TAB 23

Court File No. CV-12-9930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	**MONDAY, THE 25th DAY**
	)	
MR. JUSTICE BROWN	)	**OF NOVEMBER, 2013**

IN THE MATTER OF THE RECEIVERSHIP OF First Leaside Wealth Management Inc. and the Applicants Listed on Schedule "A" (collectively, "**First Leaside**")

ORDER
(CIPF Access to Client Files)

THIS MOTION, made by the Canadian Investor Protection Fund ("**CIPF**"), was heard this day at 330 University Ave, Toronto, Ontario.

ON READING the Affidavit of Ilana Singer, sworn October 30, 2013 (the "**CIPF Affidavit**"), and on hearing the submissions of counsel for CIPF, no one else appearing although being duly served, as appears from the Affidavit of Service of Miriam Sinclair, sworn November 18, 2013, filed, and on being advised that Grant Thornton Limited ("**GTL**"), in its capacity as the Court-appointed Receiver (the "**Receiver**") of First Leaside, does not oppose to the making of the Order herein,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the Receiver is authorized and directed to grant access to CIPF and its legal advisors to the Client Files (as defined in the CIPF Affidavit), and permit CIPF to make, retain and take away copies of the Client Files in accordance with the Protocol attached hereto as Appendix "A".

3. **THIS COURT ORDERS** that CIPF is entitled to utilize any copies of documents recovered by it from the Client Files only in connection with CIPF's assessment of the claims of former customers of First Leaside Securities Inc. ("**Customers**") made against CIPF's coverage policy ("**Customer Claims**").

4. **THIS COURT ORDERS** that the Receiver is authorized and directed to provide CIPF with records and information necessary to disclose the amount/nature of any distribution made by the Receiver to any Customer that has filed a Customer Claim.

5. **THIS COURT ORDERS AND DECLARES** that this Order is made pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV 2 5 2013

MB

Schedule "A" – List of Additional Receivership Applicants

First Leaside Finance Inc.
First Leaside Securities Inc.
F.L. Securities Inc.
Mill Street Limited Partnership
Harmony Townhomes Limited Partnership
First Leaside Management Inc.
Development Notes Limited Partnership
Special Notes Limited Partnership
First Leaside Accounting and Tax Services Inc.
2086056 Ontario Inc.
First Leaside Properties Limited Partnership
First Leaside Realty Inc.
First Leaside Realty Limited Partnership
First Leaside Realty II Inc.
First Leaside Investors Limited Partnership
First Leaside Premier Limited Partnership
First Leaside Progressive Limited Partnership
First Leaside Realty II Limited Partnership
First Leaside Ultimate Limited Partnership
First Leaside Universal Limited Partnership
Uxbridge Development Limited Partnership
First Leaside Retirement Residences Limited Partnership
First Leaside Venture Limited Partnership
965010 Ontario Inc.
Wimberly Apartments Limited Partnership
1045517 Ontario Inc.
The Shores Limited Partnership
1024919 Ontario Inc.
Old Mill Pond Apartments Limited Partnership
1031628 Ontario Inc.
1056971 Ontario Inc.
The Bluffs of Lakewood Limited Partnership
1376095 Ontario Inc.
F.L. Spring Valley Limited Partnership
1437290 Ontario Ltd.
First Leaside Partners Limited Partnership
First Leaside Opportunities Limited Partnership
1244428 Ontario Ltd.
Preston Racquet Club Real Estate Limited Partnership Series 910PA
Preston Racquet Club Real Estate Limited Partnership Series 910PB
Preston Racquet Club Real Estate Limited Partnership Series 910PC
Preston Racquet Club Real Estate Limited Partnership Series 910PD
PrestonOne Development (Canada) Inc.
PrestonTwo Development (Canada) Inc.

PrestonThree Development (Canada) Inc.
PrestonFour Development (Canada) Inc.
2088543 Ontario Inc.
2088544 Ontario Inc.
F.L.W. Pond Master Ltd.
2088545 Ontario Inc.
F.L.W. Shores Master Ltd.
1331607 Ontario Inc.
First Leaside Acquisitions Limited Partnership
Queenston Manor General Partner Inc.
Queenston Manor Limited Partnership
2107738 Ontario Inc.
First Leaside Advantage Limited Partnership
2128054 Ontario Inc.
First Leaside Elite Limited Partnership
1132413 Ontario Inc.
First Leaside Entities Limited Partnership
2067171 Ontario Inc.
First Leaside Expansion Limited Partnership
2085306 Ontario Inc.
First Leaside Growth Limited Partnership
2086218 Ontario Inc.
First Leaside Unity Limited Partnership
First Leaside Visions Management Inc.
2007804 Ontario Inc.
First Leaside Wealth Management Limited Partnership
First Leaside Fund Management Inc.
F.L. Beverages Group Limited Partnership
First Leaside Global Limited Partnership
Special U.S. Notes Limited Partnership
FLWM Holdings Limited Partnership
First Leaside Select Limited Partnership
Cherry Park Retirement Residences Limited Partnership
First Leaside Retirement Residences (Okanagan) Limited Partnership
Orchard Valley Retirement Residences Limited Partnership
The Shores Retirement Residences Limited Partnership
F.L. PrimeTime Living Limited Partnership

Appendix "A" - Protocol

1. Client Files will be retrieved from storage to a work space or office ("Office") within the storage facility located in Scarborough (the "Premises"). The cost of retrieving files from storage to the Office will be paid by CIPF (pursuant to an agreed upon fee per box, or similar quantifier charged by the storage company) to the owner/operator of the Premises (the "Operator").

2. A junior staff member from the Receiver will be entitled to be present during the time of CIPF's review of the client files. The hourly rate (to be confirmed) for the time that CIPF is reviewing documents will be paid by CIPF. If the Receiver requires that a staff member be present, such staff member will assist the CIPF representative with matters such as locating client files and documents from the boxes on site.

3. Any documents that are required by CIPF will be marked and the Operator will arrange for copies of all requested documents. CIPF will pay the copying cost on a per copy basis to the Operator.

4. The originals of any documents that have been copied will be retained by the Operator, at the Receiver's cost, until the earlier of: (i) the resolution of the customer's claim filed with CIPF, if any; or (b) the discharge of the Receiver. In the event that the Receiver seeks its discharge prior to the resolution of the claims of customers in the CIPF claims process, the Receiver and CIPF agree to negotiate in good faith or seek an order of the Court with respect to the continued retention of the documents after the Receiver's discharge, *inter alia*, at CIPF's cost, until the resolution of the Customer's claim filed with CIPF.

5. Employees of CIPF or representatives from Borden Ladner Gervais LLP will be permitted to attend to review the Client Files at the Office.

6. CIPF will dispose of any copies of documents recovered from the Receiver relating to a particular Customer as soon as possible after CIPF has determined that the claims process with respect to that Customer is complete (including the Customer's right of access to the Court, if any, in connection with an appeal of a CIPF determination)

Court File No. CV-12-9930-00CL

IN THE MATTER OF THE RECEIVERSHIP OF FIRST LEASIDE WEALTH MANAGEMENT INC., *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER
(CIPF Access to Client Files)

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Craig Hill (LSUC No. 31888K)
Tel: 416.367.6156
Fax: 416.361.7301
Email: chill@blg.com

Lawyers for Canadian Investor Protection Fund

TOR01: 5344572: v5

TAB 24

CIPF
Canadian Investor Protection Fund
About Us >

CIPF Mission Statement

To contribute to the security and confidence of customers of IIROC Dealer Members by maintaining adequate sources of funds to return assets to eligible customers in cases where a Member becomes insolvent

CIPF Members are Dealer Members of the Investment Industry Regulatory Organization of Canada (IIROC). In the unlikely event that the Member you are dealing with becomes insolvent, CIPF will ensure the securities, cash and other property that are held in your account are returned to you in accordance with our Coverage Policy.

Investment dealer insolvency doesn't happen very often. In fact, since CIPF's inception in 1969 there have been only 20 Member insolvencies. CIPF has paid claims and related expenses of $40 million, net of recoveries, and no eligible customers have suffered a loss of property.

TAB 25

CIPF
Canadian Investor Protection Fund

COVERAGE POLICY as of September 30, 2010

COVERAGE

CIPF covers customers of Members who have suffered or may suffer financial loss solely as a result of the insolvency of a Member. Such loss must be in respect of a claim for the failure of the Member to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. The Board of Directors of CIPF may exercise its discretion in respect of determining the customers eligible for protection and the financial loss suffered.

POLICY

This Policy has been adopted by the Board of Directors to describe the basis on which it intends to exercise its discretion in authorizing CIPF to make payments to customers of insolvent CIPF Members. The Directors' discretion may be exercised in a manner that is consistent with the right and extent to which a person may be entitled to claim against the customer pool fund of a Member under the Bankruptcy and Insolvency Act (Canada), subject to other restrictions in this Policy and the sole discretion of the Directors to determine protection by CIPF. CIPF and the Directors reserve the right to authorize or withhold payments in a manner other than as prescribed in this Policy.

In the case of any question or dispute as to the eligibility of a customer, the financial loss incurred by a customer for the purposes of payment by CIPF, and the maximum amounts to be paid to a customer, the interpretation of this Policy by the Board of Directors shall be final and conclusive.

ELIGIBLE CUSTOMERS

CIPF maintains on its website at www.cipf.ca a list of Members whose eligible customers are entitled to protection subject to the terms of this Policy.

A customer eligible for protection by CIPF shall be any customer having a securities or commodity and futures contracts account with a Member used solely for the purpose of transacting securities or commodity and futures contracts business (dealing as principal or agent).

Such accounts are to be fully disclosed in the records of the insolvent Member and are normally evidenced by receipts, contracts and statements that have been issued by the Member.

A customer may be an individual, a corporation, a partnership, an unincorporated syndicate, an unincorporated organization, a trust, a trustee, an executor, an administrator or other legal representative.

Customers introduced to a Member by a foreign affiliate of the Member, in accordance with SRO requirements, are customers of the Member eligible for coverage.

All the accounts of a customer that have been opened with a Member by a domestic investment counselor registered with a Canadian securities regulatory authority, and whose accounts are fully disclosed in the records of the Member shall be combined or aggregated to constitute a single General account, unless such accounts are otherwise Separate Accounts under this Policy.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 Toll-Free 1 866 243 6981
F 416 360 8441 www.cipf.ca

AN ELIGIBLE CUSTOMER SHALL NOT INCLUDE a person who at the date of insolvency or any relevant time as determined by the Directors was:

i) a Member of a sponsoring SRO of CIPF or any other dealer registrant such as a securities dealer, mutual fund dealer, limited market dealer or futures commission merchant, or a foreign securities dealer registered with a Canadian securities regulatory authority or foreign equivalent;

ii) an institution, securities dealer or other person, and its customers, dealing with a Member of an SRO on an omnibus basis (being an account in which the transactions of two or more persons are combined without the disclosure to the Member of the identity of the persons);

iii) a clearing corporation;

iv) any person who owns in aggregate five percent or more of the capital of the insolvent Member consisting of equity securities of any class and/or subordinated debt of the Member;

v) a general partner or director of the insolvent Member;

vi) a limited partner with a participation of five percent or more in the net assets or net profits of the insolvent Member;

vii) a person with the power to exercise a controlling influence over the management or policies of the insolvent Member;

viii) a person who caused or materially contributed to the insolvency of the Member;

ix) a person who did not deal at arm's length with the insolvent Member or with a person who is excluded as a customer; or

x) a customer of a foreign approved participant of an SRO which is not considered by the Board of Directors to be a Member of an SRO. Such participants include foreign dealers or other organizations regulated in recognized jurisdictions, without a place of business in Canada, and who do not deal with customers in Canada except as permitted by applicable Canadian securities legislation.

LOSSES OF ELIGIBLE CUSTOMERS NOT COVERED
The following customer losses are not eligible for payment by CIPF:

i) losses which do not result from the insolvency of a Member, such as, customers' losses that result from changing market values of securities, unsuitable investments, or the default of an issuer of securities;

ii) losses in accounts of customers related to business financing purposes of a Member, such as securities lending and purchase/repurchase transactions;

iii) losses where the customer has not filed a claim with CIPF, or the trustee in bankruptcy of the insolvent Member, within 180 days of the date of insolvency; or

iv) securities or segregated funds that are not held by a Member, or recorded in a customer's account as being held by a Member, such as a mutual fund that is registered directly in the name of the customer with the mutual fund company and is, therefore, not held by the Member for the customer in its records, unless such securities or funds are in the control of the Member.

LIMITS OF COVERAGE

MAXIMUM LIMITS OF COVERAGE

A limit has been placed by CIPF on the coverage provided for a customer's General Account, and each Separate Account after combination with other Separate Accounts as described below, equal to $1 million for losses of securities, commodity and futures contracts, segregated insurance funds and cash.

DETERMINATION OF CUSTOMER LOSSES

The date at which the financial loss of a customer is determined shall be fixed by the Directors as the date of bankruptcy of the Member, if applicable, or the date on which, in the opinion of the Directors, the Member became insolvent. The 180-day period for filing a claim to CIPF commences on, but does not include, the date of bankruptcy.

The maximum amount of financial loss that CIPF may pay to a customer of an insolvent firm shall be calculated after taking into account both the delivery of any available securities, commodity and futures contracts, segregated insurance funds and cash to which the customer is entitled and the distribution of any assets of the insolvent Member, less any amounts owed by the customer to the Member. The Directors may rely on the trustee in bankruptcy or the receiver under applicable law in determining the amount and validity of claims of a customer and for the purpose of calculating financial loss.

The amount of securities delivered to a customer in satisfaction of a claim shall be the amount to which the customer was entitled as at the date for determining financial loss without regard to subsequent market fluctuations. Where the securities are not available to be delivered, cash in an amount equal to their value as at the date for determining financial loss may be paid to the customer even though the amount of such cash may not be equal to the value of such securities as at the date of payment. Open positions in a client's account may, with or without notice, be closed out or liquidated pursuant to the terms of the account with the Member or correspondent broker, clearing house or exchange requirements or applicable insolvency legislation or orders.

For the purposes of authorizing payments, the Board of Directors may in its discretion reduce the amount of the financial loss of a customer by the amount of compensation the customer may receive from any other source. For example, a customer's claim for cash will be reduced to the extent that the customer is entitled to deposit insurance in respect of all or any of the cash held for an account or to compensation in respect of other securities or property.

GENERAL ACCOUNTS

Each account of a customer eligible for protection by CIPF that is not a Separate Account shall be part of the General Account of the customer. For example, the interest of a customer in an account of a personal holding company, or that is held on a joint or shared ownership basis is presumed to be equal to that of each other customer with an interest in the account unless otherwise evidenced in writing, and shall be treated as part of the General Account of the customer. An account held by a nominee or agent for another person who is the principal or beneficial owner shall, except as otherwise provided in this Policy, be deemed to be the account of the principal or beneficial owner.

The General and Separate Accounts that a customer has with a Member will not be combined with the General and Separate Accounts that the same customer may have with another Member, including another Member who has an introducing/carrying agreement with the first Member.

SEPARATE ACCOUNTS

Each account of a customer held in the capacity or circumstance set out below shall be considered a Separate Account of the customer. Unless otherwise indicated below, each Separate Account held by a customer in the same capacity or circumstance shall be combined or aggregated so as to constitute a single Separate Account. The burden shall be on the customer to establish each capacity or circumstance in which the customer claims to hold Separate Accounts. An account of a customer shall not be a Separate Account if it existed on the date of insolvency primarily for the purpose of increasing protection by CIPF.

Registered Retirement Plans: Accounts of registered retirement or deferred income plans such as registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs), life income funds (LIFs), locked-in retirement accounts or plans (LIRAs or LIRSPs), and locked-in retirement income funds (LRIFs) established for the account of the same customer. Accounts established with respect to a customer through the same or different trustees shall be combined and aggregated.

Registered Education Savings Plans: Accounts of education savings plans that comply with the requirements under the Income Tax Act (Canada) for registered education savings plans and that have been accepted by the Minister under such Act, where the customer is the subscriber of the plan. Accounts established with respect to a customer through the same or different trustees shall be combined and aggregated.

Testamentary Trusts: Accounts held in the name of a decedent, his or her estate or the executor or administrator of the estate of the decedent. Accounts of testamentary trusts held by the same executor or administrator shall not be combined or aggregated unless held in respect of the same decedent.

Inter-vivos Trusts and Trusts Imposed by Law: Accounts of inter-vivos trusts which are created by a written instrument and trusts imposed by law. Such Separate Accounts of customers shall be distinct from the trustee, the settlor or any beneficiary.

Guardians, Custodians, Conservators, Committees, etc.: Accounts maintained by a person as a guardian, custodian, conservator, committee or similar capacity in respect of which accounts such person has no beneficial interest. Such accounts held by the same person in any such capacity shall not be combined or aggregated unless held in respect of the same beneficial owner.

Personal Holding Corporation: Accounts of corporations controlled by a customer provided that the beneficial ownership of a majority of the equity capital of the corporation is held by persons other than the customer, as might be the case in a corporation created pursuant to an estate freeze.

Partnerships: Accounts of partnerships controlled by a customer provided that the beneficial ownership of a majority of the equity interests in the partnership is held by persons other than the customer.

Unincorporated Associations or Organizations: Accounts of unincorporated associations or organizations controlled by a customer provided that the beneficial ownership in a majority of the assets of the association or organization is held by persons other than the customer.

TIMING OF PAYMENTS

The time of payment of the maximum amount of coverage in respect of an account as described above may be affected by a number of factors including the amount of assets immediately available to CIPF to make the payment.

TAB 26

shayne.kukulowicz@dentons.com

CIPF
Canadian Investor Protection Fund

December 23, 2013

Dear Ms. ..

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN $: loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On November 21, 2013, you confirmed the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

As the basis for explaining your claim to CIPF, you stated that: "We purchased the 2 funds with the idea that First Leaside was fulfilling the requirements of CIPF and IIROC and that Dr. Leo de Bever was the Chief Executive Officer. We thought it was a legal investment." While you have not provided evidence of the truth of all of the assertions in support of your claim, losses caused by dealer misconduct, compliance failures or breaches of securities regulatory requirements in respect of the distribution of securities are not covered by CIPF. The securities that you purchased were subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 Toll-Free 1 866 243 6981
F 416 360 8441 www.cipf.ca

risks relevant to the purchase and the investment. These investments, like any securities, were subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investment and not a loss resulting from the insolvency of FLSI.

In addition, at the date of insolvency, the securities described in the table below were not held by, or in the control of, FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

	Security	Amount Claimed $
1.	FLWM FUND T/U RSTD	
2.	First Leaside Expansion Limited Partnership	

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 45 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF

Canadian Investor Protection Fund

December 30, 2013

Dear

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On December 3, 2013, you confirmed the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 Toll-Free 1 866 243 6981
F 416 360 8441 www.cipf.ca

Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise misappropriated. In addition, as a basis for explaining your claim, you stated:

> "Based on the CIPF policy and the explicit assurance by First Leaside that our life savings would be secure and covered in any event of FLSI's failure CIPF would pay up to $1,000.000 per account did we feel safe enough to turn our money over First Leaside. We strongly feel CIPF is covering our losses."

While you have not provided evidence of the truth of all of the assertions in support of your claim, losses caused by dealer misconduct, compliance failures or breaches of securities regulatory requirements in respect of the distribution of securities are not covered by CIPF. The securities that you purchased were subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the risks relevant to the purchase and the investment. These investments, like any securities, were subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investment and not a loss resulting from the insolvency of FLSI.

With respect to the security that you purchased and which is described in Table 1 below, it was properly recorded in the books and records of FLSI at the date of insolvency. That security was transferred to an account in your name at another IIROC Dealer Member subsequent to February 24, 2012.

Table 1

	Security	Account Type	Account #	Units
1.	FLEX FUND CLASS B T/U	RRIF		

In addition, at the date of insolvency, the security described in Table 2 below was not held by, or in the control of, FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

Table 2

	Security	Amount Claimed $
1.	FLWM FUND T/U RSTD	

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 45 days of the date of this letter. You may include any other information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF
nadian Investor Protection Fund

December 23, 2013

Dear

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN $. loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On November 20, 2013, you confirmed the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

At the date of insolvency, the security described in the table below was not held by, or in the control of, FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 Toll-Free 1 866 243 6981
F 416 360 8441 www.cipf.ca

	Security	Amount Claimed $
1.	FIRST LEASIDE WLTH-II PFD	

In addition, the security that you purchased was subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the risks relevant to the purchase and the investment. This investment, like any security, was subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investment and not a loss resulting from the insolvency of FLSI.

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 45 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF
Canadian Investor Protection Fund

December 20, 2013

Dear

<u>Re: Claim to the Canadian Investor Protection Fund ("CIPF")</u>

CIPF staff have reviewed your claim to CIPF for a CDN loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On November 20, 2013, you confirmed the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

At the date of insolvency, the securities described in the table below were not held by, or in the control of FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 **Toll-Free** 1 866 243 6981
F 416 360 8441 **www.cipf.ca**

	Security	Amount Claimed $
1.	Wimberly Apartments Limited Partnership	
2.	First Leaside Premier Limited Partnership	
3.	Wimberly Apartments Limited Partnership	

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 45 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF

anadian Investor Protection Fund

January 13, 2014

Dear M

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On December 12, 2013, CIPF received your confirmation of the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 **Toll-Free** 1 866 243 6981
F 416 360 8441 **www.cipf.ca**

Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise misappropriated. The securities that you purchased were subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the risks relevant to the purchase and the investment. These investments, like any securities, were subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investment and not a loss resulting from the insolvency of FLSI or the conversion of your property. Losses caused by dealer misconduct, compliance failures or breaches of securities regulatory requirements in respect of the distribution of securities are not covered by CIPF.

With respect to the securities that you purchased, they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to accounts in your name at another IIROC Dealer Member subsequent to February 24, 2012.

In addition, you indicated that your loss, or part of it, was a result of "the default of an issuer of securities". As mentioned above, losses resulting from the default of an issuer of securities are not covered by CIPF.

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 45 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF

Canadian Investor Protection Fund

January 30, 2014

Dear

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On December 31, 2013, CIPF received your confirmation of the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

At the date of insolvency, the security described in the table below was not held by, or in the control of, FLSI. As an indication of this, you provided a copy to CIPF of the security that you held in certificate form. Since the security was not held by, or in the control of, the insolvent Member at the date of insolvency, the loss is not one that is eligible for CIPF coverage.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 **Toll-Free** 1 866 243 6981
F 416 360 8441 **www.cipf.ca**

	Security	Amount Claimed $
1.	FIRST LEASIDE UNIVERS LPU	

In addition, you indicated that your loss, or part of it, was a result of "the default of an issuer of securities". As mentioned above, losses resulting from the default of an issuer of securities are not covered by CIPF.

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process, as well as general updates, can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 120 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

CIPF
Canadian Investor Protection Fund

January 30, 2014

Dear ,

Re: Claim to the Canadian Investor Protection Fund ("CIPF")

CIPF staff have reviewed your claim to CIPF for a CDN $ loss that you have alleged to have suffered in connection with your dealings with First Leaside Securities Inc. ("**FLSI**"). A summary of the facts constituting the basis of your claim was previously provided to you. On December 31, 2013, CIPF received your confirmation of the accuracy of those facts.

The CIPF Coverage Policy requires that a customer must have: (a) been an eligible customer (as defined), (b) had an account with the insolvent CIPF Member, and (c) suffered financial loss due to the Member's failure to return or account for securities, cash balances, commodities, futures contracts, segregated insurance funds or other property, received, acquired or held by, or in the control of, the Member for the customer, including property unlawfully converted. CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

The date of FLSI's insolvency for purposes of CIPF coverage was February 24, 2012, which was the date of its suspension from the Investment Industry Regulatory Organization of Canada.

CIPF staff appreciate that you have suffered unfortunate financial losses. However, CIPF staff are bound by the terms of the CIPF Coverage Policy and Claims Procedures. Based on the information available to us, CIPF staff are not able to recommend payment for the reasons provided below.

With respect to the securities that you purchased and which are described in Table 1 below, they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to an account in your name at another IIROC Dealer Member subsequent to February 24, 2012.

79 Wellington Street West, Suite 610, Box 75
Toronto, Ontario, Canada M5K 1E7
T 416 866 8366 **Toll-Free** 1 866 243 6981
F 416 360 8441 **www.cipf.ca**

Table 1

	Security	Account Type	Account #	Units
1.	FLWM FUND T/U RSTD	RRSP		
2.	FLEX FUND CLASS B T/U	RRSP		

At the date of insolvency, the securities described in Table 2 below were not held by, or in the control of, FLSI. As an indication of this, you provided copies to CIPF of the securities that you held in certificate form. Since the securities were not held by, or in the control of, the insolvent Member at the date of insolvency, the loss is not one that is eligible for CIPF coverage.

Table 2

	Security	Amount Claimed $
1.	Special Notes Limited Partnership	
2.	FIRST LEASIDE HOLDINGS LPU	

In addition, you indicated that your loss, or part of it, was a result of "the default of an issuer of securities". As mentioned above, losses resulting from the default of an issuer of securities are not covered by CIPF.

In accordance with CIPF's Claims Procedures, you are entitled to have staff's decision reviewed by a panel of one or more CIPF Directors. A description of the appeal process, as well as general updates, can be found at www.cipf.ca. If you wish to avail yourself of this opportunity, please notify CIPF by email at flsi@cipf.ca or by submitting your request in writing to 79 Wellington Street West, Suite 610, Box 75, Toronto, Ontario, M5K 1E7, within 120 days of the date of this letter. You may include any other relevant information relating to your claim at that time.

Yours very truly,

CANADIAN INVESTOR PROTECTION FUND

Ilana Singer
Vice-President

TAB 27

THE GLOBE AND MAIL

July 25, 2014

What protection do you have if your broker goes broke?

By ROB CARRICK

Risk of your investment firm going bankrupt and taking your money with it shouldn't be ignored

Bad news: There is no investor protection scheme to make good your losses in a financial market decline.

This clarification is offered up to the people who misunderstand what agencies like the Canadian Investor Protection Fund are all about. "The challenge that we seem to have most often with people understanding our coverage is that we don't cover a loss in market value," said Rozanne Reszel, CIPF's president and CEO. "We are only triggered by insolvency – protected means having your assets returned to you."

Risk is talked about constantly in the investing world – stock market risk, interest rate risk, currency risk, the business risk associated with a particular stock and social/political risks as well. The risk of your investment dealer going bankrupt and taking your assets with it is not as urgent as these other threats, but it shouldn't be ignored because firms do fail.

Since 2011 alone, CIPF has paid out claims and related expenses totalling $8.4-million related to insolvencies at MF Global Canada Co., Barret Capital Management Inc. and First Leaside Securities Inc. The Mutual Fund Dealers Association of Canada's Investor Protection Corp. (IPC) has received claims totalling about $7.9-million related to the bankruptcy last year of W.H. Stuart Mutuals Ltd.

Markham, Ont.-based W.H. Stuart was a mutual fund dealer and insurance agency that was suspended by the MFDA last May and later had its client accounts transferred to another firm, Keybase Financial Group Inc. Dorothy Sanford, president of the MFDA investor protection plan, said her organization is halfway through the process of paying out claims related to "significant shortfalls" of client money. "It was a really complex situation and our focus is now on processing the claims," Ms. Sanford said.

Whatever type of investment company you deal with, ask yourself this question: If the firm goes bankrupt, are my assets protected?

CIPF's members are investment dealers (including both full-service and discount brokers) that belong to the Investment Industry Regulatory Organization of Canada (IIROC). If a firm sells stocks, bonds and other securities, it should be a member of IIROC and if it's a member of IIROC, it has to be part of CIPF. Likewise, the MFDA's members, mainly financial planning and wealth management firms, must be part of the association's protection plan. Note that the MFDA plan does not apply in Quebec, which has its own compensation fund.

Don't assume your investment firm is a member of IIROC or the MFDA, and thus their insolvency protection plans. Always verify – that's what I do in my ranking of online brokerage firms[1]. Every year, each firm in the survey must confirm that it's a member in good standing of both IIROC and CIPF.

There are two notable parts of the investing world that are not covered by insolvency protection plans. One of them is so-called exempt dealers, who sell products like hedge funds to high net worth individuals who are supposed to be sophisticated investors. Another is portfolio managers, who look after investments for high net worth families, endowments, foundations and pension funds.

Katie Walmsley, president of the Portfolio Management Association of Canada, said in an e-mail that her members do not "handle or hold" client assets. Instead, they're held in the custody of IIROC-regulated investment firms or a division of a bank. Portfolio management firms must have insurance that offers protection in case of employee fraud.

Both CIPF and the MFDA's investor protection plan cover investors for total assets of as much as $2-million. That's $1-million for "general accounts," typically a cash or margin account, and $1-million for "separate accounts" such as registered retirement savings plans and registered retirement income funds. If you have multiple general or registered accounts at a firm, they would be aggregated and considered as a single account.

TFSAs, being comparatively new, are in a kind of grey zone right now. "We've not had a circumstance where we've had to adjudicate whether TFSAs should get separate coverage, but that's certainly something that's on our radar for clarification," Ms. Reszel said. "At this moment, I would consider them to be part of your general account."

It's primarily the cash in your investment account that is at risk if your firm goes bankrupt, although securities are also covered. "In Canada, client [cash] money is in the mix of the company money, just like it would be at a bank," Mr. Reszel said. "It's not held separate and apart in a trust account." If securities were missing from your account in the event of an insolvency, they'd either be replaced or you'd receive the cash value on the date of insolvency.

The biggest case ever handled by CIPF was the 1987 demise of Osler Inc., which accounts for almost 40 per cent of the $40-million in claims and related expenses paid out since inception. Today, Ms. Reszel said the plan has a general fund of $440-million invested in bonds, and a line of credit with two banks for $125-million. The MFDA's investor protection plan will gradually boost its $35-million fund to $50-million in the years ahead, and there's a $30-million line of credit to draw on. Both plans are funded through fees paid by member firms.

Let's be clear on what investor protection plans do not cover: Losses due to inappropriate advice; fraud that does not result in a company's insolvency; or financial market declines. Confusion over whether market losses are covered by CIPF and the MFDA's protection plan may result from the fact the Canada Deposit Insurance Corp. protects bank deposits against losses of up to $100,000. Guaranteed investment certificates are included in this coverage.

The Canadian Foundation for Advancement of Investor Rights (FAIR) did a study of investment fraud a few years ago and found that fraud and insolvencies often go together. The group also found many instances of fraud involving individuals and firms that were members of neither the MFDA nor IIROC. Marian Passmore, FAIR's policy director, said the group is calling for all investment firms to be members of an industry organization with its own insolvency plan for clients.

"Right now," she said, "investors should make sure they're dealing with either an IIROC or MFDA member if they want this protection."

Globe app users click for table showing how investors can protect their assets against an investment firm's bankruptcy.[2]

References

1. tgam.ca/dwmy
2. bit.ly/1phhnzz

TAB 28

CIPF
Canadian Investor Protection Fund

About Us > History of CIPF >

CIPF Member Insolvencies

Unaudited Schedule of Claims and Related Expenses Paid and/or Provided Net of Recoveries at at December 31, 2013

Insolvent Firm	Year	Amount $000's
Malone Lynch Securities Limited	1971	1,546
Andrews & Belanger Co. Ltd.	1971	78
Chartrand, Quinn, Senecal & Co.	1973	139
Blanchard, O'Connor & Co.	1974	36
Atlantic Securities Limited	1981	273
Rademaker MacDougall & Company	1982	0
First Commonwealth Securities Corp.	1986	1,828
Anglo Securities Limited	1986	261
Osler Inc.	1987	15,532
R. Drapeau Capital Inc.	1989	25
Invescourt, courtier en valeurs mobilières inc.	1990	6
Brault, Guy, O'Brien Inc.	1990	166
McConnell & Company Limited	1991	2,919
Essex Capital Management Ltd.	1999	6,123
Maxima Capital Inc.	2001	0
Rampart Securities Inc.	2001	3,276
Thomson Kernaghan & Co. Limited	2002	(677)
MF Global Canada Co.	2011	2,875
Barret Capital Management Inc.	2012	1,843
First Leaside Securities Inc.	2012	3,638
Total		**$ 39,887**

TAB 29

1979 CarswellQue 157
Supreme Court of Canada

Consolidated Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.

1979 CarswellQue 157F, 1979 CarswellQue 157, [1979] S.C.J. No. 133, [1980] 1 S.C.R. 888, [1980] I.L.R. 1-1176, 112 D.L.R. (3d) 49, 1 A.C.W.S. (2d) 169, 32 N.R. 488, REJB 1979-109268

Consolidated-Bathurst Export Limited, (Plaintiff) Appellant and Mutual Boiler and Machinery Insurance Company, (Defendant) Respondent

Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, and McIntyre JJ.

Judgment: March 13, 1979
Judgment: December 21, 1979

Proceedings: affirmed *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* ((4 octobre 1977)), no C.A. Montréal 500-09-000267-757 ((Que. C.A.))

Counsel: *Guy Desjardins, Q.C.*, for the appellant.
Marcel Cinq-Mars, Q.C., for the respondent.

Subject: Insurance; Family

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

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

Products of factory damaged following corrosion of machinery -- Insurer having right to inspect and terminate contract -- Exclusion clause in policy excluding liability for damages directly caused by corrosion -- Other exclusion clauses excluding liability for damages caused directly or indirectly -- Insurer liable under contra proferentem doctrine in not employing less ambiguous language to exclude liability for corrosion -- Liability also being imposed using normal rules of construction to discern intent of parties.

The reasons of Martland, Ritchie and McIntyre JJ. were delivered by *Ritchie J.* (*dissenting*):

1 This is an appeal from a judgment of the Court of Appeal of the Province of Quebec affirming the judgment rendered at trial by Mr. Justice Bisson and dismissing the claim of the appellant against its insurer for damage sustained to its property located at a plant which it operated at New Richmond in the Province of Quebec, where it was engaged in the manufacture of paper and paper and wood products.

2 By reason of their malfunction, direct damage was caused to several tubes in the heaters employed for the heating of bunker "C" fuel with the consequence that temporary closing of the plant became necessary. The appellant's claim in this action encompasses not only the direct damage done to the tubes, but the consequential loss allegedly sustained because of the breakdown of the tubes.

3 I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey in this case, but as I reach a different conclusion concerning the risk insured against by the policy in question, I have found it necessary to express my views separately.

4 The appellant's claim is made pursuant to the terms of an insurance agreement with the respondent which was in force at the time of the events above referred to whereby the respondent agreed

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> .....
>
> 1. ...To pay the Insured for loss or damage to property of the Insured directly caused by such Accident *to an Object*, or if the Company so elects, to repair or replace such damaged property; ...
>
> (The italics are my own.)

5 The objects covered by the policy are defined in the 1st Schedule thereof as follows:

> The Objects covered under this Schedule are of the type designated as follows:
>
> 1. Any metal fired or metal unfired pressure valve; and
>
> 2. Any piping, on or between premises of the Insured, connected with such vessel and which contains steam or other heat transfer medium or condensate thereof, air, refrigerant, or boiler feedwater between the feed pump or injector and a boiler, together with the valves, fittings, separators and traps on all such piping.

6 What is insured against by this agreement in my opinion is damage to the property of the insured "directly caused to an "object" by an "accident" as that word is defined in the policy. While the policy covers damage to property other than the object itself, it only covers that damage when it has been directly caused by "accident" to an "object". I am satisfied that the tubes were "objects" within the meaning of the above definition and that damage directly caused to the tubes would have been covered by the insurance agreement had it not been for the terms of the definition of "accident" contained therein which reads as follows:

> C. Definition of Accident — As respects any Object covered under this Schedule, 'Accident' shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) *depletion, deterioration, corrosion, or erosion of material*, (b) wear and tear (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protection device.
>
> (The italics are my own.)

7 Both the trial judge and the Court of Appeal were satisfied that the damage to the tubes was occasioned by corrosion and this conclusion is supported by the fact that quantities of salt water did flow through the pipes. Expert evidence was called on behalf of the appellant directed to supporting the submission that the damage was caused by an hydraulic hammer effect of sudden origin which placed an inordinate strain on the pipes and tubes causing them to break. This evidence was, however, not accepted either at trial or in the Court of Appeal and I do not find it necessary to discuss it. In the result it has been concurrently found at trial and on appeal that corrosion was the cause of the damage to the tubes and pipes and it follows from the terms of the "definition of accident" that this damage is not insured against by the policy in question.

8 It was contended also that even if the coverage afforded by the policy did not include damage by "depletion, deterioration, corrosion" or "wear and tear" within the meaning of the definition of "accident", it was nevertheless effective to make the insurer

responsible for consequential loss suffered by the insured as a result of a sudden rupture of the heat exchanger, whether due to corrosion or not. In view of the fact that the coverage is limited to indemnity in respect of loss or "damage to property of the insured *directly* caused by such accident to an Object", I cannot adopt an interpretation which would result in affording coverage to the insured for *consequential* damage whether it was due to "corrosion" or otherwise. In my opinion, the only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to me to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of ... material".

9 It has been suggested that the language employed in the policy should be construed against the insurance company which was the author of it in accordance with the *contra proferentem* rule which is frequently invoked in the construction of insurance contracts when it is found that all other rules of construction fail to assist the Court in determining the true meaning of the policy.

10 In this regard my brother Estey has made reference to the reasons for judgment of Cartwright J., as he then was, in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company* [1] where he said at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It will however be seen from what I have said that I do not find it necessary to resort to this rule in the interpretation of the policy here at issue.

11 My brother Estey has, however, adopted the view that in construing the policy and particularly the definition of accident contained therein in the manner adopted in these reasons and in those of the majority of the Court of Appeal, the result is to "largely, if not completely, nullify the purpose for which the insurance was sold" which is "a circumstances to be avoided so far as the language used will permit". In this regard reliance is placed on the judgment of this Court in *Indemnity Insurance Company of North America v. Excel Cleaning Service* [2], at pp. 177-178, but with the greatest respect I am unable to relate the circumstances of that case to those with which we are here concerned.

12 The *Excel Cleaning Service* case was one in which an "on location cleaning service" business was covered by a property damage liability policy insuring it for damage to property caused by accident arising out of its work. This policy however contained an exclusion relating "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody and control of the insured", and the insurer contended that a wall to wall carpet fixed to the floor of a house where the insured was employed which was damaged was "in the care, custody and control of the insured" and therefore excluded from the coverage. Consistent with this reasoning all of the customer's belongings on which the insured was working were similarly exclusions which would have meant that the policy afforded no coverage whatever for the business of the insured. It was in this connection that this Court said, at pp. 177-178:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

13 I am respectfully of the opinion that this case involves a very different situation from the one with which we are here concerned. The construction sought to be placed on the Excel Cleaning Service Policy would have meant that although it purported to be a property damage liability policy covering the insured's business, it in fact insured nothing whereas the present policy affords insurance "for loss or damage to property of the insured" directly caused by an accident as defined therein. The meaning assigned to the word "accident" in the policy does not constitute an exclusion from the coverage but is rather a part of the definition of the risk insured against.

14 For all these reasons, as well as for those stated by Mr. Justice Turgeon, I would dismiss this appeal with costs.

The judgment of Pigeon, Dickson, Beetz and Estey JJ. was delivered by *Estey J.*:

15 The appellant operates a manufacturing facility for the production of paper products, including paper boxes, at New Richmond, Quebec, and the respondent is the insurer under a policy of insurance issued in respect of certain property of the appellant including the property with which this action is concerned, being three heat exchangers. The heat exchangers in question are described by the trial judge as follows:

> [TRANSLATION] The parts of this system with which we are particularly concerned are three heat exchangers, a type of pipe measuring fifteen feet long with an interior diameter of ten inches.
>
> Within each of these three exchangers there are 102 tubes thirteen feet long, with an exterior diameter of $^5/_8$ inch and a metal casing measuring $^1/_{16}$ inch, or .065 inch.
>
> Inside each exchanger at the ends the 102 pipes pass through a tubular metal plate one inch thick.
>
> Further, the 102 tubes of each exchanger are themselves divided into three groups of 34 tubes each, so that oil flowing in the tubes passes around the exchanger three times and is heated to the right level before emerging and being directed towards the boilers as a fuel.
>
> Steam circulates in the exchangers, passing in through the left end immediately to the right of the tubular plate and emerging at the right end, just as it strikes the other tubular plate.
>
> Each exchanger is sealed at each end by a lid.
>
> As the exchanger measures fifteen feet and the tubes thirteen feet, it follows that a space of one foot remains at each end between the tubular plate and the lid closing the exchanger.
>
> The whole apparatus forms a sealed unit, which it was established cannot be opened without causing a breakdown and considerable damage.

16 Due to the failure of these heat exchangers, the appellant was required to shut down part of their facilities and thereby suffered a loss which the parties have agreed amounted to $158,289.24. This sum is set out in the Plaintiff's Declaration and includes "Direct Damage Loss" of $15,604.44. The insurer resists the appellant's claim on the basis that the damage was caused by corrosion of the tubes inside the heat exchanger and this risk was specifically excluded from the coverage provided by the policy of insurance. The material provisions of the policy of insurance issued by the respondent are as follows:

> **INSURING AGREEMENT**
>
> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> **COVERAGE A — PROPERTY OF THE INSURED**
>
> 1. ACTUAL CASH VALUE — To pay the Insured for loss of or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; and

The definition of accident as employed in the above excerpt is as follows:

> As respects any Object covered under this Schedule, "Accident" shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear, (c) leakage at any value, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube,

gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protective device.

17 The employees of the appellant became aware of the failure of the heat exchangers when small fuel oil spots were noticed on linerboard being produced in the mill. The source of the oil was traced to the boiler and hence to the heat exchangers where a number of ruptured tubes were discovered.

18 The appellant advanced two main submissions:

(a) that the damage was caused by hydraulic hammer effect; and,

(b) alternatively, that the damage was caused by corrosion and that the terms of the policy do not exclude damage thus occasioned.

19 The learned trial judge found that the damage was caused by corrosion and discusses the contribution of pressure changes as follows:

> [TRANSLATION] There is no doubt that the damage occurred suddenly, but the phenomenon which led up to it, namely the chemical process of corrosion, was not of a sudden and accidental nature, so that it could not be regarded as an "accident".
>
> On December 4, 1968 some occurrence, probably a fall in the steam pressure in the heat exchanger, caused a failure in certain oil tubes, which moreover apparently broke in a relatively short space of time.
>
> The fact remains, however, that corrosion was the cause of the damage.

20 The majority of the Court of Appeal found the damage was the result of corrosion and thereby excluded from policy coverage. Turgeon J.A. dealt with the hydraulic hammer theory as follows:

> [TRANSLATION] This was a possibility, not a probability, mentioned by appellant's expert witness Mahoney in his examination in chief. However, when he was cross-examined, he admitted that he could not provide any direct evidence that a "hydraulic hammer" effect was produced, or that there was excessive pressure, or that the safety valves did not operate effectively.

Dissenting from the majority, Kaufman J.A. appears to have adopted in part the hydraulic hammer theory as being a "trigger" which precipitated the leaks in the tubes. The learned justice went on to state:

> But where, as here, the pressure suddenly increased, it will not do for the insurer to point to the corrosion and say that, sooner or later, the tubes would have burst anyway.

Thus it will be seen that in both courts below the cause of the damage was found to be corrosion of the tubes which both courts went on to conclude was a risk or peril not covered by the insurance contract.

21 The issue is simply, therefore, whether the admitted loss suffered by the appellant and which was occasioned by the corrosion of the heat exchangers is a loss recoverable under the above-quoted terms of the policy of insurance issued by the respondent to the appellant. This leaves the alternative submission advanced by the appellant, namely that the term of the contract of insurance covers the damages suffered by the appellant. The heart of this argument is that while the definition of accident does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material", the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion. Thus the insurer would not be liable under the contract for the cost of repairing or replacing any insured property damaged by "depletion, deterioration, corrosion, wear and tear, etc.", but would be responsible for any consequential loss to the insured following the sudden rupture of the heat exchanger whether or not it be due to "corrosion" or "wear and tear", etc.

22 In the preliminary provisions setting up the coverage under the policy of insurance, the definition of accident is, of course, fundamental, and strip ping out the words not here relevant, the definition reads as follows:

Accident shall mean a sudden and accidental occurrence to the object ... but accident shall not mean ... corrosion...

23 Some light may be thrown on this interpretation difficulty by reference to a latter portion of the policy of insurance headed "Exclusions". The following excerpts illustrate the drafting technique employed in the policy where risks are to be excluded from its coverage:

EXCLUSIONS

This policy does not apply to

1. *WAR DAMAGE* — Loss from an Accident *caused directly or indirectly* by

(a) Hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by

•

. . . . .

2. *NUCLEAR HAZARDS* — Loss, *whether it be direct or indirect, proximate or remote*,

(a) From an Accident *caused directly or indirectly* by nuclear reaction...

(b) From nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, *caused directly or indirectly by, contributed to or aggravated by an Accident*;

•

. . . . .

3. *MISCELLANEOUS PERILS* — Loss under Coverages A and B from

•

. . . . .

(b) An Accident *caused directly or indirectly by fire* or from the use of water or other means to extinguish fire;

•

. . . . .

(d) Flood *unless an Accident ensues and the Company shall then be liable only for loss from such ensuing Accident*;

•

. . . . .

(Emphasis added.)

Thus it may be argued that when the draftsman wished to exclude consequences from an event, the words "directly or indirectly" were employed. Had this technique been adopted in the primary coverage provisions excerpted above, it would have read;

Accident does not mean that which directly or indirectly results from corrosion.

Alternatively, if the consequences of corrosion were intended by the parties to be beyond the protection of the contract, such circumstances would have been included under the heading "Exclusions" as a subparagraph comparable to one of those set out above.

24 At best, one must conclude that the definition of accident, including as it does the reference to corrosion, leaves two clear alternative interpretations open. Firstly, the definition may not include an event relating to corrosion. Secondly, the definition may exclude only the cost of making good the corrosion itself.

25 Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned with any such mandated provisions. Meredith J.A. put the proposition in *Pense v. Northern Life Assurance Co.* [3] at p. 137:

> There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.
>
> (Adopted in this Court in 1908 [4].)

Such a proposition may be referred to as step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:

> If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

This Court applied the doctrine in *Indemnity Insurance Company of North America v. Excel Cleaning Service* [5] where at pp. 179-180 it was stated:

> It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain ... Furthermore, the language of Lord Greene in *Woolfall & Rimmer, Ltd. v. Moyle*, [1942] 1 K.B. 66 at 73, is appropriate. He there states:
>
>> I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

As has already been stated, this is, of course, the second phase of interpretation of such a contract. Cartwright J., as he then was, stated in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company* [6] at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

Lindley L.J. put it this way:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But 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.

> *Cornish v. Accident Insurance Company* [7], at p. 456.

26 Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

27 The *Cornish* case, *supra*, illustrates a course generally taken when such contracts reach the courts. There the court was interpreting an insurance contract in the light of the death of the insured while crossing a railway track. The policy included an exception from insured risks resulting from "exposure of the insured to obvious risk of injury". Lindley L.J., in the course of judgment, stated:

> The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. (at p. 456)

An example of the application of the same principles is found in the *Indemnity Insurance Company of North America v. Excel Cleaning Service, supra*, where, at pp. 177-8, it was concluded:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

The appellant, as the owner and operator of a large forest products facility, sought insurance protection of the machinery employed in the plant in its industrial processes. There is no dispute that the heat exchangers in question were covered by the insurance contract. There is also no serious dispute, at least by the time the litigation had reached this Court, that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger, and the consequential release of oil into the processed steam. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.

28 It may also be argued by the insurance industry that applying the more favourable construction to this ambiguous provision will be to unnecessarily and unfairly burden the carrier. The carrier under this policy has at least two defensive mechanisms which it can readily call to its aid: firstly, the right of inspection which was exercised here both before and during the contract; and secondly, the right to terminate in the event the insurance carrier determines that the condition of the insured machinery is such as to make it impractical to extend coverage in the manner required by the contract.

29 I therefore would allow the appeal, set aside the judgment at trial and of the Court of Appeal and direct the entry of judgment in favour of the appellant in the amount of $158,289.24 with interest from the 1st of April, 1969, as claimed (it being the date of submission of claim and which date has not been contested in any court in these proceedings), together with costs throughout. In the event the parties are in disagreement as to whether the "Direct Damage" in the amount of $15,604.44 mentioned above is, in fact, repairs of the actual corrosion damage and should not therefore, on the basis of these reasons be included in judgment granted, the matter shall be determined on application to a Judge of the Superior Court.

Appeal allowed with costs, Martland, Ritchie and McIntyre JJ. dissenting.

Solicitors of record:
Solicitors for the appellant: *Desjardins, Ducharme*, Desjardins & Bourque, Montreal.
Solicitors for the respondent: *Martineau, Walker, Allison, Beaulieu, MacKell & Clermont*, Montreal.

Footnotes

1 [1956] S.C.R. 936.
2 [1954] S.C.R. 169.
3 (1907), 15 O.L.R. 131 (Ont. C.A.).
4 (1908), 42 S.C.R. 246.
5 [1954] S.C.R. 169.
6 [1956] S.C.R. 936.
7 (1889), 23 Q.B. 453 (C.A.).

End of Document

TAB 30

1996 CarswellOnt 3941
Supreme Court of Canada

Manulife Bank of Canada v. Conlin

1996 CarswellOnt 3941, 1996 CarswellOnt 3942, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101, 139 D.L.R. (4th) 426, 203 N.R. 81, 30 B.L.R. (2d) 1, 30 O.R. (3d) 577 (note), 30 O.R. (3d) 577, 66 A.C.W.S. (3d) 555, 6 R.P.R. (3d) 1, 94 O.A.C. 161, J.E. 96-2122

Manulife Bank of Canada (appellant) v. John Joseph Conlin (respondent)

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

Heard: May 30, 1996
Judgment: October 31, 1996
Docket: 24499

Counsel: *H. Stephen Lee*, for appellant.
Raymond F. Leach and *Barbara F. Fischer*, for respondent.

Subject: Property; Corporate and Commercial

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

Headnote
Guarantee and indemnity --- Guarantee — Continuing guarantee — What constituting

Mortgages --- Action on the covenant — Liability on the covenant — Guarantee

Judges and courts --- Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court

Mortgages — Action on the covenant — Liability on the covenant — Guarantee — Liability of guarantor — Guarantor not waiving equitable right to be released from liability on material variation of terms — Document construed contra proferentem against bank.

Guarantee and indemnity — Guarantee — Continuing guarantee — What constituting — Guarantee permitting variation of terms — Guarantor not having waived equitable or common law rights to be released from guarantee when mortgage renewed — Renewal agreement not constituting extension of original loan agreement.

Judges and courts — Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court — Mortgagor defaulting on mortgage and bank obtaining summary judgment against mortgagor and guarantors — Court of Appeal having jurisdiction to set aside judgment and dismiss action against guarantor — Court of Appeal having jurisdiction to make any order or decision that ought to have been made by court or tribunal appealed from.

The appellant bank made a loan to the respondent guarantor's spouse which was secured by a first mortgage on an apartment building. The guarantor (along with another), guaranteed the mortgage, which was for a three-year term with an interest rate of 11.5 per cent per annum. The guarantor signed the original mortgage documents. The guarantors covenanted to be bound by all conditions of the mortgage, and to remain so bound notwithstanding an extension of time for payment of the loan or an increase in the interest rate charged for the loan. The covenant provided that the guarantor would assume all obligations as the principal debtor.

Prior to the mortgage maturing, the bank agreed to extend the time for repayment of the loan for another three years at an interest rate of 13 per cent per annum. At that time, the guarantor had separated from his spouse, and had no notice or knowledge of the renewal. Only the spouse executed the renewal agreement as mortgagor, although the document provided for the signature of the guarantor as well.

The mortgage went into default, and the bank commenced proceedings to recover the mortgage debt. It obtained summary judgment against both the mortgagor and the guarantors for the principal owing under the mortgage, with interest at 13 per cent. The guarantor successfully appealed. The Ontario Court of Appeal set aside the judgment, and dismissed the action against the respondent guarantor. The bank appealed. At issue was whether the Court of Appeal had exceeded its jurisdiction in allowing the appeal, and dismissing the action, and whether the guarantor was released from his promise to pay under the terms of the mortgage agreement.

Held:

The appeal was dismissed.

Per Cory J. (La Forest, Sopinka and Major JJ. concurring) The principle that a guarantor will be released from liability on a 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 has been established for a long time. The basis for the rule is that any material change in the principal contract will result in an alteration of the surety's risk. While a surety can contract out of the protection provided by the common law or equity to the guarantor, such contracting out must be clear. Whether a surety remains liable is to be determined by an interpretation of the contract between the parties, the intention of the parties, and all of the circumstances surrounding the transaction. If there is any ambiguity in the guarantee, the document should be construed in accordance with the contra proferentem rule. As a favoured creditor, a surety's obligation should be strictly enforced. The guarantor in this case was not a compensated surety, and fell within the class of "accommodation sureties." Any doubt or ambiguity was to be strictly interpreted, and resolved in favour of the guarantor.

The guarantee covenant was to be interpreted and considered within the context of the entire transaction. The renewal or extension of time clause were not ambiguous. The clause clearly indicated that the guarantor was not bound by the renewal agreement. If the guarantor was to be treated as a principal debtor and not as a guarantor, the bank's failure to notify him of the renewal agreement and the new terms served to release him from his obligations, since he was not a party to the renewal agreement. In any event, the equitable or common law rules relieving a surety from liability are applicable where a contract has been materially altered by the creditor and the principal debtor without notice to the surety, in the absence of an express agreement to the contrary.

The renewal agreement was to be considered an integral part of the transaction. Two aspects of the renewal agreement led to the conclusion that the guarantor was not bound. The renewal agreement was a standard form contract prepared by the bank, and it required the signature of the guarantor. The guarantor was expected to execute the document to confirm notice to him and his acceptance of it, but he did not sign it. Furthermore, the renewal agreement provided that it constituted a new, rather than an extension of the former, agreement. The original document specifically distinguished between extensions and renewals. The absence of a reference to a renewal agreement suggested that it had no application for a renewal. The language in the covenant bound the guarantor to variations if the mortgage was extended; it did not bind the guarantor to a renewal without his consent. The guarantor was to be relieved from liability under these circumstances.

Per Iacobucci J. (dissenting) (Gonthier J. concurring): The Ontario Court of Appeal had jurisdiction to dismiss the action as against the respondent guarantor. The order originally appealed from was granted on a motion for summary judgment brought by the bank. Pursuant to r. 20.04(2) and 20.04(4) of the Ontario *Rules of Civil Procedure*, the motions court judge (and, by extension, the Court of Appeal) had jurisdiction to dismiss the action against the guarantor. The bank was not deprived of its right to have its case fully heard, and to test all of the guarantor's evidence. The bank chose not to exercise its rights under r. 39.02(1) to cross-examine on the affidavits supporting the guarantor's position.

The guarantee clause constituted a waiver of the guarantor's equitable right to be discharged because of the material variation of the mortgage contract. Being essentially a contract, the guarantee was to be interpreted in accordance with the ordinary rules of contractual construction. The primary rule was that effect was to be given to the intentions of the parties as expressed in the written document. In this case, the guarantor plainly agreed to remain bound by the guarantee agreement, notwithstanding the material variations of the principal debt. Even though the guarantee covenant did not refer specifically to a renewal agreement, the language amounted to a clear waiver of the guarantor's right to be discharged in the event of a change in the interest rate or time for repayment. The mechanism of the renewal agreement basically served to extend the time, and increase the interest rate as expressly contemplated in the guarantee covenant. The covenant also did not require the bank to notify the guarantors of any such alteration in the mortgage.

The guarantors were not expected, as "principal debtors," to be signatories to the renewal agreement. The intention of the parties in using such language was to preserve the liability of the surety even in circumstances where the principal obligations were no longer enforceable. The space for the guarantors' signature on the renewal agreement was not helpful in interpreting the guarantee contract. The extent of the guarantor's liability was limited to repayment of the principal, secured by the mortgage at 11.5 per cent per annum.

Per L'Heureux-Dubé J. (dissenting): The "modern contextual approach" constitutes the standard normative approach to judicial interpretation, although, in appropriate circumstances, resort may be had to the old "plain meaning" rules of construction. The "modern contextual approach" for statutory interpretation is equally applicable, with appropriate adaptations, to contractual interpretation. In this case, the appropriate methodology to interpret the language of the guarantee was not the application of the "plain meaning" approach, but an application of the "modern contextual approach," because the terms in the documents constituted "legal terms of art."

Table of Authorities

Cases considered:

Per Cory J. (La Forest, Sopinka and Major JJ. concurring)

Alberta Opportunity Co. v. Schinnour (1990), 112 A.R. 87, 78 Alta. L.R. (2d) 48, [1991] 2 W.W.R. 624 (C.A.) [leave to appeal to S.C.C. refused 81 Alta. L.R. (2d) lxvii (note), [1991] 6 W.W.R. lxvii (note), 136 N.R. 418 (note), 127 A.R. 390 (note), 20 W.A.C. 390 (note) (S.C.C.)] — *considered*

Bank of Montreal v. Wilder (1986), [1987] 1 W.W.R. 289, [1986] 2 S.C.R. 551, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290, [1987] 1 W.W.R. 289, 32 D.L.R. (4th) 9, 70 N.R. 341 — *referred to*

Bauer v. Bank of Montreal (1980), 33 C.B.R. (N.S.) 291, [1980] 2 S.C.R. 102, 10 B.L.R. 209, 110 D.L.R. (3d) 424, 32 N.R. 191 — *referred to*

Canadian Imperial Bank of Commerce v. Patel (1990), 66 D.L.R. (4th) 720, 72 O.R. (2d) 109 (H.C.) — *applied*

Co-operative Trust Co. of Canada v. Kirkby, [1986] 6 W.W.R. 90, 51 Sask. R. 298 (Sask. Q.B.) — *considered*

First City Capital Ltd. v. Hall (1993), 11 O.R. (3d) 792, 99 D.L.R. (4th) 435, 61 O.A.C. 212, 5 P.P.S.A.C. (2d) 8 (C.A.) — *referred to*

Holland-Canada Mortgage Co. v. Hutchings, [1936] S.C.R. 165, [1936] 2 D.L.R. 481 — *considered*

Holme v. Brunskill, [1877] 3 Q.B.D. 495 — *referred to*

Johns-Manville Canada Inc. v. John Carlo Ltd., [1983] 1 S.C.R. 513, 1 C.C.L.I. 55, 46 C.B.R. (N.S.) 177, 1 C.L.R. 169, 147 D.L.R. (3d) 593, 47 N.R. 280, [1983] I.L.R. 1-1661 — *considered*

Royal Trust Corp. of Canada v. Reid (1985), 40 R.P.R. 287, 20 D.L.R. (4th) 223, 54 Nfld. & P.E.I.R. 201, 160 A.P.R. 201 (P.E.I. C.A.) — *referred to*

Veteran Appliance Service Co. v. 109272 Developments Ltd. (1985), 67 A.R. 117 (Alta. Q.B.) [affirmed (1987), 76 A.R. 340 (C.A.). Leave to appeal to S.C.C. refused (1987), 79 A.R. 240 (note), 80 N.R. 401 (note) (S.C.C.)] — *referred to*

Per Iacobucci J. (dissenting) (Gonthier J. concurring)

Bank of Montreal v. Wilder (1986), [1987] 1 W.W.R. 289, [1986] 2 S.C.R. 551, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290, [1987] 1 W.W.R. 289, 32 D.L.R. (4th) 9, 70 N.R. 341 — *referred to*

Bauer v. Bank of Montreal (1980), 33 C.B.R. (N.S.) 291, [1980] 2 S.C.R. 102, 10 B.L.R. 209, 110 D.L.R. (3d) 424, 32 N.R. 191 — *referred to*

Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176 — *referred to*

Cornish v. Accident Insurance Co. (1889), 23 Q.B.D. 453 (C.A.) — *referred to*

Holme v. Brunskill, [1877] 3 Q.B.D. 495 — *referred to*

Johns-Manville Canada Inc. v. John Carlo Ltd., [1983] 1 S.C.R. 513, 1 C.C.L.I. 55, 46 C.B.R. (N.S.) 177, 1 C.L.R. 169, 147 D.L.R. (3d) 593, 47 N.R. 280, [1983] I.L.R. 1-1661 — *considered*

Keltic Leasing Corp. v. Curtis (1993), 16 C.P.C. (3d) 396, 133 N.B.R. (2d) 73, 341 A.P.R. 73 (C.A.) — *distinguished*

Pense v. Northern Life Assurance Co. (1907), 10 O.W.R. 826, 1907 CarswellOnt 285, 15 O.L.R. 131 (Ont. C.A.) — *referred to*

Reliance Petroleum Ltd. v. Stevenson, [1956] S.C.R. 936, 5 D.L.R. (2d) 673 — *referred to*

Rotenberg v. York (Borough) (No. 2) (1976), 13 O.R. (2d) 101, 1 C.P.C. 85, 9 L.C.R. 289 (C.A.) — *referred to*

Per L'Heureux-Dubeé J. (dissenting)

Inland Revenue Commissioners v. Williams, [1969] 1 W.L.R. 1197 (Ch.) — *referred to*

River Wear Commissioners v. Adamson (1877), 2 App. Cas 743, [1874-1880] All E.R. Rep. 1 (H.L.) — *referred to*

Sydall v. Castings Ltd. (1966), [1967] 1 Q.B. 302, [1966] 3 All E.R. 770 (C.A.) — *referred to*

Statutes considered:

Per Iacobucci J. (dissenting) (Gonthier J. concurring)
Courts of Justice Act, R.S.O. 1990, c. C.43

s. 134(1)*considered*

Rules considered:

Ontario, Rules of Civil Procedure

r. 1.04(1)*referred to*

r. 20.04(2)*considered*

r. 20.04(4)*considered*

r. 39.02(1)*referred to*

APPEAL from judgment reported at (1994), 41 R.P.R. (2d) 283, 17 B.L.R. (2d) 143, 20 O.R. (4d) 499, 120 D.L.R. (4th) 234, 75 O.A.C. 117, allowing appeal from decision granting motion for summary judgment for recovery of mortgage debt under mortgage and guarantee.

***Cory J.* (*La Forest, Sopinka* and *Major JJ.* concurring):**

1 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.

The Position of a Guarantor as Defined by Equity and the Common Law

2 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*, [1877] 3 Q.B.D. 495 (C.A.) at pp. 505-6 in this way:

> 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 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.

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.

The Right of a Guarantor to Contract Out of the Protection Provided by the 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.

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 commercial 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.

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.

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.

Professor McGuinness, in his work *The Law of Guarantee, supra*, at pp. 612-13 explains the application of the rule as follows:

> . . . . .
>
> 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:

> "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 has entered into. If that written engagement be 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.

11 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.

12 The position set out in *Holland-Canada Mortgage Co.*, *supra*, was confirmed in *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [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 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

17 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, fulfil 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.

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. However, 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

19 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.

20 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.

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.

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.

Effect of the Renewal Agreement

23 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.

24 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.]

25 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 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.

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.

Significance of Clause 7 of the Original Agreement

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):

> 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.

28 Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasises 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.

29 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 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 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 Developments Ltd.* (1986), 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 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.

32 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.

33 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.

Disposition

34 I would dismiss the appeal with costs.

L'Heureux-Dubé J. **(dissenting):**

35 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.

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 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 case 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.]

41 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 them 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, 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 (C.A.), 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 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 decided cases and in 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 outcome cannot appropriately be labelled a "plain meaning" definition.

45 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.).

46 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.

47 Subject to the above considerations, I concur with my colleague's disposition of the appeal.

***Iacobucci J.* (dissenting) (*Gonthier J.* concurring):**

48 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.

I. Background

49 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 per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in 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.

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".

52 In 1989, the respondent and Dina Conlin separated.

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.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

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 mortgage 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

56

(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 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 thereof 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.

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 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).

59 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.

60 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)

61 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.

62 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 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*, [1877] 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 change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

67 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?

68 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.

69 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 have had the jurisdiction to make, *Rotenberg v. York (Borough) (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.

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.

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.

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 fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

73 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.

74 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.

75 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?

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.

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.

a) Interpretive principles relating to guarantees

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."

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 & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (Ont. C.A.), 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.

80 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 *Reliance Petroleum Ltd. v. Stevenson*, [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 (C.A.), 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.

81 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 *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513.

82 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 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. 521-22, 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 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

85 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?

86 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.

87 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.

88 It is true, as the respondents contend, 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

. . . . .

89 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 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 magnify 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.

(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.

(v) What exactly is the extent of the respondent's obligation?

100 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

101 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.

TAB 31

CED Contracts IX.9

Canadian Encyclopedic Digest
Contracts
IX — Interpretation of Contract
9 — Other Principles Respecting Contractual Terminology

For print citation information and the currency of the title, please click here.

IX.9

See Canadian Abridgment: CON.VII.5.a Contracts — Construction and interpretation — Words and phrases — General principles

§611 Although words should generally be given their normal grammatical meanings, [1] the intent of the contract may require transposition of words. [2] Similarly, the word "and" may have to be read as if it were "or", and vice versa. [3] The word "or" is normally disjunctive. [4] In regard to the timing of an obligation related to the occurrence of two events, it means whichever of them occurs last, unless the contrary is expressly stated. [5] Normally, the word "may" connotes a permissive rather than a mandatory meaning. [6]

§612 A dictionary is an appropriate and usual reference for determining the meaning of words found in a contract. [7] Contractual headings may be taken as providing an interpretive key to succeeding language [8]; regard may also be had to marginal notations. [9]

§613 Generally, the construction of a written contract is a matter for the court unless it contains technical or other trade language, in which case construction falls to the jury. [10] But a "legal term of art" or "legal jargon" should be given its accepted meaning as taken from extrinsic aids such as textbooks. [11] 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. [12] Where a contract is partly in writing and partly in oral form, the question of its proper construction is one for the jury. [13]

§614 The Interpretation Act does not apply to the interpretation of contracts. [14]

§615 Contractual terminology is generally to be interpreted in the light in which the parties would have understood it at the time the contract was made. [15]

§616 Where the written words of a contract are at variance with the figures used therein, the former will prevail in the absence of any indication to the contrary. [16]

Footnotes

1 *Bell v. McKindsey* (1865), 1865 CarswellOnt 3 (U.C. C.A.); *Kissock v. Jarvis* (1859), 1859 CarswellOnt 129 (U.C. C.P.).

2 *Bell v. McKindsey* (1865), 1865 CarswellOnt 3 (U.C. C.A.); **see also** *Ritchie v. Webster* (1917), 1917 CarswellBC 51 (B.C. C.A.).

3 *H.H. Vivian & Co. v. Clergue* (1909), 1909 CarswellOnt 781 (S.C.C.); *Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2005), 2005 CarswellAlta 152 (Alta. C.A.); leave to appeal refused (2005), 2005 CarswellAlta 1695 (S.C.C.) (existence of "economic and profitable market" in oil lease treated conjunctively); *Lamont Health Care Centre v. Delnor Construction Ltd.* (2003), 2003 CarswellAlta 1750 (Alta. Q.B.) (clause requiring contractor to take all reasonable precautions necessary to protect work and owner's property from damage during performance of contract, and to make good any damage to same caused by contractor or any of its

subcontractors, creating two unrelated obligations); *420573 Alberta Ltd. v. 396401 Alberta Ltd.* (1999), 1999 CarswellAlta 878 (Alta. Q.B.) (restrictive covenant relating to operation of real estate and insurance office; parties intending that both plaintiff's real estate business and insurance business to be protected); *Shaka Construction Ltd. v. Polygon Pacific Homes Ltd.* (1994), 1994 CarswellBC 314 (B.C. C.A.) (vendor entitled to "wait to pay and discharge existing financial charges" until receipt of purchase price; "and" read disjunctively); *British Columbia Ferry Corp. v. Commonwealth Insurance Co.* (1987), 1987 CarswellBC 638 (B.C. C.A.) (conjunctive use of "and" in policy exclusion respecting flooding); *Gillanders v. Gillanders* (2006), 2006 CarswellBC 2398 (B.C. S.C. [In Chambers]) (conjunctive "and" in agreement meaning mother only liable to pay child support if child resided with father, and was dependent on father while attending school); *R. v. North American Van Lines (Alberta) Ltd.* (1986), 1986 CarswellOnt 2 (Ont. C.A.) (overall thrust of wording of trucking license conjunctive; "and" conjunctive in ordinary usage, and read disjunctively only where such intention clear); *Masich v. Saskatchewan Crop Insurance Corp.* (2004), 2004 CarswellSask 867 (Sask. Q.B.) (material representation in insurance application that applicant's production "stored and sold separate from all other producers"; "and" conjunctive).

4 *Jardine v. General Hydrogen Corp.* (2007), 2007 CarswellBC 148 (B.C. S.C.) (phrase "warrants or common shares" read disjunctively, and not producing commercial absurdity); *Higgins v. Orion Insurance Co.* (1985), 1985 CarswellOnt 767 (Ont. C.A.) (in construing "and/or" in insurance policy, court giving effect to both conjunctive "and" and disjunctive "or"; joint and several interests of named persons in partnership property covered).

5 *Ivany v. Lancaster Investment Inc.* (1994), 1994 CarswellNfld 95 (Nfld. T.D.).

6 *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 1957 CarswellAlta 56 (Alta. T.D.); affirmed (1958), 1958 CarswellAlta 31 (Alta. C.A.); *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc./Camions Volvo Canada Inc.* (1998), 1998 CarswellOnt 2999 (Ont. Gen. Div.) (notice provision permissive); **but see** *Alie v. Bertrand & Frère Construction Co.* (2002), 2002 CarswellOnt 4255 (Ont. C.A.); leave to appeal refused (2003), 2003 CarswellOnt 5829 (S.C.C.) ("may" having mandatory meaning if context where used mandating that meaning; reading "may" as permissive in respect of certain undertakings by insurer relating to duty to defend resulting in commercial absurdity).

7 *Mills v. Continental Bag & Paper Co.* (1918), 45 D.L.R. 389 (Ont. C.A.).

8 *Toronto (City) v. Toronto Railway* (1906), 1906 CarswellOnt 746 (S.C.C.); varied (1907), 1907 CarswellOnt 802 (Ontario P.C.); *University of British Columbia v. Assn. of Administrative & Professional Staff* (2005), 2005 CarswellBC 2152 (B.C. S.C.); affirmed on other grounds (2006), 2006 CarswellBC 2676 (B.C. C.A.) (while contractual subject headings not determinative of interpretation, valid to bear them in mind in ascertaining meaning of provisions under which they appear).

9 *Bank of Nova Scotia v. MacPherson's Estate* (1985), 1985 CarswellPEI 81 (P.E.I. C.A.); application for reconsideration quashed (1985), 1985 CarswellPEI 17 (P.E.I. C.A.).

10 *Nordheimer v. Robinson* (1878), 2 O.A.R. 305 (Ont. C.A.).

11 *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.), per L'Heureux-Dubé J. (dissenting in result); *Toronto Transit Commission v. A.T.U., Local 113* (1997), 1997 CarswellOnt 6171 (Ont. Arb. Bd.).

12 *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.), per L'Heureux-Dubé J. (dissenting in result); *Inland Revenue Commissionsers v. Williams* (1969), [1969] 1 W.L.R. 1197; **see also** *Jorian Properties Ltd. v. Zellernath* (1984), 1984 CarswellOnt 100 (Ont. C.A.) (whether contractual term is condition or warranty not depending on label used by parties; at most, use of legal term of art such as "condition" or "warranty" creating rebuttable presumption that contractual term to be interpreted in that sense).

13 *MacPherson v. Fredericton Boom Co.* (1869), 1869 CarswellNB 9 (N.B. C.A.).

14 *North American Leaseholds Ltd. v. Waller* (1992), 1992 CarswellAlta 217 (Alta. Prov. Ct.) (Interpretation Act provision regarding time limit expiring on holiday); *Smith v. Liberty Mutual Insurance Co.* (2000), 2000 CarswellNB 308 (N.B. C.A.); **but see** *Monachino v. Liberty Mutual Fire Insurance Co.* (2000), 2000 CarswellOnt 833 (Ont. C.A.) (in deciding whether to apply restrictive or liberal interpretation to automobile accident benefits schedule, court noting anomaly of taking broader, non-literal approach to interpretation of private contract of insurance than to interpretation of remedial legislation aimed at providing fair benefits to injured persons; Interpretation Act, R.S.O. 1990, c. I.11, s. 10).

15 *Calgary (City) v. Canadian Western Natural Gas Co.* (1915), 1915 CarswellAlta 367 (Alta. C.A.); affirmed (1917), 1917 CarswellAlta 216 (S.C.C.).

16 *Coote v. Borland* (1904), 1904 CarswellBC 22 (S.C.C.); **see also** *Foster v. Anderson* (1908), 16 O.L.R. 565 (Ont. C.A.); affirmed (1909), 1909 CarswellOnt 783 (S.C.C.).

End of Document

TAB 32

BLACK'S LAW DICTIONARY

NINTH EDITION

BRYAN A. GARNER
EDITOR IN CHIEF

Black's Law Dictionary

Ninth Edition

EDITOR IN CHIEF

Bryan A. Garner

President, LawProse, Inc.

Distinguished Research Professor of Law

Southern Methodist University

Dallas, Texas

ASSOCIATE EDITOR

Tiger Jackson

LawProse, Inc.

Dallas, Texas

ASSOCIATE EDITOR

Jeff Newman

LawProse, Inc.

Dallas, Texas

CONTRIBUTING EDITORS

Karolyne H. Cheng

Dallas, Texas

Herbert J. Hammond

Dallas, Texas

Brian Melendez

Minneapolis, Minnesota

Ann Taylor Schwing

Minneapolis, Minnesota

Fred Shapiro

New Haven, Connecticut

Joseph F. Spaniol Jr.

Bethesda, Maryland

PRONUNCIATION EDITOR

Charles Harrington Elster

San Diego, California

PANEL OF PRACTITIONER CONTRIBUTORS

Page vi

PANEL OF ACADEMIC CONTRIBUTORS

Page ix

distinguished from something arising by law <conventional subrogation>. **3.** Arising by treaty or convention <conventional international law>.

conventional custom. See CUSTOM.

conventional interest. See INTEREST (3).

conventionalism. (1837) A jurisprudential conception of legal practice and tradition holding that law is a matter of respecting and enforcing legal and social rules.

> "Conventionalism makes two postinterpretive, directive claims. The first is positive: that judges must respect the established legal conventions of their community except in rare circumstances. It insists, in other words, that they must treat as law what convention stipulates as law. Since convention in Britain establishes that acts of Parliament are law, a British judge must enforce even acts of Parliament he considers unfair or unwise. This positive part of conventionalism most plainly corresponds to the popular slogan that judges should follow the law and not make new law in its place. The second claim, which is at least equally important, is negative. It declares that there is no law — no right flowing from past political decisions — apart from the law drawn from those decisions by techniques that are themselves matters of convention, and therefore that on some issues there is no law either way." Ronald Dworkin, *Law's Empire* 116 (1986).

conventional law. (17c) A rule or system of rules agreed on by persons for the regulation of their conduct toward one another; law constituted by agreement as having the force of special law between the parties, by either supplementing or replacing the general law of the land. • The most important example is conventional international law, but there are many lesser examples such as rules and regulations of a country club or professional association, or the rules of golf, basketball, or any other game. — Also termed (in international law) *treaty-made law*; *treaty-created law*; *treaty law*. See CONVENTION (1).

conventional lien. See LIEN.

conventional loan. See *conventional mortgage* under MORTGAGE.

conventional mortgage. See MORTGAGE.

conventional obligation. See OBLIGATION.

conventional remission. See REMISSION.

conventional sequestration. See SEQUESTRATION.

conventional servitude. See SERVITUDE (2).

conventional subrogation. See SUBROGATION.

Convention application. See PATENT APPLICATION.

conventione (kən-ven-shee-**oh**-nee). [Latin] *Hist.* A writ for the breach of a written covenant. • This writ was often used when parties wished to convey land by fine. — Also termed *writ of covenant*. See FINE (1).

Convention for the European Patent for the Common Market. See COMMUNITY PATENT CONVENTION.

Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. See ROME CONVENTION ON RELATED RIGHTS.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. See GENEVA PHONOGRAMS CONVENTION.

Convention on the Grant of European Patent. See EUROPEAN PATENT CONVENTION.

Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite. See BRUSSELS SATELLITE CONVENTION.

conventus (kən-**ven**-təs), *n.* [Latin] **1.** An assembly. • *Conventus magnatum vel procerum* ("the assembly of the nobles") was an ancient name for Parliament. **2.** CONVENTUS JURIDICUS. Pl. ***conventus.***

conventus juridicus (kən-**ven**-təs juu-**rid**-i-kəs). [Latin "judicial assembly"] *Roman law.* A court session held by a provincial governor in the leading cities of the province. — Sometimes shortened to *conventus*.

converse-Erie doctrine. See REVERSE-ERIE DOCTRINE.

conversion, *n.* (14c) **1.** The act of changing from one form to another; the process of being exchanged.

equitable conversion. A change in the nature of property so that real property is treated as personal property, or vice versa, in certain circumstances. • Equitable conversion is based on the maxim that equity regards as done that which ought to be done. The most common situation involves transferring real property as the parties to a contract intended before the seller experienced a change in circumstances, such as marriage or death, that could affect the property's ownership. When a contract is made, the buyer acquires equitable title to the property, and the seller retains legal title. But the seller's interest is treated as one in personal property rather than in real property because the seller's true interest is in the proceeds (usu. personal property such as cash); the legal title is security for the buyer's payment. Courts usu. apply the doctrine of equitable conversion to recognize the transfer of equitable title, including the right of possession, to the buyer when the contract was signed. The buyer then acquires legal title by performing under the contract. [Cases: Conversion ⚷1.]

forced conversion. The conversion of a convertible security, after a call for redemption, when the value of the security that it may be converted to is greater than the amount that will be received if the holder permits the security to be redeemed.

2. *Tort & criminal law.* The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property. [Cases: Trover and Conversion ⚷1.] — **convert,** *vb.* — **conversionary,** *adj.*

> "There are three distinct methods by which one man may deprive another of his property, and so be guilty of a conversion and liable in an action for trover — (1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it. The term conversion was originally limited to the third of these cases. To convert goods meant to dispose of them, or make away with them, to deal with

them, in such a way that neither owner nor wrongdoer had any further possession of them: for example, by consuming them, or by destroying them, or by selling them, or otherwise delivering them to some third person. Merely to take another's goods, however wrongfully, was not to convert them. Merely to detain them in defiance of the owner's title was not to convert them. The fact that conversion in its modern sense includes instances of all three modes in which a man may be wrongfully deprived of his goods, and not of one mode only, is the outcome of a process of historical development whereby, by means of legal fictions and other devices, the action of trover was enabled to extend its limits and appropriate the territories that rightly belonged to other and earlier forms of action." R.F.V. Heuston, *Salmond on the Law of Torts* 94 (17th ed. 1977).

"By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property. It does not include mere acts of damage, or even an asportation which does not amount to a denial of the owner's right of property; but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them." William Geldart, *Introduction to English Law* 143 (D.C.M. Yardley ed., 9th ed. 1984).

constructive conversion. Conversion consisting of an action that in law amounts to the appropriation of property. • Constructive conversion could be, for example, an appropriation that was initially lawful. [Cases: Trover and Conversion ⚿6.]

conversion by detention. Conversion by detaining property in a way that is adverse to the owner or other lawful possessor. • The mere possession of property without title is not conversion. The defendant must have shown an intention to keep it in defiance of the owner or lawful possessor. [Cases: Trover and Conversion ⚿6.]

conversion by estoppel. A judicial determination that a conversion has taken place — though in truth one has not — because a defendant is estopped from offering a defense. • This occurs, for example, under the traditional rule that a bailee is estopped from denying the bailor's title even if the bailor has no title to the chattel.

conversion by taking. Conversion by taking a chattel out of the possession of another with the intention of exercising a permanent or temporary dominion over it, despite the owner's entitlement to use it at all times. [Cases: Trover and Conversion ⚿11.]

conversion by wrongful delivery. Conversion by depriving an owner of goods by delivering them to someone else so as to change the possession. [Cases: Carriers ⚿93.]

conversion by wrongful destruction. Conversion by willfully consuming or otherwise destroying a chattel belonging to another person. [Cases: Trover and Conversion ⚿12.]

conversion by wrongful disposition. Conversion by depriving an owner of goods by giving some other person a lawful title to them. [Cases: Trover and Conversion ⚿10.]

direct conversion. The act of appropriating the property of another to one's own benefit, or to the benefit of a third person. • A direct conversion is per se unlawful, and the traditional requirements of demand and refusal of the property do not apply. [Cases: Trover and Conversion ⚿3–5.]

fraudulent conversion. Conversion that is committed by the use of fraud, either in obtaining the property or in withholding it. [Cases: Trover and Conversion ⚿3, 7.]

innocent conversion. See *technical conversion.*

involuntary conversion. The loss or destruction of property through theft, casualty, or condemnation.

negligent conversion. See *technical conversion.*

technical conversion. The taking of another's personal property by one who acts in good faith and mistakenly believes that he or she is lawfully entitled to the property. — Also termed *innocent conversion*; *negligent conversion.*

conversionary act. See ACT.

conversion divorce. See DIVORCE.

conversion premium. *Securities.* The surplus at which a security sells above its conversion price.

conversion price. *Securities.* The contractually specified price per share at which a convertible security can be converted into shares of common stock.

conversion ratio. 1. The number of common shares into which a convertible security may be converted. **2.** The ratio of the face amount of the convertible security to the conversion price.

conversion rule. See SPECIFIC-PURPOSE RULE.

conversion security. See SECURITY.

conversion statute. A law under which a state official or court oversees the sale or transfer of control of an organization in order to protect public assets.

conversion value. A convertible security's value as common stock. • For example, a bond that can be converted into ten shares of stock worth $40 each has a conversion value of $400. See BOND CONVERSION.

converter, *n.* One who wrongfully possesses or disposes of another's property; esp., one who engages in a series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property. [Cases: Trover and Conversion ⚿1–12.]

innocent converter. A person who takes another's chattel tortiously but in good faith and without knowledge that he or she has no entitlement to it.

convertible arbitrage. See *kind arbitrage* under ARBITRAGE.

convertible bond. See BOND (3).

convertible collision insurance. See INSURANCE.

convertible debenture. See DEBENTURE.

universitas personarum (yoo-ni-**vər**-sə-tas pər-sə-**nay**-rəm). [Latin] *Roman & civil law.* A group of people that are legally considered an entity, such as a college or corporation. Pl. ***universitates personarum.***

universitas rerum (yoo-ni-**vər**-sə-tas **reer**-əm). [Latin] *Roman & civil law.* A whole collection of things; a variety of individual things that are together regarded by the law as a whole. See JUS RERUM.

> "In the time of Justinian the *universitas rerum*, or *universitas iuris* (both expressions are used) is a somewhat abstract conception: it means the sum or whole of a man's legal position so far as it concerns the *ius rerum*. The conception is important in law only on the occasions, of which death is by far the most important, on which the *universitas* passes from one to another. . . . The expression *universitas rerum* is also used in another sense, to denote any collection of objects considered as a whole." W.W. Buckland, *A Manual of Roman Private Law* 172 (2d ed. 1953).

universus (yoo-ni-**vər**-səs). [Latin] The whole; all together.

unjudicial, *adj.* (16c) Not becoming of or appropriate to a judge. [Cases: Judges ⚷11.]

unjust, *adj.* (14c) Contrary to justice; not just.

unjust enrichment. (1897) **1.** The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. [Cases: Implied and Constructive Contracts ⚷3.] **2.** A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. **3.** The area of law dealing with unjustifiable benefits of this kind.

unlaw, *n.* **1.** A violation of law; an illegality. **2.** Lawlessness.

> "But lawlessness is often a superficial phenomenon and whenever the duke was strong enough to keep the peace then law revived. We hear the same of England: times of 'unlaw' alternate with times of law." 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 68–69 (2d ed. 1898).

3. *Scots law.* An illegal act. **4.** *Scots law.* A fine; a penalty.

unlawful, *adj.* (14c) **1.** Not authorized by law; illegal <in some cities, jaywalking is unlawful>. **2.** Criminally punishable <unlawful entry>. **3.** Involving moral turpitude <the preacher spoke to the congregation about the unlawful activities of gambling and drinking>. — **unlawfully,** *adv.*

unlawful act. (16c) Conduct that is not authorized by law; a violation of a civil or criminal law.

unlawful arrest. See ARREST.

unlawful assembly. See ASSEMBLY.

unlawful condition. See CONDITION (2).

unlawful detainer. See DETAINER.

unlawful-detainer proceeding. (1879) An action to return a wrongfully held tenancy (as one held by a tenant after the lease has expired) to its owner. See *unlawful detainer* under DETAINER. [Cases: Landlord and Tenant ⚷287.1.]

unlawful entry. See ENTRY (1).

unlawful force. See FORCE.

unlawful interest. See USURY.

unlawful interference with contractual relations. See TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS.

unlawful picketing. See PICKETING.

unlawful sexual conduct with a minor. See IMPAIRING THE MORALS OF A MINOR.

unlawful sexual intercourse. See RAPE.

"unless" lease. See LEASE.

unlimited, *adj.* Without restriction or limitation.

unliquidated, *adj.* (18c) Not previously specified or determined <unliquidated damages>.

unliquidated claim. See CLAIM (3).

unliquidated damages. See DAMAGES.

unliquidated debt. See DEBT.

unlisted security. See SECURITY.

unlisted stock. See *unlisted security* under SECURITY.

unlivery. *Maritime law.* The unloading of cargo at its intended destination.

unmarketable title. See TITLE (2).

unmarried, *adj.* Not married; single.

unmerchantable title. See *unmarketable title* under TITLE (2).

unnatural offense. See SODOMY.

unnatural will. See WILL.

unnavigable, *adj.* See INNAVIGABLE.

unnecessary, *adj.* Not required under the circumstances; not necessary.

unnecessary hardship. See HARDSHIP (4).

uno actu (yoo-noh **ak**-t[y]oo). [Latin] In a single act; by one and the same act.

unoccupied, *adj.* **1.** (Of a building) not occupied; vacant. **2.** (Of a person) not busy; esp., unemployed.

unofficious payment. See PAYMENT.

unofficious will. See *inofficious testament* under TESTAMENT.

uno flatu (yoo-noh **flay**-t[y]oo). [Latin] In one breath.

unpaid dividend. See DIVIDEND.

unpatentable over art. *Patents.* (Of an invention) ineligible for patent protection because of obviousness or the lack of novelty. [Cases: Patents ⚷16(2).]

unperfected security interest. See SECURITY INTEREST.

unprecedented (ən-pres-ə-den-tid), *adj.* Never before known; without any earlier example.

unpremeditation. The lack of premeditation; the absence of planning.

unprofessional conduct. See CONDUCT.

unpublished opinion. See OPINION (1).

TAB 33

CANADIAN INSURANCE CONTRACTS LAW

In a Nutshell

Craig Brown

CARSWELL

CANADIAN INSURANCE CONTRACTS LAW IN A NUTSHELL

Craig Brown

This convenient reference provides a "road map" to resolving insurance law problems - a framework for navigating the statutes, regulations, and caselaw which govern this complex area. The author clearly explains how insurance contracts are affected by legislation and the underlying principles of utmost good faith, fortuity, indemnity, consumer protection and compensation.

Contents include:

- The Nature of Insurance Law
- How Legal Issues Arise in Insurance
- Where to Find Insurance Law
- Making (and Ending) An Insurance Contract
- Disclosure During Negotiations
- The Need To Have an Interest in the Subject Matter
- The Role of Agents and Other Intermediaries
- The Form and Content of Insurance Contracts
- Interpreting Insurance Policies
- Making Claims
- Excusing Defects in Claims and Other Defaults
- Settling Claims and Resolving Disputes
- Insurers' Rights on Paying Claims
- Claims Against More Than One Insurer
- Rights of People not Party to the Insurance Contract

Professor Brown is a respected authority in the insurance law field, having written many books and articles published in Canada and the U.S. He is the author of *No-Fault Automobile Insurance in Canada* and the co-author (with Professor Julio Menezes) of *Insurance Law in Canada, 2nd Edition*, also by Carswell.

ISBN 0-459-56023-9

9 780459 560232

for loss that did not occur. The insurer could not reasonably have intended that.

3. The Plain Meaning of Words

When a court professes to use the "literal" or plain meaning approach to construing words in a policy it is usually applying the "intention" approach by another name. It is really saying nothing more than that the words used are so clear that the parties must surely have meant to achieve the meaning they so clearly capture. But it is clear that the literal approach is subordinate to the intention of the parties' approach. Words in policies should not be given their literal meaning if it flies in the face of the parties' intention as gleaned from the document as a whole.[6]

One context in which literal interpretations give way to meanings thought better to reflect the intent, at least of the consumer, is in the approach taken to words and phrases which can be used as terms of art. Here, the general rule is that the ordinary meaning, rather than the technical one is to be preferred.[7]

4. Presuming Intention

Where the notion of an intention in respect of particular words used, on the part of the customer at least, is no more than a fiction, courts seek to impose a "sensible" or "commercially realistic" interpretation on the assumption that this is what the parties would have intended if they had turned their minds to it when entering into the contract.

Another way of putting it is that the courts favour an interpretation which gives effect to a viable commercial arrangement over one that nullifies it. While this is true of contracts generally, in insurance it has several specific applications. It means that there is no cover for loss which is not fortuitous, in the sense that it is intentionally caused by the insured or inherent in the nature of the subject matter of the insurance, even where the literal meaning of the policy appears to cover that loss. On the other hand, it means that courts tend to avoid forfeiture of cover if possible. More specifically, coverage provisions are interpreted broadly while exclusions are interpreted narrowly.

6 See *Consolidated Bathurst*, above, note 2.

7 See *e.g.*, *Model Jewellery Manufacturing Co. v. Western Assurance Co.* (1963), 42 D.L.R. (2d) 318 (S.C.C.); *Dominion Bridge Co. v. Toronto General Ins. Co.*, [1963] S.C.R. 362.

5. Ambiguities

When a court is unable to determine a common intention as to the meaning of a particular word or phrase by applying the rules of construction discussed so far, in other words when the policy is ambiguous, the impasse is resolved by resort to some notion of fairness. It has been stated in the Supreme Court of Canada that this second step is to be taken only after the first step has proved futile.[8] But it is worth repeating that we are discussing here a singularly imprecise process. It will be apparent from preceding paragraphs that the inquiry about intention seems itself frequently to dissolve into a search for a fair result, a search not necessarily encumbered by a real belief that a genuine common intent exists.

Be that as it may, it is standard practice for courts to distinguish between words or phrases whose meaning, after due inquiry, can be pronounced to be "clear" and those which are irreducibly ambiguous.

An ambiguity can arise in at least two ways. A word or phrase might reasonably bear two meanings in the sense that it is fairly arguable both that a given set of facts does and does not fit into it. Another form of ambiguity exists where two or more provisions in the same contract, each clear in itself, are irreconcilable. The terms may be in different parts of the policy or, one may be in the policy and the other in the cover note.

When an ambiguity is identified it is, by and large, resolved in favour of the insured. This is done on one of two theories: *contra proferentem* or reasonable expectation. These two notions need to be examined separately.

(a) *Contra Proferentem*

This is the short form of the Latin maxim *verba cartarum fortius accipiuntur contra proferentem*, which means the words of a contract are to be construed more strongly against the person offering them. For the most part insurance contracts are evidenced by policies which are documents drafted almost exclusively by insurers. At least where individuals are concerned, most of the terms are offered on a take it or leave it basis. The relative sophistication and bargaining power of the parties is markedly unequal. The opportunity for modifying or adding to the text by way of clarification lies almost entirely with insurers. It is therefore considered appropriate that an ambiguity occurring among such terms be resolved against the insurer.[9] The rule applies even where the text has to be submitted to the Superintendent of Insurance for approval.[10] But it does not apply to

8 *Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.R. 936.

9 *McClelland & Stewart Ltd. v. Mutual Life Assurance Co.*, [1981] I.L.R. 1-1393 (S.C.C.).

10 *Wigle v. Allstate Ins. Co. of Can.* (1985), 10 C.C.L.I. 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 14 D.L.R. (4th) 404n (S.C.C.).

terms in a contract which are mandated, word for word, by legislation or regulation, because the insurer is not responsible for the drafting.[11]

6. Reasonable Expectation

Over the past 10 years another approach has made its appearance in Canada. Disputes about the meaning of terms in insurance contracts are now occasionally resolved by courts determining and applying the "reasonable expectation" of the parties. This development may have created some anxiety among insurers because some courts in the United States, the birthplace of the idea, have looked only at the customer's expectations and have even imposed contractual obligations on insurers in complete disregard even of clear exclusionary language in the policy.[12] But these fears have not, so far, been borne out. Canadian courts, most notably the Supreme Court of Canada, have been circumspect in their use of the doctrine and have reiterated the following guidelines for the interpretation of insurance policies.[13]

1. The true intent of the parties is to be gleaned from the whole contract.
2. Where two or more meanings are possible, the court is to select that which most reasonably promotes the intent of the parties.
3. Coverage provisions are to be construed broadly and exclusions narrowly.
4. Ambiguities are to be construed against the insurer.
5. The court should avoid an interpretation which will either give a windfall to the insurer or an unanticipated recovery to the insured. In other words, the court should give effect to the reasonable expectations of both parties.

7. Causation

Even if words in a policy are not ambiguous there may still be questions about whether they cover a particular loss. For there to be coverage, the loss has to have been caused by one of the perils specified and the question of causation can sometimes be problematic. If, for example, a truck is damaged when a branch of a tree, having been split by a bolt of lightning, falls on it, has the truck been damaged "by" lightning? It is

11 *Martin v. M.P.I.C.*, [1988] I.L.R. 1-2388 (Man. C.A.); *Squire v. I.C.B.C.* (1990), 44 B.C.L.R. (2d) 65 (C.A.).

12 See the review of U.S. law by Cory J. in his dissenting judgment in *Brissette v. Westbury Life Ins. Co.* (1992), 13 C.C.L.I. (2d) 1 (S.C.C.).

13 See *Brissette, ibid.*; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Ins. Co.* (1993), 13 C.C.L.I. (2d) 161 (S.C.C.).