, l'arrêt *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562.

La règle est fondée sur le raisonnement selon lequel toute modification importante du contrat principal a pour résultat de modifier les conditions auxquelles la responsabilité de la caution devait être engagée, ce qui a pour effet de modifier le risque auquel la caution est exposée. Ce raisonnement a été formulé par le professeur K. P. McGuinness dans *The Law of Guarantee* (2e éd. 1996), à la p. 534:

[TRADUCTION] Le fondement de la règle d'*equity* est certainement compatible avec le courant de pensée traditionnel, mais il est juste de se demander s'il est nécessaire d'invoquer de quelque façon l'*equity* pour conclure que, dans le cas où une modification importante est apportée au contrat principal sans le consentement de la caution, cette dernière ne verra pas sa responsabilité engagée en cas d'inexécution subséquente. Au fond, un cautionnement particulier ou distinct (par opposition à un cautionnement général) est un engagement par lequel la caution se porte garante des risques découlant d'un contrat particulier avec le débiteur principal. Si ce contrat est modifié de manière à changer la nature et l'ampleur des risques qui en découlent, la modification n'a pas tant pour effet d'annuler la responsabilité de la caution que de soustraire le créancier à la protection que le cautionnement accorde. Sous cet angle, la défense de la caution paraît reposer sur la common law plutôt que sur l'*equity*: ce n'est pas que la caution n'assume plus aucune responsabilité relativement au contrat initial, mais plutôt que le contrat initial pour lequel la caution a assumé une responsabilité ne s'applique plus. En modi-

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approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will result in the discharge of the surety from liability under the guarantee.

fiant le contrat principal sans le consentement de la caution, le créancier le fait à ses risques et périls, et si une malchance survient, elle survient uniquement aux dépens du créancier. Une façon d'aborder la défense sous l'angle de la common law est attrayante à certains égards, parce que cela fait passer le droit de la caution de se défendre, dans le cas où il y a eu modification importante, du domaine discrétionnaire et donc relativement incertain de l'*equity* au domaine plus absolu et certain de la common law. De toute manière, il est clair, très certainement en *equity* et fort probablement en common law aussi, que la modification importante du contrat principal effectuée sans le consentement de la caution (à moins qu'elle ne l'ait ratifiée ultérieurement) aura pour résultat de libérer la caution de sa responsabilité aux termes du cautionnement.

And further at p. 541, he wrote:

Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

Il écrit ensuite, à la p. 541:

[TRADUCTION] Si le risque auquel la caution est exposée est modifié, la libération totale de la caution se justifie facilement. Modifier le contrat principal, c'est modifier le motif pour lequel la caution a convenu d'être responsable. La responsabilité de la caution se limite au contrat pour lequel elle s'est portée garante. Si les conditions de ce contrat (et donc les conditions du risque auquel est exposée la caution) sont modifiées, alors le créancier ne devrait plus avoir le droit d'exiger de la caution l'exécution de son obligation en vertu du cautionnement. Dans un tel cas, exiger d'une caution qu'elle maintienne son cautionnement équivaudrait à permettre au créancier et au débiteur principal de forcer la caution à se porter garante d'une nouvelle opération. Un tel pouvoir de la part du créancier et du débiteur principal représenterait une dérogation radicale aux principes de consensus et d'acceptation volontaire d'obligations sur lesquels repose le droit des contrats.

The Right of a Guarantor to Contract Out of the Protection Provided by the Common Law

Le droit de la caution de renoncer par contrat à la protection de la common law

4 Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

De façon générale, il est loisible aux parties de conclure leurs propres arrangements. Il s'ensuit qu'une caution peut renoncer par contrat à la protection que lui accorde la common law ou l'*equity*; voir, par exemple, l'arrêt *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107. La Cour d'appel de l'Ontario a ajouté, à juste titre selon moi, que toute renonciation par contrat au principe d'*equity* doit être claire. Voir *First City Capital Ltd. c. Hall* (1993), 11 O.R. (3d) 792 (C.A.), à la p. 796.

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5 The principle was explained by Professor McGuinness in *The Law of Guarantee*, *supra*, at p. 546, in these words:

> There are certain types of amendment that may be made to the terms of a principal contract (or departures from the terms of the principal contract) that will not have the effect of discharging the surety under that contract, even though those changes may be of a material nature. For instance, where the changes that have been made to the principal contract were specifically authorized by the surety or were otherwise within the contemplation of the contract, the surety will not be discharged. Similarly, changes which are authorized within the guarantee will not relieve the surety from liability.
>
> It is a question of interpretation whether such changes are authorized or contemplated.

The author added at p. 547 the following sage advice to lending institutions:

> Since the courts have tended to give a narrow construction to provisions in standard form guarantees which authorize such changes, it would be most unwise for a creditor to agree to changes without first obtaining the consent of the surety, except where there is clear authorization for him to act solely upon his own initiative. Where the creditor seeks to show that the guarantee agreement provides a blanket authorization to make material alterations to the principal contract, the wording must be very clear that such a right was intended. [Emphasis added.]

6 The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole.

Principles of Interpretation

7 In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited com-

Dans *The Law of Guarantee*, *op. cit.*, le professeur McGuinness explique ainsi ce principe, à la p. 546:

> [TRADUCTION] Il y a certaines modifications des conditions d'un contrat principal (ou dérogations à ces conditions) qui n'auront pas pour effet de libérer la caution à l'égard de ce contrat, même si ces modifications peuvent être importantes. Par exemple, si les modifications du contrat principal ont été précisément autorisées par la caution ou si elles étaient par ailleurs prévues par le contrat, la caution ne sera pas libérée. De même, les modifications autorisées apportées au cautionnement ne libéreront pas la caution de sa responsabilité.
>
> La question de savoir si ces modifications sont autorisées ou prévues est une question d'interprétation.

À la page 547, l'auteur ajoute à l'intention des établissements de crédit le sage conseil suivant:

> [TRADUCTION] Étant donné que les tribunaux ont tendance à donner une interprétation restrictive aux dispositions des contrats types de cautionnement qui autorisent ces modifications, il serait extrêmement imprudent, de la part d'un créancier, de convenir de faire des modifications sans d'abord obtenir préalablement le consentement de la caution, sauf lorsqu'il est clairement autorisé à agir de son propre chef. Lorsque le créancier cherche à démontrer que la convention de cautionnement lui accorde une autorisation générale d'apporter des modifications importantes au contrat principal, il doit être écrit très clairement qu'on a voulu conférer ce droit. [Je souligne.]

Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération.

Principes d'interprétation

De nombreux cautionnements, voir la plupart, sont consentis au moyen d'un contrat d'adhésion. En d'autres termes, le document proposé par l'établissement de crédit est une formule type. L'emprunteur et la caution ne participent que peu ou pas du tout à la négociation de la convention. Ils ne peuvent rien faire d'autre que d'accepter les conditions du prêt, s'ils veulent qu'il leur soit

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mercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

accordé. Souvent, les cautions sont des membres de la famille qui ont une expérience limitée des affaires. C'est par complaisance pour un membre de la famille ou un ami qu'elles souscrivent le cautionnement. Bien des cautions sont des personnes non averties et vulnérables. Pourtant le cautionnement accordé à titre de faveur peut engendrer une tragédie financière pour la caution. Si les arguments de la banque sont retenus, cela signifiera, en fait, que, sans avoir bénéficié d'un avis ou de quelque autre contrepartie, la caution sera liée indéfiniment par d'autres hypothèques souscrites par le débiteur hypothécaire à des conditions et à des taux d'intérêt variables. La caution n'a aucun contrôle sur la situation. La position adoptée par la banque, à supposer que ce soit la bonne, peut avoir de graves conséquences à long terme. Lorsqu'elles se seront rendu compte de l'ampleur de leur responsabilité, les cautions disparaîtront inévitablement du paysage de sorte que de nombreux prêts tout simples ne seront pas conclus faute de caution.

8 In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

À mon avis, il est parfaitement juste d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. C'est une façon raisonnable et satisfaisante d'aborder la situation étant donné que les établissements de crédit qui rédigent normalement ces conventions peuvent facilement modifier leurs documents de façon à ce qu'ils ne comportent aucune ambiguïté. La doctrine appuie ce principe.

9 G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability. . . .
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

Dans *The Law of Contract in Canada* (3e éd. 1994), aux pp. 470 et 471, G. H. L. Fridman décrit ainsi la situation:

> [TRADUCTION] La règle *contra proferentem* est d'une grande importance, particulièrement lorsque la clause interprétée crée une exonération totale ou partielle de responsabilité . . .
>
> Lorsque le contrat est ambigu, l'application de la règle *contra proferentem* assure que l'interprétation la moins favorable à l'auteur du document sera retenue.

Professor McGuinness, in his work *The Law of Guarantee*, *supra*, at pp. 612-13, explains the application of the rule as follows:

Dans *The Law of Guarantee*, *op. cit.*, aux pp. 612 et 613, le professeur McGuinness explique ainsi l'application de la règle:

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. . . the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words, at p. 244:

Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

10 As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, at p. 172:

A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.

He goes on to say:

[TRADUCTION] . . . la règle d'interprétation *contra proferentem* (en vertu de laquelle les dispositions d'une convention qui y ont été incluses par une partie pour sa propre protection sont sujettes à une interprétation restrictive) offre aux tribunaux un moyen de restreindre la portée de dispositions extrêmement générales qui ont pour effet d'éliminer les droits de la caution. La justification d'une telle interprétation restrictive de ces dispositions est claire: c'est une chose que de dire qu'une partie peut, si elle le désire, consentir à assumer un fardeau excessif et renoncer aux droits que la common law lui reconnaît généralement pour sa protection. C'est une toute autre chose que de présumer que les parties veulent nécessairement souscrire à de telles obligations. Il est plus naturel de présumer le contraire. Lorsque le cautionnement a été rédigé par le créancier et qu'il y a une ambiguïté ou une imprécision dans une clause qui a pour effet de limiter les droits d'une caution, il n'est que juste que l'ambiguïté soit dissipée au détriment de la partie qui a préparé le document. Si le créancier désire retirer un droit à la caution, il doit le préciser clairement dans le document.

McGuinness explique, en outre, le principe et sa justification en ces termes, à la p. 244:

[TRADUCTION] Lorsque c'est le créancier qui a rédigé les conditions du contrat, il serait logique que le cautionnement soit interprété de façon restrictive et donc au détriment du créancier. On prétend que la règle à appliquer est la suivante: s'il n'y a qu'une façon raisonnable d'interpréter les termes d'un cautionnement, cette interprétation doit être donnée au cautionnement. Dans ce cas, la règle *contra proferentem* ne joue pas. Toutefois, si la convention est ambiguë en ce sens qu'il y a deux interprétations ou plus qui pourraient raisonnablement lui être données, le cautionnement doit être interprété au détriment de la partie qui l'a rédigé ou qui en a proposé l'adoption, que ce soit le créancier ou la caution.

De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. C'est ce qui ressort des motifs du juge Davis dans *Holland-Canada Mortgage Co. c. Hutchings*, [1936] R.C.S. 165, à la p. 172:

[TRADUCTION] La caution a toujours été un créancier privilégié aux yeux de la common law. Son obligation est interprétée et exécutée strictement.

Il ajoute:

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"It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G. F. & J. 367, at 376,

in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety," . . . the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not.

Those comments are as true today as they were at the time they were written.

The appellant contends that this principle of interpretation has been abandoned and for that proposition relies upon the reasons of this Court in *Bauer*, *supra*. I cannot agree with this submission. The issue in that case was whether a particular clause within the guarantee was an exemption clause and thus subject to the special rules of construction applying to those clauses. It was held that the clause in question was not, in fact, an exemption clause. The general question as to whether the scope of surety obligations should be construed strictly was not explicitly addressed by the Court. It is also significant that the Alberta Court of Appeal in *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624, found that the clause they were considering was analogous to that in issue in *Bauer*. Nonetheless they determined, correctly in my view, that it should be interpreted in accordance with the general rules of construction. Those rules should, in my view, include the *contra proferentem* rule and thus will be generally applicable to guarantee or surety clauses.

[TRADUCTION] «Il faut toujours se souvenir», a dit lord Westbury, dans *Blest c. Brown* (1862), 4 De G. F. & J. 367, à la p. 376,

de quelle façon la caution est liée. Vous l'obligez à respecter son engagement à la lettre. Au-delà de l'interprétation correcte de cet engagement, vous n'avez aucun pouvoir sur elle. Elle ne touche aucun avantage ni aucune contrepartie. Elle n'est donc liée qu'en vertu de l'interprétation et de l'effet réguliers de l'engagement écrit qu'elle a souscrit. Si la moindre modification est apportée à cet engagement, peu importe que ce soit à son avantage ou que la modification ait été faite innocemment, elle a le droit de dire: «Le contrat n'est plus celui que je me suis engagée à cautionner; vous avez mis fin au contrat dont je me suis portée garante et, par conséquent, mon obligation n'existe plus.»

Sauf stipulation expresse contraire, si la modification porte sur une question qui ne peut pas «de toute évidence et indéniablement être considérée comme non importante ou nécessairement profitable à la caution,» [. . .] la caution, si elle n'a pas consenti à demeurer responsable en dépit de la modification, sera libérée, peu importe que la modification lui soit préjudiciable ou pas.

Ces commentaires sont aussi vrais aujourd'hui qu'ils l'étaient à l'époque où ils ont été rédigés.

11 L'appelante soutient que ce principe d'interprétation a été abandonné et, à ce propos, elle invoque les motifs de notre Cour dans l'arrêt *Bauer*, précité. Je ne puis souscrire à cet argument. La question en litige dans cet arrêt était de savoir si une certaine clause du cautionnement était une clause d'exonération et si elle était, ainsi, assujettie aux règles spéciales d'interprétation applicables à ces clauses. On a statué que la clause en question n'était pas, en réalité, une clause d'exonération. La Cour n'a pas abordé expressément la question générale de savoir si l'étendue des obligations d'une caution devait être interprétée restrictivement. Il est également révélateur que la Cour d'appel de l'Alberta ait conclu, dans *Alberta Opportunity Co. c. Schinnour*, [1991] 2 W.W.R. 624, que la clause qu'elle examinait était analogue à celle en cause dans *Bauer*. Elle a néanmoins décidé, à juste titre selon moi, qu'elle devait être interprétée selon les règles générales d'interprétation. À mon sens, ces règles doivent comprendre la règle *contra proferentem* et seront ainsi généralement applicables aux clauses de cautionnement.

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12 The position set out in *Holland-Canada Mortgage Co., supra*, was confirmed in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513. At p. 521 of that case, it was said that "accommodation sureties" are those who entered into the guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans". The protection offered to this class of guarantors was explained also at p. 521:

> In respect of them, the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

13 These sureties were contrasted with "compensated sureties" whose business consists of guaranteeing performance and payment in return for a premium. With respect to this latter class of sureties it was held at p. 524:

> . . . in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability.

Although the primary issue in the case was the distinction between accommodation sureties and those who receive compensation, these words nonetheless represent the considered opinion of the Court. In my view, they are correct.

14 I would note in passing that the guarantor in this case comes within the class of accommodation sureties.

15 It follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the guarantor in this case, they must be strictly interpreted and resolved in favour of the guarantor. Further, as a result of the favoured position of guarantors, the clauses binding them must be strictly construed.

16 Finally, when the guarantee clause is interpreted, it must be considered in the context of the entire transaction. This flows logically from the

Le point de vue énoncé dans *Holland-Canada Mortgage Co.*, précité, a été confirmé dans *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513. À la page 521, la Cour affirme que les «cautions de complaisance» sont celles qui ont conclu le contrat de cautionnement «en espérant peu de rétribution, si ce n'est aucune, et dans le but de rendre service à d'autres personnes ou de les aider à réaliser leur projet». La protection accordée à cette catégorie de cautions est également expliquée, à la p. 521:

> En ce qui les concerne, la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

Ces cautions ont été comparées aux «cautions rétribuées» qui garantissent l'exécution et le paiement moyennant une contrepartie. La Cour statue, au sujet de cette dernière catégorie de cautions, à la p. 524:

> . . . dans le cas de caution rétribuée il ne faut pas que toutes les dérogations au contrat de garantie, même mineures, ni toutes les omissions du réclamant de se conformer aux conditions du cautionnement, si minimes soient-elles, permettent à la caution d'échapper à sa responsabilité.

Bien que, dans cette affaire, le litige ait principalement porté sur la distinction entre les cautions de complaisance et les cautions rétribuées, ces propos représentent néanmoins l'opinion réfléchie de la Cour. Ils sont exacts quant à moi.

Je ferais remarquer en passant que la caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance.

Il s'ensuit que, s'il y a un doute ou une ambiguïté quant à l'interprétation ou au sens des clauses liant la caution en l'espèce, ces clauses doivent être interprétées de façon restrictive et en faveur de la caution. De plus, en raison de la situation privilégiée des cautions, les clauses qui les lient doivent être interprétées de façon restrictive.

Finalement, l'interprétation de la clause de cautionnement doit tenir compte du contexte de toute l'opération. Cela découle logiquement du point de

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bank's position that the renewal agreement was an integral part of the original contract of guarantee. This position I believe is correct. It follows that fairness demands that the entire transaction be considered and this must include the terms and arrangements for the renewal agreement.

Application of the Principles of Interpretation to the Guarantee and Renewal Agreement Presented in this Case

It may be helpful to set out once again clauses 34 and 7 of the original guarantee agreement and recall that the renewal agreement called for the signature of the guarantor.

Clause 34: Guarantee and Indemnity

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in

vue de la banque selon lequel la convention de renouvellement faisait partie intégrante du contrat de cautionnement initial. Je crois que ce point de vue est exact. Il s'ensuit que la justice exige que l'on examine toute l'opération, y compris les conditions et les arrangements relatifs à la convention de renouvellement.

Application des principes d'interprétation à la convention de cautionnement et de renouvellement en l'espèce

Il peut être utile de reproduire à nouveau les clauses 34 et 7 de la convention de cautionnement initiale et de se rappeler que la convention de renouvellement exigeait la signature de la caution.

Clause 34: Cautionnement et indemnité

[TRADUCTION] EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que, relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres

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full of the principal sum and all other moneys hereby secured.

Clause 7: Renewal or Extension of Time

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

18 Counsel for the appellant contended that there was no ambiguity in these clauses and that they made it clear that the respondent's obligations as guarantor continued in spite of the renewal agreement. Counsel for the respondent came to exactly the opposite conclusion. He submitted that on the plain meaning of the clauses, the guarantor was not bound. A somewhat cynical observer might conclude that it should not be unexpected that counsel for the opposing parties would take these positions. However, the same conclusion cannot possibly be reached with regard to the judges who have considered these clauses. The trial judge and the minority in the Court of Appeal came to the same conclusion as the appellant. The majority in the Court of Appeal came to the opposite conclusion. That skilled and experienced judges could come to opposite conclusions with regard to the clauses might well lead one to suspect that the meaning of the clauses is unclear; in a word, they are ambiguous. Of course, if that be the case, the *contra proferentem* rule should be applied. How-

engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

Clause 7: Renouvellement ou prorogation de délai

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire, ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

L'avocat de l'appelante a soutenu qu'il n'y avait aucune ambiguïté dans ces clauses et qu'elles prévoyaient clairement que l'intimé continuait d'assumer ses obligations de caution malgré la convention de renouvellement. L'avocat de l'intimé est arrivé exactement à la conclusion contraire. Il a prétendu que, selon le sens ordinaire de ces clauses, la caution n'était pas liée. Un observateur quelque peu cynique pourrait conclure qu'il n'y a rien d'étonnant à ce que les avocats des parties opposées adoptent ces positions. Cependant, il n'est pas possible de tirer la même conclusion en ce qui concerne les juges qui ont examiné ces clauses. Le juge du procès et le juge dissident de la Cour d'appel sont arrivés à la même conclusion que l'appelante. La Cour d'appel à la majorité a conclu le contraire. Le fait que des juges compétents et expérimentés puissent être arrivés à des conclusions opposées en ce qui concerne les clauses en question pourrait bien nous amener à soupçonner que le sens de ces clauses n'est pas clair, somme toute, qu'elles sont ambiguës. Évidem-

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ever, for the reasons set out above, my view is that the clauses unambiguously indicate that the respondent was not bound by the renewal agreement. If I am in error and if the *contra proferentem* rule were applied it would strengthen and support my conclusion as to the interpretation of the clauses.

The Effect of the "Principal Debtor Obligation" Set Out in Clause 34

In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

The appellant contended that the words in clause 34 which provide "the said Guarantors . . . covenant, promise and agree as principal debtors and not as sureties" indicate that the respondent is bound as a principal debtor yet without any of the usual rights and benefits of a principal debtor such as notice with regard to renewal, and the opportunity to negotiate and consent to its terms. To take this position seems to me to be unfair and unreasonable.

ment, si c'est le cas, il y a lieu d'appliquer la règle *contra proferentem*. Toutefois, pour les motifs exposés plus haut, je suis d'avis que les clauses indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. Si je me trompe, l'application éventuelle de la règle *contra proferentem* renforcerait et appuierait ma conclusion quant à l'interprétation de ses clauses.

L'effet de l'«obligation à titre de débiteur principal» énoncée à la clause 34

Dans *Canadian Imperial Bank of Commerce c. Patel* (1990), 72 O.R. (2d) 109 (H.C.), à la p. 119, on a statué qu'une clause de débiteur principal transformait une caution en un débiteur principal à part entière. Je suis d'accord avec cette conclusion. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. Cette conclusion n'exige pas que l'on recoure à des règles d'*equity* concernant la modification importante de contrats de cautionnement. Il ressort simplement du contrat que le débiteur principal doit être avisé des modifications importantes et y consentir. Il va sans dire qu'une caution qui, en vertu d'une clause de débiteur principal, a le droit d'être avisée des modifications importantes peut, aux termes du contrat, renoncer à ces droits. Cependant, en l'absence d'une renonciation claire à ces droits, une telle caution doit être avisée des modifications importantes et y consentir pour être liée par celles-ci. 19

L'appelante prétend que les mots de la clause 34 [TRADUCTION] «nous, lesdites cautions, [. . .] conven[ons], promett[ons] et accept[ons] [. . .], à titre de débiteurs principaux et non de cautions» indiquent que l'intimé est lié à titre de débiteur principal, sans cependant jouir des droits et avantages d'un débiteur principal, comme le droit d'être avisé d'un renouvellement et la possibilité de négocier et d'accepter les conditions de ce renouvellement. Adopter ce point de vue me semble injuste et déraisonnable. 20

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21 The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement. The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal.

Le débiteur hypothécaire doit, à titre de débiteur principal, être avisé de la convention de renouvellement. Cela ressort clairement de l'exigence que le débiteur hypothécaire signe la convention de renouvellement. La clause de débiteur principal transforme la caution en un débiteur principal à part entière qui assume toutes les responsabilités et les obligations que cette expression implique. Si la caution doit être responsable envers l'établissement de crédit à titre de «débiteur principal à part entière», elle a alors le droit d'être avisée de la convention de renouvellement au même titre que le débiteur principal qu'est le débiteur hypothécaire. C'est sans doute la raison pour laquelle la formule type de la convention de renouvellement comporte un espace pour la signature de la caution. Non seulement la justice et l'*equity*, mais aussi la désignation de la caution à titre de débiteur principal mènent à la conclusion que la caution doit être avisée du renouvellement et y consentir pour être liée par ses conditions. Une caution qui lirait la clause 34 serait amenée à croire qu'à titre de débiteur principal elle serait avisée du renouvellement de la convention au même titre que le débiteur principal qu'est le débiteur hypothécaire. Si un établissement de crédit souhaite que la caution soit liée à titre de débiteur principal, alors la caution doit avoir les mêmes droits que le débiteur principal, y compris celui d'être avisée d'un renouvellement et d'y consentir à titre de partie.

22 Even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him. This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction.

Même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. En l'espèce, il s'agit de savoir si, soit à titre de débiteur principal, soit à titre de garant, la caution a expressément renoncé par contrat aux protections qui lui sont normalement accordées. Pour répondre à cette question, il faut interpréter les clauses de la convention en fonction de l'ensemble de l'opération, et appliquer les règles d'interprétation appropriées.

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Effect of the Renewal Agreement

In my view, the renewal agreement must be considered an integral part of the transaction. There are two aspects of the renewal agreement itself which lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other. The requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather, he was expected to sign the renewal agreement. His signature would confirm his notice of the agreement and his consent to it.

The appellant submitted that the renewal agreement is simply an extension of the original mortgage which was contemplated by the terms of that mortgage. This submission should not be accepted. The original mortgage was for a period of three years, a term not uncommon in today's mortgage market. The renewal agreement provides for an agreement as to the term of a new mortgage and the new rate of interest. The document itself appears to indicate that the renewal agreement constitutes a new mortgage arrangement. This can be gathered from the provision which reads:

All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of *this* agreement, except those amended herein. [Emphasis added.]

The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no

Effet de la convention de renouvellement

23 À mon avis, la convention de renouvellement doit être considérée comme une partie intégrante de l'opération. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, je le répète, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Il faut présumer que toutes ces conventions types préparées par la banque, à titre d'établissement de crédit, sont destinées à s'agencer et à se compléter mutuellement. Le fait que la formule type requiert la signature de la caution appuie alors la thèse de l'intimé selon laquelle, aux termes de la convention de prêt initiale, il n'a pas été dépouillé de la protection que l'*equity* et la common law accordent généralement aux cautions. Au contraire, on s'attendait à ce qu'il signe la convention de renouvellement. Sa signature confirmerait qu'il avait été avisé de la convention et qu'il y consentait.

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24 L'appelante soutient que la convention de renouvellement est une simple prorogation de l'hypothèque initiale, prévue dans l'hypothèque même. Il n'y a pas lieu de retenir cet argument. L'hypothèque initiale était pour une durée de trois ans, ce qui n'est pas inhabituel dans le marché hypothécaire actuel. La convention de renouvellement comporte une entente sur la durée d'une nouvelle hypothèque et un nouveau taux d'intérêt. Le document même paraît indiquer que la convention de renouvellement constitue une nouvelle convention hypothécaire. Cela peut se déduire de la disposition qui prévoit:

[TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et *en* font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

25 La formule type indique que bien des modifications de l'hypothèque initiale doivent faire l'objet d'un consentement. Par exemple, le débiteur hypothécaire peut choisir l'échéance du prêt; le taux d'intérêt doit être fixé par convention entre le débiteur hypothécaire et l'établissement de crédit. Si la

more than the extension of the original mortgage, the mischief that that position creates becomes obvious. What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.

convention de renouvellement n'est rien de plus qu'une prorogation de l'hypothèque initiale, le tort causé par cette position devient évident. Que penser d'un renouvellement qui prorogerait la durée de l'hypothèque à 25 ans, à un taux d'intérêt sensiblement supérieur? Que penser d'un changement marqué de la situation de la caution qui résulterait d'un nouveau règlement de zonage ou d'un nouveau code du bâtiment, ou d'une modification sensible de l'utilisation des terrains environnants? Affirmer que, malgré les nouvelles circonstances, la caution est, au-delà des conditions strictes de la convention et en l'absence d'avis, tenue de garantir de façon indéfinie une hypothèque sensiblement modifiée quant à la durée du prêt et quant au taux d'intérêt a de quoi inquiéter.

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26 Further, it is significant that the renewal agreement states that the terms of the old mortgage will form part of the agreement. By doing so it indicates that this is a new agreement rather than merely an extension of an old agreement. This serves to strengthen my view that the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement.

Il est en outre significatif que la convention de renouvellement prévoie que les conditions de l'ancienne hypothèque feront partie de la convention. Elle indique ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. Cela renforce mon opinion que l'intimé n'est plus lié par les conditions du cautionnement initial depuis que la convention de renouvellement a été signée sans qu'il en soit avisé.

Significance of Clause 7 of the Original Agreement

L'importance de la clause 7 dans la convention initiale

27 The reasons of Finlayson and Carthy JJ.A. forming the majority of this case in the Court of Appeal are in my view correct. Finlayson J.A. wrote ((1994), 20 O.R. (3d) 499, at p. 513):

À mon avis, les motifs que la Cour d'appel à la majorité, composée des juges Finlayson et Carthy, a exposés en l'espèce sont exacts. Le juge Finlayson écrit ((1994), 20 O.R. (3d) 499, à la p. 513):

> The reference in cl. 7 to the renewal agreement taking priority over subsequent encumbrancers indicates to me that the mortgagee was not directing its corporate mind to the guarantors when negotiating this document. . . . Certainly, there is no express reference to the renewal agreement in cl. 34. On balance, and keeping in mind that these documents were all drawn and presented by the mortgagee, I conclude that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the guarantee and has the effect of releasing the guarantors from their obligations as sureties.

> [TRADUCTION] Dans la clause 7, la mention que la convention de renouvellement a priorité sur toute charge ultérieure m'indique que la personne morale créancière hypothécaire ne songeait pas aux cautions en négociant le présent document [. . .] Certes, il n'y a aucune mention expresse de la convention de renouvellement dans la clause 34. Tout bien considéré et compte tenu du fait que ces documents ont tous été préparés et présentés par la créancière hypothécaire, je conclus que la convention de renouvellement constituait une modification importante de la dette hypothécaire initiale, qui n'était pas prévue par le libellé du cautionnement et qui a pour effet de libérer les cautions de leurs obligations à ce titre.

Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasizes different aspects. First, he stresses that clause 34 makes no reference to renewals. In his view, this is significant because it is a term commonly used with respect to mortgages and it is explicitly used in other clauses such as clause 7. Moreover, he found that clause 34 is perfectly capable of coherently referring to changes in the terms within the period of the original mortgage itself.

It is, I think, noteworthy and telling that clause 7 specifically distinguishes between extensions and renewals both in its heading and its text. This leads me to conclude that these terms do not refer to the same eventuality. Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both *Black's* legal dictionary and *The Oxford Dictionary* give separate and distinct definitions of the terms extension and renewal. *Black's Law Dictionary* (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (*e.g.* of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended". This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by *The Concise Oxford Dictionary of Current English* (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined at p. 1164 as "revive; regenerate; make new again; restore to the original state". It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term

L'interprétation donnée au contrat par le juge Carthy appuie celle du juge Finlayson, mais elle met l'accent sur des aspects différents. Premièrement, le juge Carthy souligne que la clause 34 ne mentionne pas les renouvellements. À son avis, cela est révélateur parce que c'est une condition courante en matière d'hypothèque et qu'on y recourt expressément dans d'autres clauses comme la clause 7. De plus, il a conclu que la clause 34 est parfaitement susceptible de renvoyer de façon cohérente à des modifications des conditions pendant la durée de l'hypothèque initiale même. 28

Il est, je pense, remarquable et révélateur que la clause 7 distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. Cela m'amène a conclure que ces deux termes ne désignent pas la même chose. Étant donné que la clause 7 distingue avec tant de soin les prorogations des renouvellements, ces termes doivent désigner des choses différentes. Tant le dictionnaire juridique *Black's* que *The Oxford Dictionary* donnent des définitions différentes des termes *extension* (prorogation) et *renewal* (renouvellement). *Black's Law Dictionary* (5e éd. 1979), à la p. 1165, définit le terme «*renewal*» («renouvellement») comme [TRADUCTION] «[l]'action de renouveler ou de remettre en vigueur; la remise en état d'une chose qui vient à expiration; chose faite à nouveau ou rétablie», alors qu'il définit le terme «*extension*» («prorogation»), à la p. 523, comme étant [TRADUCTION] «[u]n accroissement de la durée (par exemple, de l'échéance d'un bail ou d'un billet). Le mot «*extension*» («prorogation») implique ordinairement l'existence d'une chose qui doit être prorogée». Cela indique clairement qu'une «prorogation» désigne la prolongation d'une convention qui existe déjà, alors que le renouvellement désigne la remise en vigueur d'une convention expirée. *The Concise Oxford Dictionary of Current English* (9e éd. 1995), à la p. 476, confirme cette distinction en définissant «*extend*» par [TRADUCTION] «allonger ou accroître dans l'espace ou dans le temps» alors que «*renew*» est défini à la p. 1164 comme [TRADUCTION] «remettre en vigueur; régénérer; rénover; rétablir dans l'état original». Il s'ensuit que l'absence de mention d'une convention de renouvelle- 29

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which is well known in the commercial world of mortgages.

30 Finally, the renewal agreement refers to incorporating the mortgage terms into the agreement. Clause 3 of the renewal agreement provides that:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of this agreement, except those amended herein. [Emphasis added.]

This, too, suggests that the renewal agreement is a new agreement and not an extension, since the original mortgage terms are only incorporated to the extent that they are not altered by the renewal. Although clause 34 contemplates a change in the interest rate, an extension would not ordinarily involve an alteration of the original terms, but rather a continuation of the same terms over a longer time period.

31 The appellant sought comfort from *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90 (Sask. Q.B.). In that case, Armstrong J. noted that in some cases, a mortgage extension or renewal agreement could have exactly the same effect as a new mortgage. However, he concluded, correctly I believe, that on the facts of that case, there was no evidence to support the contention that the mortgage extension agreement was in fact a new mortgage. In my view, such a determination will involve a review of the particular guarantee clause and the whole transaction between the parties. The appellant also referred to the decisions in *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287 (P.E.I. C.A.), and *Veteran Appliance Service Co. v. 109272 Development Ltd.* (1985), 67 A.R. 117 (Q.B.). In both those decisions, the terms renewal and extension agreement were used interchangeably. Yet I think that it becomes clear in reading both these decisions that this was not a

ment ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Si les établissements de crédit souhaitaient que la clause 34 s'applique aux renouvellements, il leur suffirait d'utiliser ce terme spécifique bien connu dans le milieu des prêts hypothécaires.

Finalement, la convention de renouvellement mentionne l'incorporation des conditions de l'hypothèque dans la convention. La clause 3 de la convention de renouvellement prévoit:

> [TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et en font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

Cela aussi donne à penser que la convention de renouvellement est une nouvelle convention et non une prorogation, étant donné que les conditions de l'hypothèque initiale sont incorporées seulement dans la mesure où elles ne sont pas modifiées par le renouvellement. Bien que la clause 34 envisage une modification du taux d'intérêt, une prorogation comporte normalement non pas une modification des conditions initiales, mais plutôt le maintien des mêmes conditions pour une période plus longue.

L'appelante a invoqué la décision *Co-operative Trust Co. of Canada c. Kirkby*, [1986] 6 W.W.R. 90 (B.R. Sask.). Dans cette décision, le juge Armstrong a fait remarquer que, dans certains cas, une prorogation d'hypothèque ou une convention de renouvellement peuvent avoir exactement le même effet qu'une nouvelle hypothèque. Il a toutefois conclu, à juste titre selon moi, que, d'après les faits de cette affaire, il n'y avait aucune preuve à l'appui de l'argument selon lequel la convention de prorogation de l'hypothèque était, en fait, une nouvelle hypothèque. À mon avis, pour décider cela, il faut examiner la clause de cautionnement en question et l'ensemble de l'opération conclue par les parties. L'appelante a aussi mentionné les décisions *Royal Trust Corp. of Canada. c. Reid* (1985), 40 R.P.R. 287 (C.A. Î.-P.-É.), et *Veteran Appliance Service Co. c. 109272 Development Ltd.* (1985), 67 A.R. 117 (B.R). Dans ces deux affaires, les expressions «convention de renouvellement» et

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central or major issue in the case. To repeat, it will be a question of fact to be determined on the particular transaction, agreement and circumstances presented in each case whether a renewal agreement is a new contract or simply an extension of the existing agreement.

«convention de prorogation» ont été utilisées indifféremment. Je pense cependant qu'il devient évident, à la lecture de ces deux décisions, que ce n'était pas alors une question majeure ou importante. Je le répète, la question de savoir si une convention de renouvellement est un nouveau contrat ou une simple prorogation de la convention existante est une question de fait qui doit être tranchée en fonction de l'opération, de la convention et des circonstances en cause dans chaque affaire.

It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.

Je conclus donc que les mots utilisés dans les 32
clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. La convention de renouvellement qui a été conclue sans qu'avis ne soit donné à la caution, ou sans le consentement de cette dernière, a modifié sensiblement les dispositions de la convention de prêt initiale. La caution a ainsi été libérée de son obligation.

If the wording of the two clauses should be found to be ambiguous, the *contra proferentem* rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Si l'on conclut que le texte des deux clauses est 33
ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Disposition

Dispositif

I would dismiss the appeal with costs.

Je suis d'avis de rejeter le pourvoi avec dépens. 34

The following are the reasons delivered by

Les motifs suivants ont été rendus par

L'HEUREUX-DUBÉ J. (dissenting) — I substantially agree with my colleague Justice Iacobucci's reasons and the result he reaches. I have only one comment which relates to the judicial interpretation methodology relied upon by my colleague.

LE JUGE L'HEUREUX-DUBÉ (dissidente) — Je 35
suis substantiellement d'accord avec les motifs de mon collègue le juge Iacobucci et le résultat auquel il arrive. Mon seul commentaire portera sur la méthode d'interprétation judiciaire utilisée par mon collègue.

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36 The "modern contextual approach" is, in my view, the standard, normative approach to judicial interpretation, and one may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. One example of the latter is statutory interpretation in the area of taxation, where the words and expressions used in legislative provisions quite often have a well-defined "plain meaning" within the business community.

37 In the case at bar, our Court is called upon to determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment", in the context and factual situation of the instant case.

38 My colleague decides the issue by going through a contractual interpretation exercise as follows. Firstly, the impugned contractual provisions are reviewed in the context of the whole contract. Secondly, the issue of the *contra proferentem* rule is addressed. Thirdly, the issue of the difference between "accommodating" and "compensated" sureties is examined. Fourthly, an authoritative academic text is relied upon: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996).

39 Thus, after reviewing the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids, my colleague comes to a contextual interpretation of the impugned phrase. I fully agree with both the process used and the conclusions he arrived at. However, with respect, that process is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to judicial interpretation is the one that is actually used in the instant case.

40 I agree with my colleague that "[t]he rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally". But the rules which govern the interpretation of deeds and contracts generally are essentially the

La «méthode contextuelle moderne» est, à mon avis, la méthode normative standard d'interprétation judiciaire même s'il y a lieu, exceptionnellement, de recourir à l'ancienne règle du «sens ordinaire» lorsque les circonstances s'y prêtent. Par exemple, il y a l'interprétation des lois en matière fiscale, dans lesquelles on utilise des mots et expressions qui ont bien souvent un «sens ordinaire» bien défini dans le monde des affaires.

En l'espèce, notre Cour est appelée à définir l'expression [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement», selon le contexte et les faits de la présente affaire.

Mon collègue tranche la question en adoptant la démarche suivante en matière d'interprétation des contrats. Premièrement, les dispositions contractuelles attaquées sont examinées dans le contexte du contrat dans son ensemble. Deuxièmement, la question de la règle *contra proferentem* est abordée. Troisièmement, la question de la différence entre la caution «de complaisance» et la caution «rétribuée» est analysée. Quatrièmement, un texte de doctrine faisant autorité est invoqué: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996).

Ainsi, après avoir examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure, mon collègue arrive à une interprétation contextuelle de l'expression contestée. Je suis entièrement d'accord avec la démarche adoptée et les conclusions auxquelles il est arrivé. En toute déférence, cependant, cette démarche ne constitue pas une application de la méthode du «sens ordinaire»: en fait, c'est la «méthode contextuelle moderne» d'interprétation judiciaire qui est utilisée en l'espèce.

Je conviens avec mon collègue que «[l]es règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général». Mais les règles qui régissent l'interprétation des actes et des contrats en général sont

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same as the rules for statutory interpretation. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.), at pp. 763-65:

. . . I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. . . .

In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; . . .

In the case of a contract, the two parties are speaking of certain things only. . . . [In both cases] the Court . . . declares what the intention, indicated by the words used under such circumstances, really is.

And this, as applied to the construction of statutes, is no new doctrine. . . . My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct. [Emphasis added.]

Therefore, the "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131, applies equally to contractual interpretation:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its total context, having regard to [its] purpose . . ., the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of [. . .] meaning. After taking these into account, the court must then 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 [. . .] text; (b) its efficacy, that is, its promotion of the [. . .] purpose; and (c) its acceptability,

essentiellement les mêmes que les règles d'interprétation des lois. Comme lord Blackburn l'affirme dans *River Wear Commissioners c. Adamson* (1877), 2 App. Cas. 743 (H.L.), aux pp. 763 à 765:

[TRADUCTION] . . . j'exposerai donc de façon aussi précise que possible quels sont, d'après moi, les principes établis dans la jurisprudence, sur lesquels les cours de justice se fondent pour interpréter un instrument. Dans tous les cas il s'agit de découvrir quelle est l'intention exprimée par les mots employés. . . .

Je pense que le même principe s'applique à l'interprétation des instruments. Dans le cas d'un testament, le testateur parle de toutes ses affaires; . . .

Dans le cas d'un contrat, les deux parties parlent de certaines choses seulement, [. . .] [Dans les deux cas] la cour [. . .] énonce quelle est réellement l'intention indiquée par les mots employés dans ces circonstances.

Et cela n'est pas un principe nouveau en matière d'interprétation des lois. [. . .] Vos Seigneuries, je pense que cela s'applique *mutatis mutandis* à l'interprétation des lois autant qu'à celle des testaments. Et je pense qu'il est bien qu'il en soit ainsi. [Je souligne.]

Par conséquent, la «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, la méthodologie exposée par R. Sullivan dans *Driedger on the Construction of Statutes* (3[e] éd. 1994), à la p. 131, s'applique également à l'interprétation des contrats: 41

[TRADUCTION] Il n'existe qu'une seule règle d'interprétation moderne: les tribunaux sont tenus de déterminer le sens de [ce qui doit être interprété judiciairement] dans son contexte global, en tenant compte de [son] objet [. . .], des conséquences des interprétations proposées, des présomptions et des règles spéciales d'interprétation, ainsi que des sources acceptables d'aide extérieure. Autrement dit, les tribunaux doivent tenir compte de tous les indices pertinents et acceptables du sens d'un texte [. . .]. Cela fait, ils doivent ensuite adopter l'interprétation qui est appropriée. L'interprétation appropriée est celle qui peut être justifiée en raison a) de sa plausibilité, c'est-à-dire sa conformité avec le texte [. . .], b) de son efficacité, dans le sens où elle favorise la réalisa-

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that is, the outcome is reasonable and just. [Emphasis added.]

42 This methodology was indeed the one followed by my colleague. In the case at bar, however, the resulting interpretation did not really come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". As Lord Diplock explained in *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302, at pp. 313-14:

> Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession it is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. These words and phrases to which a more precise meaning is so ascribed are called by lawyers "terms of art" but are in popular parlance known as "legal jargon". [Emphasis added.]

43 After having specified the nature of "legal terms of art", Lord Diplock stated the basic rule of judicial interpretation, as well as the methodology, that are applicable in that context (at p. 314):

> The words and phrases . . . which are "terms of art" must therefore be given the meaning which attaches to them as terms of art; . . .
>
> The lexicon of terms of art is to be found in the decided cases and in the textbooks consulted by legal practitioners.

44 It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting

tion de l'objet du texte [. . .], et c) de son acceptabilité, dans le sens où le résultat est raisonnable et juste. [Je souligne.]

En réalité, c'est cette méthode que mon collègue a suivie. En l'espèce, cependant, l'interprétation qui en a résulté ne découlait pas vraiment du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Comme lord Diplock l'a expliqué dans *Sydall c. Castings Ltd.*, [1967] 1 Q.B. 302, aux pp. 313 et 314:

> [TRADUCTION] Les documents qui visent à donner naissance à des droits et à des obligations exécutoires sur le plan juridique envisagent leur mise à exécution par application régulière de la loi, ce qui comprend leur interprétation par des tribunaux composés de juges dont chacun a son propre tempérament issu de ses sentiments, de son éducation, et évidemment de son âge. Ces documents n'atteindraient pas leur objectif si les droits et obligations qui pourraient être mis à exécution dépendaient du tempérament personnel du ou des juges qui seraient appelés à les interpréter. C'est pour éviter cela que les avocats, dont c'est la profession de rédiger et d'interpréter ces documents, ont dû mettre au point une langue anglaise composée de mots et d'expressions ayant un sens plus précis que ceux utilisés par Shakespeare ou par n'importe quel usager du transport en commun de Clapham, ce matin. Ces mots et expressions auxquels est ainsi attribué un sens plus précis sont qualifiés de «termes techniques» par les avocats, mais dans le langage populaire, ils sont connus sous le nom de «jargon juridique». [Je souligne.]

Après avoir précisé la nature des «termes techniques propres au domaine juridique», lord Diplock a formulé la règle fondamentale d'interprétation judiciaire et la méthode applicables dans ce contexte (à la p. 314):

> [TRADUCTION] Les mots et expressions [. . .] qui sont des «termes techniques» doivent donc recevoir le sens qui leur est propre en tant que termes techniques; . . .
>
> Le lexique des termes techniques se trouve dans la jurisprudence et les ouvrages consultés par les praticiens du droit.

Il est tout à fait évident que, lorsque les tribunaux interprètent un «terme technique propre au domaine juridique» en recourant à des sources

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outcome cannot appropriately be labelled a "plain meaning" definition.

d'aide extérieure comme des ouvrages juridiques, on ne peut, à juste titre, dire que la définition ainsi obtenue repose sur le «sens ordinaire» du terme en cause.

Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense: *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197 (Ch.; Megarry J.).

45 Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact: *Inland Revenue Commissioners c. Williams*, [1969] 1 W.L.R. 1197 (Ch., le juge Megarry).

This is the presumption that is resorted to by my colleague Iacobucci J. when he makes use of admissible external aids — i.e.: McGuinness, *supra*, — in determining the correct meaning of the phrase "to give time". As McGuinness reviews extensive case-law authority that establishes the generally accepted "meaning in law" of these "legal terms of art", it is an admissible external aid to judicial interpretation: see *Driedger, supra*, at pp. 428, 468 and 474; see also P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 449-53 and 457-58.

46 C'est la présomption à laquelle recourt mon collègue le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure, soit l'ouvrage de McGuinness, *op. cit.*, pour déterminer le sens exact de l'expression [TRADUCTION] «accorder un délai». Comme McGuinness passe en revue une jurisprudence abondante qui établit le «sens en droit» généralement accepté de ces «termes techniques propres au domaine juridique», il s'agit d'une source d'aide extérieure acceptable en matière d'interprétation judiciaire: voir *Driedger*, *op. cit.*, aux pp. 428, 468 et 474; voir également P.-A. Côté, *Interprétation des lois* (2e éd. 1990), aux pp. 516 à 520, de même qu'à la p. 526.

Subject to the above considerations, I concur with my colleague's disposition of the appeal.

47 Sous réserve de ces considérations, je souscris à la façon dont mon collègue tranche le pourvoi.

The reasons of Gonthier and Iacobucci JJ. were delivered by

Version française des motifs des juges Gonthier et Iacobucci rendus par

IACOBUCCI J. (dissenting) — This appeal raises questions regarding the proper method for interpreting guarantees. Specifically, we are asked to determine whether the wording of the contract in issue was clear enough to waive the guarantors' equitable right to be released when the principal loan was renewed.

48 LE JUGE IACOBUCCI (dissident) — Le présent pourvoi soulève des questions concernant la bonne façon d'interpréter les contrats de cautionnement. Plus précisément, on nous demande de déterminer si le libellé du contrat en cause était suffisamment clair pour constituer une renonciation du droit en *equity* des cautions d'être libérées de leur obligation lorsque le prêt principal a été renouvelé.

I. Background

I. Le contexte

On February 20, 1987, the appellant Manulife Bank of Canada (at the time known as The Regional Trust Company) made a loan of $275,000 to Dina Conlin. The loan was for a term of three years and bore interest at the rate of 11.5 percent

49 Le 20 février 1987, l'appelante, la Banque Manuvie du Canada (à l'époque connue sous le nom de «La Compagnie de Fiducie Régionale») a accordé un prêt de 275 000 $ à Dina Conlin. Le prêt était consenti pour une période de trois ans et

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per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.

il portait intérêt au taux de 11,5 pour 100 par année. Dina Conlin a offert en garantie de remboursement une première hypothèque sur des terrains situés à Welland (Ontario).

50 The terms of the loan required the signature of two guarantors: the respondent John Joseph Conlin, who was the mortgagor's husband; and Conlin Engineering and Planning Limited, an Ontario corporation. In clause 34 of the mortgage agreement, the two promised, "as principal debtors and not as sureties", to pay the money secured by the mortgage. They further agreed to all of the particular conditions and stipulations of the mortgage which were binding upon the mortgagor.

Les conditions du prêt exigeaient la signature de deux cautions: l'intimé John Joseph Conlin, qui était l'époux de la débitrice hypothécaire, et Conlin Engineering and Planning Limited, une société ontarienne. À la clause 34 de la convention hypothécaire, les deux se sont engagés, [TRADUCTION] «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Ils ont aussi accepté toutes les autres conditions et stipulations de l'hypothèque qui liaient la débitrice hypothécaire.

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51 The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". The liability of the guarantors was stated to be continuous, subsisting "until payment in full of the principal sum and all other moneys hereby secured".

Le cautionnement devait demeurer valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». La responsabilité des cautions était qualifiée de continue et elle devait subsister [TRADUCTION] «jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes».

52 In 1989, the respondent and Dina Conlin separated.

En 1989, l'intimé et Dina Conlin se sont séparés.

53 In 1990, shortly before the mortgage was to mature, Dina Conlin and the appellant executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but the agreement was signed only by Dina Conlin. The respondent had no notice or knowledge of the renewal.

En 1990, peu avant que l'hypothèque vienne à échéance, Dina Conlin et l'appelante ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année. Les formules de renouvellement comportaient un espace pour la signature du [TRADUCTION] «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par Dina Conlin. L'intimé n'a reçu aucun avis et n'a pas eu connaissance du renouvellement.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

En mars 1992, il y a eu défaut de paiement de l'hypothèque de la part de Dina Conlin.

55 After fruitless efforts to sell the Welland lands, the bank initiated proceedings for summary judgment against Dina Conlin and the guarantors. The bank claimed the principal owing under the mort-

Après avoir vainement tenté de vendre les terrains de Welland, la banque a engagé des procédures pour obtenir un jugement sommaire contre Dina Conlin et les cautions. La banque réclamait le gage with interest at the rate of 13 percent per annum. Judgment was obtained on the motion. However, a majority of the Court of Appeal set aside the judgment and dismissed the action against the respondent: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Relevant Contractual Provisions

(7) RENEWAL OR EXTENSION OF TIME

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

(34) GUARANTEE AND INDEMNITY

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertain-

capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La banque a obtenu gain de cause relativement à cette requête. Cependant, la Cour d'appel à la majorité a infirmé ce jugement et rejeté l'action intentée contre l'intimé: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Dispositions contractuelles pertinentes

[TRADUCTION]

(7) RENOUVELLEMENT OU PROROGATION DE DÉLAI 56

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire, ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

(34) CAUTIONNEMENT ET INDEMNITÉ

EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que,

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ing to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

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III. Judgments Appealed From

A. *Ontario Court (General Division)*

57 In a very succinct judgment, Killeen J. granted the bank's motion for summary judgment against both Dina Conlin and the respondent. He found that, according to the "clear and unequivocal language" of clauses 7 and 34, the respondent was liable under his guarantee despite the renewal of the mortgage and despite the increase in the rate of interest: "In my view, there is no escape for the guarantor".

B. *Ontario Court of Appeal* (1994), 20 O.R. (3d) 499

(a) Finlayson J.A.

58 Finlayson J.A. first considered the following language in clause 34: "the said guarantors . . . covenant, promise and agree as principal debtors and not as sureties . . ." (emphasis added). He found an apparent inconsistency between this last phrase and the fact that, on the face of the contract, the respondent appeared to be signing as a surety and not as a principal debtor. Having briefly discussed the difference between contracts of

III. Juridictions inférieures

A. *Cour de l'Ontario (Division générale)*

Dans un jugement très succinct, le juge Killeen a fait droit à la requête de la banque visant à obtenir un jugement sommaire contre Dina Conlin et l'intimé. Il a conclu que, selon le [TRADUCTION] «texte clair et net» des clauses 7 et 34, l'intimé était responsable en vertu de son cautionnement malgré le renouvellement de l'hypothèque et l'augmentation du taux d'intérêt: [TRADUCTION] «À mon avis, la caution n'a aucune échappatoire»

B. *Cour d'appel de l'Ontario* (1994), 20 O.R. (3d) 499

a) Le juge Finlayson

Le juge Finlayson a d'abord examiné le passage suivant de la clause 34: «nous, lesdites cautions [. . .] conven[ons], promett[ons] et accept[ons] [. . .] à titre de débiteurs principaux et non de cautions» (je souligne). Il a conclu que ce passage semblait incompatible avec le fait qu'à la lecture du contrat l'intimé paraissait signer à titre de caution et non de débiteur principal. Après avoir brièvement analysé la différence entre les contrats indemnity and contracts of guarantee, Finlayson J.A. concluded that it was unnecessary to resolve the exact nature of the guarantor's status, stating: "the reference to the guarantor as principal debtor can be disregarded for the purposes of this appeal" (p. 511).

Finlayson J.A. then turned to the main issue of whether the renewal agreement extinguished the respondent's liability under his guarantee. He noted that, in equity, either an increase of the interest rate or an extension of the mortgage's term constitutes a material change of the original contract which will extinguish a guarantor's liability.

Therefore, it was necessary to determine whether clause 34 constituted a waiver, on the part of the sureties, of these equitable rights. After reviewing several cases where the language of a particular guarantee was held to embrace a renewal agreement, Finlayson J.A. stated that "each of these cases must be confined to its own wording" (pp. 511-12). Furthermore, the language of the Manulife guarantee clause did not, in the opinion of Finlayson J.A., clearly contemplate the renewal agreement. Accordingly, the material change to the loan, effected through the renewal agreement, released the guarantors from their respective obligations.

(b) Carthy J.A. (concurring with Finlayson J.A. in the result)

Carthy J.A. began by stating that the law has always treated sureties as "favoured" creditors. While a surety can contract out of his legal rights, the language used to do so must be clear.

Applying a "strict" interpretation to the loan agreement, Carthy J.A. concluded that the guarantee agreement was not "explicit enough to embrace a renewal" (p. 515). Furthermore, he found that the wording of clause 7 did not stipulate clearly that the loan could be renewed by an agreement which

d'indemnité et les contrats de cautionnement, le juge Finlayson a conclu qu'il n'était pas nécessaire de déterminer le statut exact de la caution, affirmant qu'[TRADUCTION] «aux fins du présent appel, il est possible de ne pas tenir compte de la mention de la caution en tant que débiteur principal» (p. 511).

Le juge Finlayson a ensuite examiné la question 59
principale de savoir si la convention de renouvellement avait mis fin à la responsabilité qui incombait à l'intimé en vertu du cautionnement qu'il avait consenti. Il a fait remarquer qu'en *equity* une augmentation du taux d'intérêt ou une prorogation de l'hypothèque constituent une modification importante du contrat initial, qui met fin à la responsabilité d'une caution.

Il était donc nécessaire de déterminer si la 60
clause 34 constituait une renonciation, de la part des cautions, à ces droits en *equity*. Après avoir examiné plusieurs affaires où on a jugé que le texte d'un cautionnement englobait une convention de renouvellement, le juge Finlayson a affirmé que [TRADUCTION] «chacune de ces affaires doit se limiter à son propre libellé» (pp. 511 et 512). En outre, le texte de la clause de cautionnement de Manuvie ne prévoyait pas clairement, selon le juge Finlayson, la convention de renouvellement. Par conséquent, la modification importante apportée au contrat de prêt au moyen de la convention de renouvellement libérait les cautions de leurs obligations respectives.

b) Le juge Carthy (souscrivant à l'opinion du juge Finlayson quant au résultat)

Le juge Carthy a commencé par affirmer que le 61
droit a toujours considéré les cautions comme des créanciers «privilégiés». Une caution peut renoncer par contrat aux droits que lui confère la loi, mais cela doit être fait en termes clairs.

Interprétant «restrictivement» la convention de 62
prêt, le juge Carthy a conclu que la convention de cautionnement n'était pas [TRADUCTION] «suffisamment explicite pour comprendre un renouvellement» (p. 515). Il a, en outre, conclu que le texte de la clause 7 ne stipulait pas clairement que le

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was not signed by the guarantors. The guarantors had not waived their equitable rights and, accordingly, the renewal agreement extinguished their liability.

(c) Robins J.A. (dissenting)

63 Robins J.A. first reviewed the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.) which states that any material variation of the principal contract without the surety's consent will discharge the surety. He went on to note that a guarantor can contract out of this equitable protection.

64 Robins J.A. then looked at the terms of clause 34 which stated that the guarantee would remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". He concluded that these words clearly contemplated both the extension of the mortgage's term and the increase in the interest rate, as implemented by the renewal agreement. In other words, by clause 34, the guarantors waived their equitable rights to be released from their obligations in the event of these particular changes to the loan contract.

65 Having decided that the respondent was liable as a guarantor, Robins J.A. did not find it necessary to consider whether the guarantors were, in fact, "principal debtors".

66 However, while he found the respondent to be liable under the guarantee, Robins J.A. would have varied the order of the motions court judge such that Conlin would only be liable for the principal amount secured under the mortgage and interest thereon calculated at 11.5 percent per annum. He based this variation on the finding that the guarantors agreed to be liable for the moneys secured under the original mortgage. In his view, although they agreed to be liable notwithstanding any

prêt pourrait être renouvelé au moyen d'une convention non signée par les cautions. Les cautions n'avaient pas renoncé à leurs droits en *equity* et, par conséquent, la convention de renouvellement mettait fin à leur responsabilité.

c) Le juge Robins (dissident)

Le juge Robins a d'abord examiné la règle établie dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), selon laquelle toute modification importante du contrat principal sans le consentement de la caution libère cette dernière. Puis, il a fait remarquer qu'une caution peut renoncer par contrat à cette protection dont il bénéficie en *equity*.

Le juge Robins a ensuite examiné le texte de la clause 34 qui prévoit que le cautionnement demeure valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Il a conclu que ces mots prévoyaient clairement à la fois la prorogation de l'hypothèque et l'augmentation du taux d'intérêt effectuées par la convention de renouvellement. Autrement dit, à la clause 34, les cautions avaient renoncé à leur droit en *equity* d'être libérées de leurs obligations dans le cas où de telles modifications seraient apportées au contrat de prêt.

Ayant décidé que l'intimé était responsable à titre de caution, le juge Robins n'a pas considéré nécessaire de déterminer si les cautions étaient, en fait, des «débiteurs principaux».

Toutefois, bien qu'il ait conclu que l'intimé était responsable en vertu du cautionnement consenti, le juge Robins aurait modifié l'ordonnance du juge des requêtes, de manière à ce que Conlin ne soit responsable que du capital garanti en vertu de l'hypothèque et des intérêts sur ce montant calculés au taux de 11,5 pour 100 par année. Il a fondé cette modification sur la conclusion que les cautions avaient convenu d'être responsables des sommes garanties en vertu de l'hypothèque initiale. À son avis, bien qu'elles aient convenu d'être responsables nonobstant toute modification du taux d'in-

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change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

Before our Court, the appellant raised a threshold issue of jurisdiction. It claimed that the Court of Appeal had erred in dismissing the action when that order was not requested by either party at the motion for summary judgment or on appeal and when neither counsel nor the courts ever discussed this form of relief. Accordingly, there are two major issues before us:

1. Did the majority of the Ontario Court of Appeal exceed its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial?
2. Under the terms of the loan agreement, was the respondent John Joseph Conlin released from his promise to pay the principal sum and other moneys secured by the mortgage, when the term of the mortgage was extended and the rate of interest increased, without notice to the respondent?

V. Analysis

A. *Did the Court of Appeal have jurisdiction to dismiss the action as against the respondent?*

Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states as follows:

134. — (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

The order originally appealed from was granted on a motion for summary judgment brought by the bank. The respondent Conlin had brought no cross-motion for summary judgment dismissing the action. There had been no examination for discovery and no trial. Given that an appeal court may not make an order which the trial judge would not

térêt, elles n'avaient pas convenu d'être responsables relativement à ce taux d'intérêt majoré.

IV. Questions en litige

67 Devant notre Cour, l'appelante a soulevé une question de compétence préliminaire. Elle a allégué que la Cour d'appel avait commis une erreur en rejetant l'action alors que cela ne lui avait été demandé ni par l'une ou l'autre des parties à la requête en obtention d'un jugement sommaire, ni en appel, et alors que ni les avocats ni les cours n'avaient parlé de cette forme de réparation. Par conséquent, deux questions principales se posent devant nous:

1. La Cour d'appel de l'Ontario, à la majorité, a-t-elle excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès?
2. En vertu des conditions de la convention de prêt, l'intimé John Joseph Conlin a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé?

V. Analyse

A. *La Cour d'appel avait-elle compétence pour rejeter l'action intentée contre l'intimé?*

68 Le paragraphe 134(1) de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, se lit ainsi:

134 (1) Sauf disposition contraire, le tribunal saisi d'un appel peut:

a) rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre;

b) ordonner un nouveau procès;

c) rendre toute ordonnance ou toute décision qu'il estime juste.

69 L'ordonnance qui a fait l'objet d'un appel au départ a été accordée à la suite de la requête de la banque visant à obtenir un jugement sommaire. L'intimé Conlin n'avait déposé aucune requête incidente pour faire rejeter l'action par jugement sommaire. Il n'y avait eu ni interrogatoire préalable ni procès. L'appelante a soutenu devant nous

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have had the jurisdiction to make (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), at p. 110), the appellant argued before us that the Court of Appeal had jurisdiction only to set aside the order for summary judgment and send the matter back for trial. The question to be answered, therefore, is whether the motions court judge had the jurisdiction to dismiss the action against the respondent.

que la Cour d'appel n'avait compétence que pour annuler l'ordonnance de jugement sommaire et renvoyer l'affaire au procès, étant donné qu'une cour d'appel ne peut pas délivrer une ordonnance que le juge du procès n'aurait pas eu le pouvoir de rendre (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), à la p. 110). Il s'agit donc de savoir si le juge des requêtes avait compétence pour rejeter l'action intentée contre l'intimé.

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70 The original motion for summary judgment was brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 20.04(2) states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20.04(4) states:

> Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, . . .

The interpretive guide to the Rules is set out in Rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

La requête initiale en obtention d'un jugement sommaire était fondée sur l'art. 20 des *Règles de procédure civile*, R.R.O. 1990, règl. 194. Le paragraphe 20.04(2) se lit ainsi:

> Le tribunal, s'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse, rend un jugement sommaire en conséquence.

Le paragraphe 20.04(4) prévoit ceci:

> Le tribunal, s'il est convaincu que la seule question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. . . .

Le paragraphe 1.04(1) énonce la façon d'interpréter les Règles:

> Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

71 Considered in light of Rule 1.04(1), in my opinion, Rules 20.04(2) and (4) gave Killeen J. the jurisdiction to dismiss the action against the respondent. The motions court judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing Manulife's claim.

J'estime qu'à la lumière du par. 1.04(1) les par. 20.04(2) et (4) conféraient au juge Killeen compétence pour rejeter l'action intentée contre l'intimé. Le juge des requêtes aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de Manuvie.

72 However, the appellant further argues that Finlayson and Carthy JJ.A. erred in basing their decisions on the unproven assertion that Conlin had never consented to the 1990 renewal agreement. The appellant claims that it had no opportunity to

Toutefois, l'appelante prétend, en outre, que les juges Finlayson et Carthy de la Cour d'appel ont commis une erreur en fondant leurs décisions sur l'affirmation non prouvée que Conlin n'avait jamais consenti à la convention de renouvellement fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

I do not agree with this assertion. The appellant did, in fact, have the opportunity to test Conlin's evidence. Rule 39.02(1) of the *Rules of Civil Procedure* says that a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. However, the bank chose not to exercise this right and left Conlin's evidence unchallenged. Therefore, in my opinion, the appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence.

This case is far from the circumstances that arose in *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73 (C.A.). In that case, the trial judge erred in making a finding of fact on a question which had not been addressed at all by the parties. The Court of Appeal found that this deprived the plaintiff of its right to adduce evidence in support of its position. However, in the case before us, the question of Conlin's consent, or lack thereof, to the renewal agreement was addressed before Killeen J. and, as discussed above, the appellant had full opportunity to counter this with evidence to the contrary.

For these reasons, it is my view that there is no reason to interfere with the Court of Appeal's procedural handling of this case.

B. *Under the terms of the loan agreement, was the respondent released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased without the respondent's consent?*

de 1990. L'appelante fait valoir qu'elle n'a pas eu l'occasion de vérifier pleinement l'exactitude du témoignage par affidavit de Conlin concernant le consentement et que, par conséquent, on lui a refusé le droit de faire entendre pleinement sa preuve.

Je ne suis pas de cet avis. L'appelante a bel et 73
bien eu la possibilité de vérifier l'exactitude du témoignage de Conlin. Le paragraphe 39.02(1) des *Règles de procédure civile* prévoit qu'une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. Toutefois, la banque a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de Conlin. Par conséquent, je suis d'avis qu'on n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé.

Les circonstances de la présente affaire sont loin 74
de ressembler à celles dont il était question dans l'arrêt *Keltic Leasing Corp. c. Curtis* (1993), 133 R. N.-B. (2e) 73 (C.A.). Dans cette affaire, le juge du procès avait erronément tiré une conclusion de fait sur une question qui n'avait pas été abordée par les parties. La Cour d'appel a conclu que cela avait privé la demanderesse de son droit de présenter des éléments de preuve à l'appui de sa thèse. Cependant, dans l'affaire qui nous est soumise, la question du consentement ou de l'absence de consentement de Conlin à la convention de renouvellement a été abordée devant le juge Killeen et, comme nous l'avons vu précédemment, l'appelante a eu pleinement l'occasion de répliquer à cela au moyen d'une preuve contraire.

Pour ces motifs, je suis d'avis qu'il n'y a aucune 75
raison d'intervenir dans la façon dont la Cour d'appel a procédé en l'espèce.

B. *En vertu des conditions de la convention de prêt, l'intimé a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans son consentement?*

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76 It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor: *Holme v. Brunskill*, *supra*, at pp. 505-6; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at ¶¶ 10.23 and 10.51.

Il est bien reconnu que toute modification importante des conditions d'un contrat entre un débiteur et un créancier qui est préjudiciable à la caution et qui est faite sans son consentement, libère cette dernière: *Holme c. Brunskill*, précité, aux pp. 505 et 506; *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562. Une augmentation du taux d'intérêt et une prorogation du délai de paiement sont toutes deux des modifications importantes de la convention de prêt qui sont suffisantes pour libérer une caution: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996), aux ¶¶ 10.23 et 10.51.

77 However, this right to be discharged as a result of a material variation of the principal contract can be waived by the surety. As McIntyre J. said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107, "it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule". The question to be resolved, therefore, is whether clause 34 amounts to a waiver of the respondent's equitable rights. Before dealing with this question, I believe it would be helpful to discuss briefly some of the interpretive principles relating to guarantees.

Cependant, la caution peut renoncer à ce droit d'être libérée en raison d'une modification importante du contrat principal. Comme le juge McIntyre l'a dit dans *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107: «les parties peuvent conclure leur propre entente, et une caution peut renoncer à la protection de la règle d'*equity*». Il s'agit donc de savoir si la clause 34 équivaut à une renonciation par l'intimé aux droits qui lui sont reconnus en *equity*. Avant d'examiner cette question, je crois qu'il serait utile d'analyser brièvement certains principes d'interprétation en matière de cautionnement.

(a) Interpretive principles relating to guarantees

a) Principes d'interprétation en matière de cautionnement

78 In my opinion, there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. As McGuinness states, *supra*, at p. 238, "The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally."

À mon avis, il n'existe aucune règle particulière d'interprétation des cautionnements. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. Comme McGuinness l'affirme, *op. cit.*, à la p. 238: [TRADUCTION] «Les règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général».

79 The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey J. said in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.*

La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. Comme le juge Estey l'a dit dans l'arrêt *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888, à la p. 899, en citant les pro-

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(1907), 15 O.L.R. 131, at p. 137: "[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used." The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is "plainly repugnant to the intention of the parties": McGuinness, *supra*, at p. 239; and see the reasons of Estey J. in *Consolidated-Bathurst*, *supra*, at p. 901.

When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did not draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the intentions of the parties, as expressed by their written contract, have failed. See the words of Cartwright J. in *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936, at p. 953. As Lindley L.J. said in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453, at p. 456:

> . . . this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

There is some suggestion in the case law that guarantee agreements entered into by an "uncompensated" or "accommodating" surety will be interpreted more strictly than those entered into by a compensated surety. In this respect, most notable is the decision of the Court in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.

In that case, the respondent, Johns-Manville, had entered into a contract with a supplier. That supplier had entered into a payment bond which named the appellant, Citadel, as guarantor of the supply contract. A condition of the bond was that

pos tenus par le juge Meredith dans *Pense c. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, à la p. 137: «[Dans tous les contrats], il faut donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés.» La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat [TRADUCTION] «nettement inconciliable avec l'intention des parties»: McGuinness, *op. cit.*, à la p. 239; voir aussi les motifs du juge Estey dans l'arrêt *Consolidated Bathurst*, précité, à la p. 901.

80 Pour interpréter un cautionnement, la cour peut, comme pour les autres contrats, appliquer la règle *contra proferentem* lorsqu'il est possible d'attribuer plus d'un sens au texte du cautionnement. Selon cette règle, l'ambiguïté doit être dissipée en faveur de la partie qui n'a pas rédigé le contrat. Il s'agit d'une règle d'interprétation de dernier recours, qui ne doit être utilisée que lorsque tous les autres moyens de vérifier les intentions des parties, exprimées par écrit dans leur contrat, ont échoué. Voir les propos du juge Cartwright dans l'arrêt *Stevenson c. Reliance Petroleum Ltd.*, [1956] R.C.S. 936, à la p. 953. Comme le lord juge Lindley l'a affirmé dans *Cornish c. Accident Insurance Co.* (1889), 23 Q.B.D. 453, à la p. 456:

> [TRADUCTION] . . . ce principe ne devrait être appliqué que pour dissiper un doute, et non pour créer un doute ou amplifier une ambiguïté, quand les circonstances de l'affaire ne posent aucune difficulté réelle.

81 La jurisprudence laisse entendre jusqu'à un certain point qu'une convention de cautionnement souscrite par une caution «non rétribuée» ou «de complaisance» sera interprétée d'une façon plus restrictive que celle souscrite par une caution rétribuée. À cet égard, l'arrêt de notre Cour *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513, est des plus remarquables.

82 Dans cette affaire, l'intimée, Johns-Manville, avait conclu un contrat avec un fournisseur. Ce fournisseur avait souscrit un cautionnement qui désignait l'appelante, Citadel, comme caution du contrat d'approvisionnement. Une condition du

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no suit could be commenced under the bond without proper notice being given to the appellant surety and to the supplier. The supplier defaulted and the respondent commenced an action against the guarantor, Citadel. The respondent gave proper notice to the guarantor. However, while notice was given to the supplier, it did not strictly comply with the requirements of the bonding agreement. The guarantor denied liability under the bond on the basis that the notice provisions of the bond had not been complied with.

83 The Court rejected this argument and held that the guarantor was liable under the bonding agreement despite the respondent's failure to comply strictly with the terms of the contract. The basis for the decision was that guarantee agreements entered into for valuable consideration should be interpreted according to the ordinary rules of contractual construction. In *obiter*, McIntyre J., at pp. 521 and 523, went on to suggest that a different, stricter rule would apply to guarantors who had not received compensation:

> In respect of them [i.e., uncompensated sureties], the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety. Any material variation in the terms of the guaranteed indebtedness and any extension of time or postponement of the debtor's obligation, or any discharge or relinquishment of any security for the debt without the consent of the surety will discharge him. In other words, courts have adopted the *strictissimi juris* construction of the surety contract.

> . . . surety contracts should be more liberally construed in favour of claimants in the case of compensated sureties than in the case of accommodation sureties.

84 In my opinion, the above statement should be understood in the context in which it was made. In *Citadel General Assurance*, the issue was not one of contractual interpretation. Rather, it was a question of what consequences were to flow from a clear breach of the contract. For these reasons, it is my view that the comments in *Citadel General Assurance* are not a sufficient basis for holding

cautionnement était qu'aucune poursuite ne pouvait être engagée en vertu du cautionnement sans qu'un avis approprié n'en soit donné à la caution appelante et au fournisseur. Le fournisseur a manqué à ses obligations et l'intimée a intenté une action contre la caution Citadel. L'intimée a donné un avis approprié à la caution. Toutefois, bien qu'un avis ait été donné au fournisseur, il ne satisfaisait pas strictement aux exigences de la convention de cautionnement. La caution a affirmé qu'elle n'était pas responsable en vertu du cautionnement, pour le motif que les dispositions du cautionnement relatives à l'avis n'avaient pas été respectées.

La Cour a rejeté cet argument et a statué que la caution était responsable en vertu de la convention de cautionnement malgré le défaut de l'intimée de respecter strictement les conditions du contrat. La raison de cette décision était que les conventions de cautionnement souscrites à titre onéreux devraient être interprétées selon les règles ordinaires d'interprétation des contrats. Dans une opinion incidente, aux pp. 521 et 523, le juge McIntyre a laissé entendre qu'une règle différente plus stricte s'appliquerait aux cautions non rétribuées:

> En ce qui les concerne [les cautions non rétribuées], la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement. Toute modification substantielle des conditions de la dette garantie, toute prorogation de délai ou tout délai accordé au débiteur, toute remise ou abandon de sûreté à l'égard de la dette sans le consentement de la caution libérait cette dernière. En d'autres termes, les cours ont adopté une interprétation *strictissimi juris* du contrat de cautionnement.

> . . . il faut interpréter les contrats de cautionnement plus libéralement en faveur des réclamants s'il s'agit de cautions rétribuées plutôt que de cautions de complaisance.

À mon avis, l'énoncé qui précède doit être interprété dans son contexte. Dans l'arrêt *Citadel General Assurance*, le litige ne portait pas sur une interprétation de contrat. Il s'agissait plutôt de déterminer quelles conséquences découleraient d'une violation claire du contrat. Pour ces motifs, je suis d'avis que les commentaires faits dans *Citadel General Assurance* ne sont pas suffisants pour

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generally that guarantee contracts should be subject to special, stricter rules of interpretation if the guarantor has not received compensation.

(b) Application of the rules of interpretation to the contract between Conlin and Manulife

In applying the above principles to this case, a number of sub-questions arise from the arguments of the parties which I now will address.

(i) *Does clause 34 amount to a waiver of the respondent's equitable rights?*

By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest.

The respondent argued that clause 34 does not include a waiver of the guarantors' right to be discharged in the event of a renewal of the mortgage. According to this argument, since the renewal agreement constituted a material change, it discharged the guarantors.

It is true, as the respondent contends, that clause 34 does not refer to "renewal" agreements by name. However, the clause does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest:

> ... this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon ...

The respondent maintained that a renewal was not the same thing as the giving of time for payment. He pointed out that clause 7 uses the term "renewal" while clause 34 does not. According to this line of argument, if the parties had intended the guarantee agreement to include a waiver of the right of discharge in the event of a renewal of the

conclure, de manière générale, que les contrats de cautionnement devraient être sujets à des règles d'interprétation spéciales plus strictes dans le cas d'une caution non rétribuée.

b) Application des règles d'interprétation au contrat conclu par Conlin et Manuvie

Si on applique les principes susmentionnés à la présente affaire, les arguments des parties soulèvent un certain nombre de questions que je vais maintenant aborder. 85

(i) *La clause 34 équivaut-elle à une renonciation par l'intimé à ses droits en equity?*

À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt. 86

L'intimé fait valoir que la clause 34 ne comprend pas une renonciation au droit des cautions d'être libérées en cas de renouvellement de l'hypothèque. Selon cet argument, puisque la convention de renouvellement constituait une modification importante, elle a libéré les cautions. 87

Il est vrai, comme le prétend l'intimé, que la clause 34 ne mentionne pas expressément les conventions de «renouvellement». La clause contient, cependant, une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt: 88

> [TRADUCTION] ... cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt ...

L'intimé a soutenu qu'un renouvellement n'était pas la même chose que l'attribution d'un délai de paiement. Il a fait remarquer que la clause 7 utilise le mot «renouvellement» alors que la clause 34 ne le fait pas. Selon ce raisonnement, si les parties avaient voulu inclure dans la convention de cautionnement une renonciation au droit à la libération 89

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mortgage, they would have said so explicitly in clause 34.

90 However, I do not find this argument persuasive. The plain ordinary meaning of the words, "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. Through this agreement, the appellant bank extended the term of the loan by three years and increased the rate of interest charged on the debt. I can see no support for the respondent's contention that the "giving of time for payment", as detailed in clause 34, does not include the giving of time for payment as effected by the renewal agreement.

91 In his book *The Law of Guarantee*, *supra*, at p. 556, McGuinness discusses the effect of agreements "to give time" to the principal debtor and says that the "giving of time" includes those agreements "which provide specifically for an extension of time for performance. . . . [for] further time in which to pay . . . the guaranteed debt". This is precisely what the renewal agreement accomplished and, thus, this is what was contemplated by the language of the guarantee agreement.

92 In other words, what we must consider is the substantive effect of the renewal agreement, rather than the form of the instrument by which it was executed. The parties did use a renewal agreement, but, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34.

93 With respect, I do not agree with Carthy J.A. when he says that the words "notwithstanding the giving of time for payment" should be interpreted to refer only to forbearance by the bank to pursue remedies during the original term of the mortgage. This is a case where we should heed the warning of Lindley L.J. in *Cornish v. Accident Insurance Co.*, *supra*, and not use the *contra proferentem* doctrine in any guise to create a doubt, or to mag-

en cas de renouvellement de l'hypothèque, elles l'auraient fait explicitement à la clause 34.

Toutefois, je ne considère pas cet argument persuasif. Le sens clair et ordinaire des mots [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Grâce à cette convention, la banque appelante a prorogé le prêt pour une durée de trois ans et a augmenté le taux d'intérêt applicable à la dette. Je ne vois rien qui justifie la prétention de l'intimé que «l'attribution d'un délai de paiement», mentionnée dans la clause 34, ne comprend pas l'attribution d'un délai de paiement en vertu de la convention de renouvellement.

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Dans son ouvrage intitulé *The Law of Guarantee*, *op. cit.*, à la p. 556, McGuinness analyse l'effet des conventions [TRADUCTION] «accordant un délai» au débiteur principal et affirme que l' [TRADUCTION] «attribution d'un délai» comprend toutes les conventions «qui prévoient expressément une prorogation du délai d'exécution [. . .] [afin] de disposer d'un plus long délai pour payer [. . .] la dette garantie». C'est précisément ce qui a été réalisé par la convention de renouvellement et c'est donc ce qui était prévu par le texte de la convention de cautionnement.

En d'autres termes, il faut prendre en considération l'effet réel de la convention de renouvellement, plutôt que la forme de l'instrument par lequel elle a été mise à exécution. Les parties ont bel et bien conclu une convention de renouvellement, mais, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34.

En toute déférence, je ne suis pas d'accord avec le juge Carthy lorsqu'il affirme que les mots [TRADUCTION] «nonobstant l'attribution d'un délai de paiement» devraient être interprétés de manière à désigner seulement une abstention de la part de la banque d'intenter un recours pendant la durée initiale de l'hypothèque. Il s'agit ici d'une affaire où nous devrions tenir compte de la mise en garde du lord juge Lindley dans *Cornish c. Accident Insur-*

nify an ambiguity. Like Killeen J., I am of the view that the plain wording of the agreement in question raises no real difficulty.

(ii) *Under clause 34, did the appellant have to notify the guarantors of the renewal agreement?*

94 One of the last phrases of clause 34 reads as follows: "we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us" (emphasis added). By contrast, the preceding phrase which waives the guarantors' rights to be discharged in the event of certain material changes to the principal contract does not contain this phrase, "without notice to us". The respondent contends that this omission means that, if the bank failed to notify the guarantors of the relevant material changes, the guarantors would be discharged from their obligations. Because the respondent received no notice of the renewal agreement, he was released from his liability.

95 Again, I am unable to agree with this line of argument. As already stated, the language of clause 34 is clear: the guarantor unconditionally promises to remain bound notwithstanding the extending of time or the changing of the rate of interest charged. It is rather odd to infer a condition of notice when the undertaking is so clear and unambiguous. Of course, the parties could have included a requirement of notice, but, as the language of the waiver in clause 34 is so clear, they would have had to do so explicitly. It may be that the insertion of the words "without notice to us", in connection with the waiver of breaches and the accepting of other covenants, sureties or securities, was simply made out of an abundance of caution, but, regardless, this cannot affect the clear waiver relating to extending time and changing the interest rate.

ance Co., précité, et ne pas appliquer la règle *contra proferentem* de manière à créer un doute ou à amplifier une ambiguïté. À l'instar du juge Killeen, je suis d'avis que le texte clair de la convention en cause ne pose aucune difficulté réelle.

(ii) *En vertu de la clause 34, l'appelante était-elle tenue d'aviser les cautions de la convention de renouvellement?*

L'une des dernières phrases de la clause 34 se lit ainsi: [TRADUCTION] «nous conven[ons] toutes et chacune que le créancier hypothécaire [peut] renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis» (je souligne). Par contre, la phrase précédente, qui écarte les droits des cautions d'être libérées dans le cas où certaines modifications importantes seraient apportées au contrat principal ne renferme pas l'expression «sans nous donner avis». L'intimé soutient que cette omission signifie que si la banque n'avisait pas les cautions des modifications importantes pertinentes, les cautions seraient libérées de leurs obligations. Puisque l'intimé n'a reçu aucun avis de la convention de renouvellement, il est libéré de sa responsabilité.

Là encore, je suis incapable de souscrire à ce raisonnement. Comme je l'ai déjà affirmé, le texte de la clause 34 est clair: la caution promet, de façon inconditionnelle, de demeurer liée nonobstant la prorogation du délai ou la modification du taux d'intérêt imposé. Il est plutôt étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. Évidemment, les parties auraient pu inclure une exigence d'avis, mais, étant donné la clarté du texte de la renonciation figurant à la clause 34, il leur aurait fallu le faire explicitement. Il se peut que l'inclusion des mots «sans nous donner avis», relativement à la renonciation au droit de résiliation pour violation et à l'acceptation d'autres engagements, cautionnements ou sûretés, ait été faite simplement par excès de prudence, mais, néanmoins, cela ne saurait pas affecter la renonciation claire relative à la prorogation de délai et à la modification du taux d'intérêt.

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(iii) *What is the effect of the respondent promising "as a principal debtor and not as a surety"?*

96 Clause 34 provides that the respondent and Conlin Engineering enter the agreement "as principal debtors and not as sureties". In his concurring judgment, Carthy J.A. reasoned that, as "principal debtors", the guarantors would be "expected" to be signatories to the renewal agreement. With respect, I do not agree.

97 I agree with Robins J.A.'s conclusion that the evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable, although I express no opinion on whether the language is sufficient to accomplish such an objective. In any event, it is unnecessary to consider whether this clause was sufficient to turn clause 34 into an indemnity agreement, because I am of the opinion that the respondent is liable as a guarantor.

(iv) *What is the significance of the fact that the renewal form provides a space for the guarantor's signature?*

98 The respondent points to the fact that the renewal agreement had a space for the signature of the guarantor as proof that the reasonable expectations of the parties were that, in the absence of the guarantors' consent to a renewal agreement, any such agreement would discharge the guarantors. With respect, I do not agree.

99 Our primary task is to determine the meaning of the guarantee contained in clause 34. This agreement was entered into in 1987. The wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the original agreement. In my opinion, the space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract.

(iii) *Quel est l'incidence du fait que l'intimé a promis «à titre de débiteur principal et non de caution»?*

La clause 34 prévoit que l'intimé et Conlin Engineering concluent la convention [TRADUCTION] «à titre de débiteurs principaux et non de cautions». Dans ses motifs concordants, le juge Carthy a considéré qu'on «s'attendrait» à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. En toute déférence, je ne suis pas de cet avis.

Je suis d'accord avec la conclusion du juge Robins que les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée, quoique je n'exprime aucune opinion quant à savoir si cette terminologie est suffisante pour permettre d'atteindre un tel objectif. De toute façon, il n'est pas nécessaire de déterminer si cette clause était suffisante pour faire de la clause 34 une convention d'indemnisation, parce que je suis d'avis que l'intimé est responsable à titre de caution.

(iv) *Quelle importance faut-il attacher au fait que la formule de renouvellement comportait un espace pour la signature de la caution?*

L'intimé souligne que le fait que la convention de renouvellement comportait un espace pour la signature de la caution prouve que les parties s'attendaient raisonnablement à ce qu'en l'absence du consentement des cautions à une convention de renouvellement, cette convention libérerait ces dernières. En toute déférence, je ne suis pas d'accord.

Il nous incombe, d'abord et avant tout, de déterminer le sens du cautionnement contenu dans la clause 34. Cette convention a été signée en 1987. Le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. À mon avis, l'espace prévu pour la signature de la caution dans la convention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement.

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(v) *What exactly is the extent of the respondent's obligation?*

The respondent promised to guarantee the payment of the money secured by the 1987 mortgage. In my view, the terms of that mortgage determine the extent of the respondent's liability. Clause 34 does include a waiver of the guarantors' rights to be discharged in the case of material variation of the terms of the loan agreement. However, the fact that the renewal agreement does not discharge the respondent does not mean that the respondent is liable for the money secured by that renewal agreement — a contract to which he never consented. In clause 34, the guarantors promise to pay "the principal sum and all other moneys hereby secured" (emphasis added), i.e., secured by the original mortgage agreement. In other words, the respondent is not liable for interest at the increased rate of 13 percent. Rather, his responsibility, as specified in the 1987 agreement, and as found by Robins J.A. in the Court of Appeal, is to repay the balance owing on the principal sum with interest charged at the rate of 11.5 percent.

VI. Disposition

For the foregoing reasons, I would allow the appeal, with costs here and below, set aside the judgment of the Court of Appeal, and substitute therefor an order to the effect that the respondent is liable under his guarantee to pay the balance owing on the principal amount with interest at 11.5 percent per annum.

Appeal dismissed with costs, L'HEUREUX-DUBÉ, GONTHIER *and* IACOBUCCI JJ. *dissenting.*

Solicitors for the appellant: Lee, Bowden, Concord, Ontario.

Solicitors for the respondent: Siskind, Cromarty, Ivey & Dowler, London, Ontario.

(v) *Quelle est exactement l'étendue de l'obligation de l'intimé?*

100 L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque de 1987. J'estime que les conditions de cette hypothèque déterminent l'étendue de la responsabilité de l'intimé. La clause 34 comprend bel et bien une renonciation aux droits des cautions d'être libérées dans le cas où une modification importante serait apportée aux conditions de la convention de prêt. Toutefois, le fait que la convention de renouvellement ne libère pas l'intimé ne signifie pas qu'il est responsable des sommes garanties par cette convention de renouvellement — un contrat auquel il n'a jamais consenti. À la clause 34, les cautions promettent de payer [TRADUCTION] «le capital et toutes les autres sommes garantis par les présentes» (je souligne), c.-à-d. garantis par la convention hypothécaire initiale. En d'autres termes, l'intimé n'est pas responsable des intérêts calculés au taux majoré de 13 pour 100 par année. La responsabilité qui lui incombe en vertu de la convention de 1987, et selon ce que le juge Robins de la Cour d'appel a conclu, est plutôt de rembourser le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

VI. Dispositif

101 Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, avec dépens devant toutes les cours, d'infirmer l'arrêt de la Cour d'appel et d'y substituer une ordonnance selon laquelle l'intimé a, en vertu de son cautionnement, la responsabilité de payer le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Pourvoi rejeté avec dépens, les juges L'HEUREUX-DUBÉ, GONTHIER *et* IACOBUCCI *sont dissidents.*

Procureurs de l'appelante: Lee, Bowden, Concord (Ontario).

Procureurs de l'intimé: Siskind, Cromarty, Ivey & Dowler, London (Ontario).

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COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Ombudsman v. Hamilton (City), 2018 ONCA 502
DATE: 20180601
DOCKET: C64796

Doherty and LaForme JJ.A. and Himel J. (*ad hoc*)

BETWEEN

Ombudsman of Ontario

Appellant

and

City of Hamilton

Respondent

Robert A. Centa and Denise Cooney, for the appellant

Byrdena M. MacNeil, for the respondent

Heard: May 22, 2018

On appeal from the judgment of the Divisional Court (Matheson, Trimble and Sheard JJ.), dated August 28, 2017, reported at 2017 ONSC 4865.

REASONS FOR DECISION

[1] There are essentially two issues before the court on the appeal and the cross-appeal. On the appeal, the Ombudsman of Ontario ("Ombudsman") argues that the Divisional Court erred in law in holding that neither the Election Compliance Audit Committee ("Audit Committee"), nor the Property Standards

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Committee ("Standards Committee") was a "local board" within the meaning of s. 14.1 of the *Ombudsman Act*, R.S.O. 1990, c. O.6.

[2] The purposes of and the statutory provisions governing the Audit Committee and the Standards Committee are fully set out in the reasons of the Divisional Court. We need not repeat that exercise.

[3] The City of Hamilton ("the City") submits that the Divisional Court was correct in its interpretation of the phrase "local board". Alternatively, on its cross-appeal, the City submits that even if the entities in question were "local boards", the deliberation component of their proceedings did not constitute "meetings" within the meaning of s. 239(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

[4] For the reasons that follow, we agree with the Divisional Court's conclusion that neither the Audit Committee nor the Standards Committee fall within the meaning of the phrase "local board" and, as such, the Ombudsman had no jurisdiction under s. 14.1 to investigate whether those entities had complied with s. 239 of the *Municipal Act*. In light of our conclusion on the main appeal, it is unnecessary to address the cross-appeal and we do not propose to do so.[1]

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[1] In the cross-appeal, the City also asked for a declaration that s. 14.1 did not apply to the deliberations of any of the City's statutory adjudicative tribunals performing quasi-judicial functions. The Divisional Court declined to address the status of any tribunals other than the Audit Committee and the Standards Committee. We agree and also limit our reasons to those two committees.

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THE MAIN APPEAL

[5] Section 239(1) of the *Municipal Act* declares that “all meetings shall be open to the public”. There are exceptions to the requirement that the meetings be open to the public set out in the remainder of s. 239, but none of those exceptions are relevant here.

[6] Section 239.1(b) of the *Municipal Act* provides that a person may request an investigation of whether a “municipality or local board” has complied with the public meeting requirement in s. 239. The Ombudsman, under s. 239.1(b), may conduct that investigation. Section 14.1 of the *Ombudsman Act* dovetails with s. 239.1(b) of the *Municipal Act* by empowering the Ombudsman to investigate complaints made with respect to the failure to comply with the public meeting requirement of s. 239. The Ombudsman may investigate and report any conclusions and the reasons for those conclusions to the relevant municipality or local board. The Ombudsman may also make recommendations: *Ombudsman Act*, s. 14.1(7).

[7] The Ombudsman’s power to investigate for compliance with the open meeting requirement applies to municipalities or “local boards”: *Ombudsman Act*, s. 14.1(3). The operative definition of “local board” is found in s. 1(1) of the *Municipal Act*:

> ‘Local board’ means a municipal service board, transportation commission, public library board, board of

> health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority.

[8] Neither the Audit Committee nor the Standards Committee are among the entities specifically identified in the definition provided in s. 1(1). The Ombudsman argued, however, that both committees exercise power under legislation “with respect to the affairs or purposes of one or more municipalities” and are therefore “local boards” within the meaning of s. 1(1).

[9] The Ombudsman’s submission would have considerable force if the general language at the end of the definition of “local board” stood alone. It does not. That general language follows the identification of several specific entities as “local boards”. As this court recently observed in *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, at para. 52:

> Where a class of things is modified by general wording that expands the class, the general wording is usually restricted to things of the same type as the listed items (*ejusdem generis*).

[10] All of the named entities in the definition of “local board” provide services which are integral to the day-to-day operation of the business of municipalities. Neither the Audit Committee nor the Standards Committee provide the same kind of services.

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[11] The Audit Committee is an investigative/adjudicative body created to enforce provincially enacted laws relating to municipal election campaign funding. As observed by the Divisional Court, the Audit Committee was created to remove that oversight function from the municipality. The Audit Committee does not provide a municipal service in the same sense as the entities enumerated in the definition of “local board”.

[12] The Standards Committee is an adjudicative body. Its purpose is to adjudicate disputes between the municipality and individuals dissatisfied with orders made by municipal officers concerning compliance with property standards bylaws. We agree with the Divisional Court’s conclusion that the function of the Standards Committee is dramatically different than the function of the entities specifically identified in the definition of “local board”.

[13] Applying *ejusdem generis* to the definition of “local board”, we are satisfied that the general language at the end of the definition does not include entities which cannot be said to carry on the operations of the municipality. The functions of the Audit Committee and the Standards Committee do not fall within that descriptor. They are not local boards. That, of course, does not mean that they are not subject to other legislation controlling the manner in which they are obligated to conduct their proceedings: e.g. see *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

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[14] Consequently, we agree with the Divisional Court that the Ombudsman did not have jurisdiction under s. 14.1 of the *Ombudsman Act* to investigate the alleged non-compliance by the Audit Committee or the Standards Committee with the open meeting requirement of s. 239 of the *Municipal Act*.

[15] We would add, however, that we do agree with the Ombudsman's submission that the "deliberative secrecy principle" has nothing to do with the interpretation of the phrase "local board" in s. 1(1) of the *Municipal Act*. That principle would become relevant were this court to reach the merits of the cross-appeal.

THE CROSS-APPEAL

[16] In the cross-appeal, the City urges the court to draw a distinction between the deliberative component of the proceedings of the Audit Committee and the Standards Committee, and other aspects of their processes. Given the finding that neither is a "local board", that distinction is unnecessary. We also note that on April 1, 2018, the *Municipal Elections Modernization Act*, 2016, s. 65 came into force and repealed subsection 88.34 of the *Municipal Elections Act*. The new provision, which applies to the Audit Committee, reads:

> Open Meetings
>
> (9.1) The meetings of the Committee under subsection (9) shall be open to the public, but the Committee may deliberate in private. 2017, s. 20, Schedule 10, (s. 2).

[17] We need not further address the merits of the cross-appeal.

CONCLUSION

[18] The appeal is dismissed. The cross-appeal is dismissed as moot without considering the merits of the cross-appeal. The parties agree there should be no order as to costs.

"Doherty J.A."
"H.S. LaForme J.A."
"Himel J. (*ad hoc*)"

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Court File No. C69603

CLEARFLOW COMMERCIAL FINANCE CORP. -and- JAIMEE LYNN GDAK et al.

Plaintiff
(Respondent)

Respondents
(Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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