2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of 92834 Newfoundland and Labrador Inc., ("**92834**" or the "**Company**"); and

**AND IN THE MATTER OF** the Companies Creditors Arrangement Act R.S.C., 1985 c. C-36 as Amended (the "**CCAA**")

# MEMORANDUM OF FACT AND LAW OF APPLICANT

## SUMMARY OF CURRENT DOCUMENT

| | |
|---|---|
| Court File Number(s): | 2022 01G 0709 |
| Date of Filing of Document: | March 1, 2024 |
| Name of Party Filing or Person: | Grant Thornton Limited, in its capacity as Court-Appointed Monitor (the "**Applicant**") of the Company |
| Application to which Document being filed relates: | Notice of Motion filed by the Applicant to approve a payment into Court and to establish the appropriate process by which appeals from claim determinations under the Claims Identification Order will be adjudicated |
| Statement of Purpose in filing: | Memorandum in support of the Application |
| Court Sub-File Number, if any | N/A |

**FACTS:**

1. On the 25th day of January, 2024, this Court issued an order (the "**Distribution Order**") providing for the following: (i) 8th amendment to the ARIO extending the stay of proceedings until the 30th day of June, 2024, (ii) a distribution of funds by the Monitor to the priority claimants in an amount of $272,892.76 and to Bridging in an amount of $500,878.46, and (iii) that upon distribution of funds by the Monitor, the stay of proceedings be lifted to allow the Monitor to make an assignment in to bankruptcy of 92384.

2. Pursuant to the Distribution Order, claimants were given until the 15th day of February 2024 to appeal any claim determinations or the Monitor's proposed distribution of the funds.

3. The Monitor has received 6 notices of disputed claims, with a total claims value of $1,813,643.01.

4. At this time, the Monitor proposes to pay into court the amount of $1,230,700.00, being the amount of the disputed claim of the Town of St. Lawrence. The Monitor will deal with the remaining disputed claims as outlined in paragraph 17 of the Affidavit of Liam Murphy dated March 1, 2024.

5. In the Claims Identification Order, this Honourable Court ordered that the Monitor's determinations are subject to further determination by this Honourable Court in the event that the Monitor and the applicable claimant are unable to resolve any dispute with respect to a particular claim. The Monitor is requesting that this court adjudicate the appeals of the Town of St. Lawrence, Inaminka Marine Services Limited, and Richard Spellacy (collectively, the "Appeals"). The Monitor will work to resolve the remaining appeals before seeking the assistance of this Honourable Court.

6. The Monitor submits that appeals of the Monitor's determinations are properly categorized as "true appeals" and that the standard of review is the standard that is applicable to appellate courts during typical civil appeals.

7. The Monitor is of the view that any claimants who appeal the Monitor's determinations are fundamentally having a priorities dispute with Bridging, as the senior secured creditor. The Monitor has discussed the adjudication of these appeals with Bridging, and has come to the following agreement:

    (a) The Monitor will file any materials, as applicable, for the following claimants that have appealed:

        (i) Inaminka Marine Services Limited ("IMSL"); and

        (ii) Richard A. Spellacy ("Mr. Spellacy").

    (b) Bridging will file any materials, as applicable, for all other claimants that have appealed. The Monitor will execute any formal documentation required to allow Bridging to respond to those appeals.

8. The exception for IMSL and Mr. Spellacy is due to the Monitor's extensive knowledge garnered as a result of multiple Federal Court applications undertaken by IMSL and Mr. Spellacy. The Monitor is of the view that it can most efficiently see the adjudication of the IMSL and Mr. Spellacy claims to completion.

9. The Monitor is requesting that, pursuant to the Claims Identification Order and the Distribution Order:

    (a) This Honourable Court confirm that it will adjudicate the Appeals; and

    (b) This Honourable Court set forth the particulars related to the appeal process.

**<u>ISSUES</u>:**

10. The issues before this Honourable Court are as follows:

    (a) Whether this Honourable Court should accept payment from the Monitor in the amount of $1,230,700.00, being the amount of the disputed claim of the Town of St. Lawrence, to be held by this Honourable Court until final determination of the appeal;

(b) Whether this Honourable Court should adjudicate the Appeals, and if this Honourable Court adjudicates the Appeals, what is the proper process for the Appeals; and

(c) Whether the Monitor can be held liable for the costs of the Appeals.

**LAW AND ARGUMENT:**

**Payment into Court of the claim of the Town of St. Lawrence.**

11. The fifth paragraph of the Distribution Order states as follows:

> THIS COURT ORDERS that should any claimant appeal the Monitor's proposed distribution of funds by February 15, 2024, the Monitor shall remit the funds subject to the appeal to the Court and reduce the distribution to Bridging accordingly.

12. In accordance with the Distribution Order, the Monitor is now seeking to pay the amount of $1,230,700.00, being the amount of the disputed claim of the Town of St. Lawrence, into this Honourable Court until final determination of the appeal.

**Adjudication of the Appeals.**

13. Pursuant to the Claims Identification Order and the Distribution Order, the Appeals should be adjudicated by this Honourable Court.

14. In the Claims Identification Order, this Honourable Court ordered that the Monitor's determinations are subject to further determination by this Honourbale Court in the event that the Monitor and the applicable claimant are unable to resolve any dispute with respect to a particular claim.

15. This Honourable Court then ordered in the Distribution Order that should any claimant appeal the Monitor's proposed distribution of funds by February 15, 2024, the Monitor shall remit the funds subject to the appeal to this Honourable Court and reduce the distribution to Bridging accordingly.

16. A series of cases from different jurisdictions across the country have supported the conclusion that appeals contemplated in the Claims Identification Order and the Distribution Order should be adjudicated by the Court overseeing the CCAA proceedings. The decisions also support the conclusion that the Appeals are properly categorized as "true appeals", and that the applicable standard of review is the standard applicable to appellate courts during typical civil appeals.

17. The Ontario Superior Court of Justice in *General Motors Corporation v Tiercon Industries Inc*, 2009 CanLII 72341 (ONSC), stated the following, which judgment was confirmed on appeal:

> [11] The Claims Procedure Order provides that a party may appeal a final determination of the Claims Officer.
>
> [12] The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:
>
> > (a) With respect to pure questions of law, the standard of review is correctness.
> >
> > (b) With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.
> >
> > (c) With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an **"extricable"** legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.
> >
> > (d) With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.
> >
> > (e) With respect to the appeal of the cost award, a high degree of deference is accorded to discretionary decisions with respect to an award of costs assessed following a hearing and the decision should be respected unless the decision maker failed to consider relevant factors, reached an unreasonable conclusion, made an error in principle or if the costs award is plainly wrong.

> [...]
>
> [69] The role of the court on this appeal is to review the decision of the Claims Officer. <u>It is not to conduct a trial de novo</u>. In my view, there was ample evidence to support the findings of the Claims Officer and he was correct in his application of the law. [Emphasis added.]
>
> **Reference:** *General Motors Corporation v Tiercon Industries Inc,* 2009 CanLII 72341 (ONSC)*,* at paragraphs 11, 12 and 69, confirmed at 2010 ONCA 666 [TAB 1].

18. Following *General Motors Corporation v Tiercon Industries Inc*, the Cour supérieure du Québec stated the following in *AbitibiBowater Inc (Re)*, 2011 QCCS 4284:

> [103] To consider this appeal as a de novo hearing would defeat such purpose and render rather useless the recourse to a claims officer process. This is even truer when one considers the credentials of the Claims Officers designated by the Court in the Abitibi CCAA claims process, including the one designated in the current Claim.
>
> [104] That said, contrary to another assertion put forward by Woodridge in argument, to make the Claims Officer's Determination subject only to an appeal process is perfectly acceptable. In such a situation, the final say remains with the Court, and not with the Claims Officer. It is only the criteria for intervention that vary.
>
> **Reference**: *AbitibiBowater Inc (Re)*, 2011 QCCS 4284 at paragraphs 103-105 [TAB 2]

19. The British Columbia Court of Appeal stated the following in *8640025 Canada Inc (Re)*, 2018 BCCA 93:

> [65] In my view, these considerations all support the conclusion that the appeal contemplated by the September order was correctly regarded as a "true appeal" (at least in the absence of any determination that a de novo hearing was required to avoid

a miscarriage of justice); and that the standard of review, on extricable questions of law, was correctness. To the extent that questions of law — for example the question of whether the assets of a company that is not in CCAA proceedings may be sold by reason of the fact that its parent company is in CCAA proceedings — can be 'extricated', the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, most such issues (including the valuation of creditors' claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

**Reference:** *8640025 Canada Inc (Re)*, 2018 BCCA 93 at paragraph 65 [TAB 3]

20. The Cour supérieure du Québec in *AbitibiBowater Inc (Re)* provided further guidance on the evidence that is permitted to be considered during a "true appeal". In *AbitibiBowater Inc (Re)*, the Cour supérieure du Québec determined that in "true appeals", the relevant record consists solely of the determination made by the decision maker, including the summary of facts, reasons, and conclusions, as well as the affidavits and exhibits filed before the decision maker. As such, the permitted evidence during the Appeals consists solely of the Monitor's determination, the documents presented to the Monitor prior to such determination, and the materials filed with this Honourable Court. The appellants do not have the right to produce new evidence during the Appeals. The Cour supérieure du Québec in *AbitibiBowater Inc (Re)* stated as follows:

> 80 Recently, the Ontario Court of Appeal explained that rationale in the following terms:
>
> > 24 At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance, will first decide the issue of whether the matter proceeds as a true appeal or as a hearing de novo. The test that has evolved seems to be that a hearing de novo will occur if

> the court decides that to proceed otherwise would result in an injustice to the creditor: Charlestown Residential School (Re) (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.
>
> 25 I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the BIA is not intended to be a trial de novo but rather a true appeal: Galaxy Sports Inc. (Re) (2004), 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency.
>
> <u>26 This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency in the operation of the bankruptcy scheme would be lost.</u> Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the BIA, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality: Galaxy Sports at para. 41.

81 A similar analogy can also be drawn with the appeal process of a registrar decision under Section 192(4) BIA, which proceeds as a true appeal and not de novo.

82 Bearing this in mind, with respect to questions of fact, which are the sole basis for its Motion, Woodbridge is therefore

> required to establish that the Claims Officer made palpable and overriding errors.
>
> 83 As well, since this is not a de novo hearing, the oral evidence offered by Woodbridge on the Motion is inadmissible. Normally, a court does not admit such evidence in appeal. The Court cannot simply accept it as a substitute for the lack of transcripts of the September 17, 2010 hearing before the Claims Officer.
>
> 84 The relevant record in this case consists only of the Claims Officer's Determination, which includes a summary of facts, reasons and conclusions, as well as the affidavits and exhibits filed before him. No official recording was made of the hearing in front of the Claims Officer. Neither a tape recording of the proceedings, nor a transcript of the hearing is thus part of the current record.
>
> **Reference**: *AbitibiBowater Inc (Re)*, 2011 QCCS 4284 at paragraphs 80-84 [TAB 2]

21. Two receivership cases out of the Ontario Superior Court of Justice considered what "to avoid a miscarriage of justice" means in the context of appealing a court appointed officer's determination. The Ontario Superior Court of Justice in *1307347 Ontario Inc v 1243058 Ontario Inc, 2001 CarswellOnt 221* stated that "a miscarriage of justice involves more than just a finding that a different result might have occurred" and that "it involves a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the court would be countenanced".

> **Reference:** *1307347 Ontario Inc v 1243058 Ontario Inc*, 2001 CarswellOnt 221 at paragraph 9 [TAB 4]

22. The determination in *1307347 Ontario Inc* was supported in *Potentia Renewables Inc v Deltro Electric Ltd,* 2018 ONSC 6894, whereby the Ontario Superior Court of Justice found that "courts have generally considered issues such as fraud and deliberate misleading" to be situations where a miscarriage of justice may occur.

**Reference:** *Potentia Renewables Inc v Deltro Electric Ltd*, 2018 ONSC 6894 at paragraph 31 [TAB 5]

23. Considering the totality of the foregoing, the Monitor submits that the law is clear that:

(a) This Honourable Court is the proper forum for the adjudication of the Appeals;

(b) The Appeals are properly categorized as "true appeals";

(c) The Appeals should only be considered *de novo* hearings if a *de novo* hearing is required "to avoid a miscarriage of justice". For there to be a miscarriage of justice, there must be more than just a finding that a different result might have occurred, and there must be a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the court would be countenanced. The Monitor submits that there has been no miscarriage of justice in this matter and *de novo* hearings are therefore not required; and

(d) The standard of review for questions of law is correctness, and the standard of review for questions of fact or for mixed fact and law is palpable and overriding error.

24. This Honourable Court reiterated the test for the standard of correctness in *Loblaw Properties Ltd v Mount Pearl (City)*, 2016 NLTD(G) 30:

> 18 The correctness standard was explained at paragraph 50:
>
> > 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it

> will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

**Reference:** *Loblaw Properties Ltd v Mount Pearl (City)*, 2016 NLTD(G) 30 at paragraph 18 [TAB 6]

25. The Newfoundland and Labrador Court of Appeal recently addressed the test to determine whether there has been a palpable and overriding error in *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27:

> 41 In *Housen*, <u>the review standard of palpable and overriding error was explained as an error "clear to the mind to see" and one that had to have discredited the result</u>. In *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 (S.C.C.), the Supreme Court of Canada explained palpable and overriding error in further detail:
>
> > [9] ... <u>Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result.</u> "Palpable and overriding error" is a resonant and compendious expression of this well-established norm...

**Reference:** *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27 at paragraph 41 [TAB 7]

26. The Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, analyzed the differences between questions of law, questions of fact, and questions of mixed fact and law:

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

[ ... ]

33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean c. Mercier*, 2002 SCC 15 (S.C.C.), at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts.

**Reference:** *Housen v Nikolaisen*, 2002 SCC 33 at paragraphs 26 and 33 [TAB 8]

27. In consideration of the intertwining of the factual matrix underpinning the Appeals and the legal framework applicable to the factual matrix, it is Monitor's view that the Appeals are questions of mixed fact and law and should be adjudicated on a standard of palpable and overriding error. As such, the errors claimed by the appellants must be clear to the mind to see. Findings of fact and the factual inferences drawn by the Monitor should not be interfered with, unless they are clearly wrong, unsupported by the evidence, or otherwise unreasonable. Additionally, the imputed error must, moreover, be plainly identified, and it must be shown to have affected the result.

28. In the alternative, in the event that this Honourable Court determines that the Appeals should be adjudicated on a standard of correctness, this Honourable Court will undertake its own analysis of the questions set out in the Appeals. In doing so, this Honourable Court will determine whether it agrees with the determination of the Monitor. From the outset, this Honourable Court will ask whether the Monitor's decision was correct.

**Costs.**

29. The Monitor submits that it cannot be found liable for any costs related to the Appeals or damages related to the claims determination process, given the Monitor's role as an

officer of the Court and given the various protections provided to the Monitor under the CCAA and through the various Orders of this Honourable Court, including in the ARIO at paragraph 26, the Monitor's Enhanced Powers Order dated June 7, 2023, at paragraph 7, and the Claims Identification Order at paragraph 12.

30. Paragraph 26 of the ARIO sates as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

31. Paragraph 7 of the Monitor's Enhanced Powers Order states as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, the Monitor and its legal counsel shall continue to have the benefit of all of the indemnities, charges, protections and priorities as set out in the ARIO and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor in carrying out the provisions of this Order and exercising any powers granted to it hereunder. Without limiting the generality of the foregoing: (i) in exercising any powers granted to it hereunder, the Monitor shall not be deemed to have taken or maintained possession or control of the Business or Property of ResidualCo, or any part thereof; and (ii) the Monitor shall incur no liability or obligation as a result of exercising any powers granted to it hereunder, save and except for any gross negligence or wilful misconduct on its part.

32. Finally, paragraph 12 of the Claims Identification Order states as follows:

> THIS COURT ORDERS that the Monitor shall: (i) have all protections afforded to it by the CCAA, this Claims Identification Order, the Initial Order, any other Orders of this Court in the CCAA Proceedings and other applicable law in connection with its activities in respect of this Claims Identification Order, including the stay of proceedings in its favour provided pursuant to the Initial Order; and (ii) incur no liability or obligation as a result of carrying out the provisions of this Claims Identification Order, including in respect of its exercise of discretion as to the completion, execution or time of delivery of any documents to be delivered hereunder, other than in respect of gross negligence or wilful misconduct.

33. Considering the totality of the foregoing, the Monitor shall only be liable for costs related to the Appeals or damages related to the claims determination process if the Monitor acted with gross negligence or wilful misconduct in relation to the matters subject to the Appeals. The Monitor submits that there can be no order of costs against the Monitor since it did not act with gross negligence or wilful misconduct at any time during the claims determination process.

## CONCLUSION

34. The Applicant respectfully requests that this Honourable Court grant the Order attached to the within Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at the City of St. John's, in the Province of Newfoundland and Labrador, this 1st day of March, 2024.

**Geoffrey Spencer**
McInnes Cooper
Solicitors for the Applicant
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

**TO:** **Supreme Court of Newfoundland & Labrador**
**General Division (In Bankruptcy)**
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

**AND TO:** **The Service List attached as Schedule "A" to the Application**

**List of Authorities:**

1. *General Motors Corporation v Tiercon Industries Inc,* 2009 CanLII 72341 (ONSC), confirmed at 2010 ONCA 666

2. *AbitibiBowater Inc (Re)*, 2011 QCCS 4284

3. *8640025 Canada Inc (Re)*, 2018 BCCA 93

4. *1307347 Ontario Inc v 1243058 Ontario Inc*, 2001 CarswellOnt 221

5. *Potentia Renewables Inc v Deltro Electric Ltd*, 2018 ONSC 6894

6. *Loblaw Properties Ltd v Mount Pearl (City)*, 2016 NLTD(G) 30

7. *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27

8. *Housen v Nikolaisen*, 2002 SCC 33

# TAB 1

2009 CarswellOnt 8164
Ontario Superior Court of Justice [Commercial List]

General Motors Corp. v. Tiercon Industries Inc.

2009 CarswellOnt 8164, [2009] O.J. No. 5580, 183 A.C.W.S. (3d) 1110, 62 C.B.R. (5th) 90

# GENERAL MOTORS CORPORATION (Plaintiff) and TIERCON INDUSTRIES INC. (Defendant)

Morawetz J.

Judgment: December 23, 2009
Docket: 05-CL-5854

Counsel: R.B. Moldaver, Q.C. for Appellant Landlord, Galanda Properties Inc.
D.V. MacDonald for Royal Bank of Canada, as Agent for itself
S. Aggarwal, R. Moncur for General Motors Corporation
M. R. Sims for Zeifman Partners Inc., in its capacity as the court appointed Receivers and Manager of Tiercon Industries Inc.

**Headnote**
Debtors and creditors --- Receivers — Possession of receiver — General principles
Landlord filed post-filing claim of $4,390,452 for repair, maintenance, replacement and restoration of plant leased by defendant and for realty tax arrears — Receiver disallowed claim except for $7,000 — On appeal, claims officer determined that issues relating to scope of liability should be separated from issues relating to quantification of damages — In his interim ruling, claims officer found receiver was not liable for damages caused to premises by defendant, was responsible for damages caused while receiver was in occupation, but was not responsible for cost of restoring premises back nor for removing fixtures — Claims officer issued ruling disallowing landlord's claim against receiver for $34,829.76 in tax arrears — Judge upheld interim ruling and ruling — In his final ruling, claims officer found landlord suffered $53,283.72 damages for receiver's failure to fulfil occupation obligations, $112,978 damages for receiver's failure to fulfil receiver repair obligations, $513,526 damages for defendant's failure to fulfil end-of-lease restoration obligations, and found that since none of listed assets or other assets removed by receiver were tenant's fixtures, receiver did not incur receiver restoration obligations — Landlord brought motion to appeal claims officer's decision — Motion dismissed — Principles set out by claims officer with respect to whether equipment constituted fixtures or chattels were correct — Claims officer's determination that specific claims were end of term obligations of defendant with no liability to receiver should not be interfered with, absent palpable and overriding error, and his determinations were supported by record — Claims officer made no error in his findings with respect to occupation obligations — There was no error in principle in assessing damages and allocating those items as set out by claims officer on basis of his assessment of evidence — Claims officer was correct in concluding that party who was entitled to compensatory damages for repairs was not entitled to profit earned in conducting repairs itself or through entity which was alter ego of claimant — There was no error in principle in claims officer's costs award.
**Table of Authorities**
**Cases considered by *Morawetz J.*:**

*B.D.N. Mechanical Ltd. v. British Columbia* (2006), 54 B.C.L.R. (4th) 193, 2006 BCSC 78, 2006 CarswellBC 71 (B.C. S.C.) — referred to

*Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159, 108 N.S.R. (2d) 198, 294 A.P.R. 198, *(*sub nom. *Bayhold Financial Corp. v. Community Hotel Co. (Receiver of))* 86 D.L.R. (4th) 127, 1991 CarswellNS 33 (N.S. C.A.) — referred to

*Consultoka Services Inc. v. Peat Marwick Ltd.* (2000), 2000 CarswellOnt 2631 (Ont. S.C.J.) — referred to

*Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409, *(*sub nom. *Eastern Power Ltd. v. Azienda Communale Energia & Ambiente)* 125 O.A.C. 54, 50 B.L.R. (2d) 33, 1999 CarswellOnt 2807, 39 C.P.C. (4th) 160 (Ont. C.A.) — referred to

*Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (2000), 139 O.A.C. 397 (note), 259 N.R. 198 (note), [2000] 1 S.C.R. xi, 186 D.L.R. (4th) vii (note), 2000 CarswellOnt 2212, 2000 CarswellOnt 2213 (S.C.C.) — referred to

*Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — referred to

*Housen v. Nikolaisen* (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

*Kostopoulos v. Jesshope* (1985), 48 C.P.C. 209, 50 O.R. (2d) 54, 6 O.A.C. 326, 1985 CarswellOnt 463 (Ont. C.A.) — referred to

*Moore's Taxi (1961) Ltd. v. Shore* (1968), 73 W.W.R. 558, 1968 CarswellMan 75 (Man. Co. Ct.) — referred to

*Padfield v. Martin* (2003), 227 D.L.R. (4th) 670, 172 O.A.C. 256, 64 O.R. (3d) 577, 34 C.P.C. (5th) 59, 2003 CarswellOnt 1891 (Ont. C.A.) — referred to

*Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, 1 O.W.R. 511, 1902 CarswellOnt 399 (Ont. Div. Ct.) — referred to

*Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004), 2004 CarswellOnt 2065, 71 O.R. (3d) 263, 187 O.A.C. 78 (Ont. C.A.) — considered

*Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (2002), 2002 CarswellOnt 1624 (Ont. S.C.J.) — referred to

**Statutes considered:**

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

s. 14.06(1.2) [en. 1997, c. 12, s. 15] — referred to

***Morawetz J.*:**

**Background**

1 The landlord, Galanda Properties Inc. ("Galanda" or the "Landlord") brought this motion to appeal the decision of David E. Baird, Q.C., Claims Officer (the "Claims Officer") dated February 25, 2009 including his decision with respect to costs (the "Final Ruling").

2 Galanda seeks an order that the decision of the Claims Officer be reversed and that in its place judgment issue awarding Galanda the amounts claimed including its costs.

3 The Claims Officer was appointed pursuant to the Order of Cameron J. of July 11, 2006 (the "Claims Procedure Order"), to determine the amounts, if any, owing by Zeifman Partners Inc. (the "Receiver") to Post-Filing Claimants (as defined in the Claims Procedure Order).

4 Galanda filed a Post-Filing Claim in the amount of $4,390,452 for repair, maintenance, replacement and restoration of the plant leased by Tiercon Industries Inc. ("Tiercon") located at 950 Service Road in Stoney Creek, Ontario (the "Premises") and for realty tax arrears (the "Landlord's Claim"). The Receiver disallowed the claim except for the sum of $7,000 and the landlord appealed. The Claims Officer heard the appeal. The Claims Officer determined that the issues relating to the scope of liability should be separated from the issues relating to quantification of damages.

5 In an Interim Ruling dated March 7, 2009 dealing with the issues relating to the scope of liability, the Claims Officer held:

> (a) The Receiver was not liable for damages caused to the premises by Tiercon as a result of the failure of Tiercon to repair, or lack of maintenance by Tiercon, or as a result of modifications to the Premises by Tiercon.

(b) The Receiver was responsible for any damages that it or its agents caused during the period the Receiver occupied the Premises as a result of its obligation to repair and maintain the Premises during the period that they were occupied by the Receiver or its agents.

(c) The Receiver was not responsible for the cost of restoring the Premises back to and consistent with the requirements of the Plant Lease as a result of modifications to the Premises made by Tiercon, including the cost of removing such modifications.

(d) The Receiver was not required to remove any of the equipment included in certain assets listed in the Endorsement of Lederman J. dated October 31, 2005, which are described in Schedule "A" to his ruling (the "Listed Assets"). However, if the Receiver elected to remove any of the Listed Assets which constituted fixtures, the Receiver was responsible for repairing any damage occasioned to the Premises by the installation or removal of the fixtures and to restore the demised Premises to the state that existed prior to such installation, reasonable wear and tear, excepted.

6 On March 9, 2007, the Claims Officer issued his ruling disallowing the Landlord's Claim against the Receiver for arrears of taxes in the amount of $34,829.76 plus interest.

7 Both the Interim Ruling and the Ruling of March 9, 2007 were upheld on appeal by Siegel J.

8 The Claims Officer stated that the remaining portion of the Landlord's Claim in the amount of $4,330,653 related to damages arising from the alleged failure of the Receiver to maintain and repair the Premises during the period that the Receiver occupied the Premises and to repair and restore the Premises after the Receiver removed equipment owned by Tiercon and vacated the Premises.

9 At paragraph 8 of the Final Ruling, the Claims Officer stated that the final stage of adjudication of the Landlord's Claim had been completed and the following issues had been considered:

(a) Did the Receiver, or its agents, fulfill its obligation to maintain and repair the Premises during the period that the Receiver occupied the Premises (the "Occupation Obligation") and, if not, what was the measure of any damages suffered by the Landlord?

(b) Did the Receiver fulfill its obligation to repair any damage caused to the Premises by the removal of equipment which constituted chattels (a "Receiver Repair Obligation"), and if not, what was the measure of any damages suffered by the Landlord?

(c) If any of the equipment removed by the Receiver was a fixture, did the Receiver fulfill its obligation to repair any damage occasioned to the Premises by the installation or removal of the fixture and to restore the Premises to the state that existed prior to such installation, reasonable wear and tear accepted (a "Receiver Restoration Obligation"), and if not, what the measure of damages suffered by the Landlord?

(d) What portion of the Landlord's Claim constituted a claim against Tiercon as a result of its failure to honour its end-of-lease restoration obligations under the plant lease (an "End-of-Lease Restoration Obligation")?

(e) What amount, if any, should be payable by the Receiver to the Landlord for project management and engineering fees?

(f) What amount, if any, should be payable by the Receiver to the Landlord for rental income, taxes, maintenance, insurance and utility costs, such as water, electricity and heating?

(g) Costs of these proceedings.

(h) The award of pre-ruling and/or post-ruling interest.

10 In his Final Ruling, the Claims Officer concluded:

(a) The Landlord suffered damages in the amount of $53,283.72 as a result of the failure of the Receiver to fulfill Occupation Obligations.

(b) The Landlord suffered damages in the amount of $112,978 as a result of the failure of the Receiver to fulfill the Receiver Repair Obligations.

(c) Since none of the listed assets or any other assets of Tiercon removed by the Receiver were "tenant's fixtures" (as legally defined), the Receiver did not incur a Receiver Restoration Obligation.

(d) The Landlord suffered damages in the amount of $513,526 as a result of the failure of Tiercon to fulfill the End-of-Lease Restoration Obligations.

(e) The Landlord is entitled to a 6% project management fee in the amount of $9,975.70 in addition to the damage claims set out in sub-paragraphs (a) and (b) above.

(f) The Landlord's Claim for four months of rental income, taxes, maintenance, insurance, utility, electric and heating costs for the period after April 1, 2006 was dismissed on the basis that insufficient evidence was introduced to support the basis for the Receiver's obligation to pay the claim for that period and the quantum of the claim.

(g) Each party was responsible for its own legal costs of the proceedings.

(h) The costs of the Receiver were to be paid as part of the expenses of the receivership.

(i) The responsibility for the costs of the Claims Officer were to be borne equally between the Receiver and the Landlord.

**The Standard of Review**

11 The Claims Procedure Order provides that a party may appeal a final determination of the Claims Officer.

12 The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:

(a) With respect to pure questions of law, the standard of review is correctness.

(b) With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.

(c) With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.

(d) With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.

(e) With respect to the appeal of the cost award, a high degree of deference is accorded to discretionary decisions with respect to an award of costs assessed following a hearing and the decision should be respected unless the decision maker failed to consider relevant factors, reached an unreasonable conclusion, made an error in principle or if the costs award is plainly wrong. [1]

**The Issues**

13 The issues raised in the factum delivered by the Landlord in respect of the Final Ruling (as recognized by counsel to the Receiver) are as follows:

(a) Issue 1 - Whether the Claims Officer erred in not finding that all assets were fixtures.

(b) Issue 2 - Whether the Claims Officer erred in not finding that all of the Listed Assets were fixtures.

(c) Issue 3 - Whether the Claims Officer erred in not finding that the equipment at the Plant constituted fixtures, removal of which engaged repair and restoration obligations set out paragraph 5 of the Plant Lease.

(d) Issue 4 - Whether the Claims Officer erred in dismissing the claims referenced in Schedule "D" of the Final Ruling as claims for which the Receiver had no liability as end of term obligations of the tenant.

(e) Issue 5 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations on the basis of 15% to the Receiver and 85% Tiercon.

(f) Issue 6 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations (allocated between the Receiver and Tiercon) and the Receiver's Repair Obligations.

(g) Issue 7 - Whether the Claims Officer erred in denying the claim for profit in assessing damages with respect the Receiver repair and maintenance claims.

(h) Issue 8 - Whether the Claims Officer erred in determining that each party should bear its own costs and requiring the Receiver and the Landlord to each pay one-half of the Claims Officer's costs.

**Determination of Whether Equipment Constituted Fixtures or Chattels**

14 On this appeal counsel to the Landlord raised fundamental arguments relating to the status of the fixture issue.

15 Mr. Moldaver submits that the question as to whether the Listed Assets/Genres were fixtures had already been determined prior to the hearing which resulted in the Final Ruling.

16 Mr. Moldaver submits that the Claims Officer erred in that he failed to confirm or find that the "Listed Assets" or "Genres", identified in the Endorsement of Lederman J. of October 31, 2005 were in themselves fixtures, as recorded in the reasons of Siegel J. dated September 29, 2007.

17 At paragraph 8 of his factum, Mr. Moldaver stated that, "The Genres/Listed Assets received their designations, as such, because it was asserted at the time of the Maynard's auction agreement with the Receiver that they were not just fixtures, but actually more; namely, part of the Premises - building materials, as it were. Eventually when the Receiver backed off the right to remove or sell *genre* 1, the electrical, the debate resolved itself to the issues heard by Mr. Baird, but there was never any doubt going in that the Listed Assets were fixtures and it was just a question, in respect of them, as to how much."

18 At paragraph 10, Mr. Moldaver stated that "the parties had agreed that the Genres/Listed Assets were fixtures and this is recorded and confirmed in the reasons of Siegel J. This means that the silos, the 20 Ton crane, the Compressors and the Chillers were agreed to be fixtures. It was an error to consider or decide otherwise".

19 I have reviewed the Order of Greer J. dated April 15, 2005, the Order of Lederman J. dated October 31, 2005, the Endorsement of Hoy J. dated November 15, 2005, the Order of Hoy J. dated November 15, 2005, the Order of Hoy J. dated November 22, 2005, the Endorsement of Mesbur J. dated May 18, 2006, the Order of Mesbur J. dated May 18, 2006 and the Endorsement of Siegel J. dated September 11, 2007.

20 The issue of whether certain assets were Listed Assets or were true fixtures was identified early in the proceedings, but, in my view, prior to the Final Ruling, the issue had not been determined.

21 Early identification of the issue is referenced in the Endorsement of Hoy J. dated November 15, 2005. At paragraph 1, Hoy J. stated:

> The Landlord opposed the inclusion of the five "genres" of assets described at paragraph 12 of the Receiver's 7th Report (Bulk storage silos; Cranes; chillers and cooling towers; compressed air system; transformers) in the auction sale by Maynard's because it says they are not "tenant fixtures" or "trade fixtures"; rather, it says, they are true fixtures.

22 At paragraph 3, Hoy J. stated:

> It became apparent that the real issue, and the Landlord's real concern, is the extent of the Receiver's obligation to repair damage occasioned to the Premises by the removal of the fixtures, and whether the Receiver is obligated to restore the demised Premises to the state that existed prior to the installation of the trade fixtures (paragraph 5 of the Lease) or to remove all of the trade fixtures, if it removes any, as the tenant is required to do upon termination of the lease.
>
> The parties were in agreement that the extent of the Receiver's repair obligations in connection with the removal of the assets in issue (including the issue of whether all trade fixtures must be removed) should be left for another day.

23 The Endorsement of Siegel J. dated September 11, 2007 was in respect of the appeals from interim rulings of the Claims Officer.

24 The Receiver appealed the Interim Ruling with respect to the repair and restoration obligations of the Receiver. Starting at paragraph [4] Siegel J. stated:

> The issue before the claims officer was the standard of the repair and restoration obligations of the Receiver in respect of that part of the plant of Tiercon affected by the removal of certain assets (the "Listed Assets") contemplated by an order and endorsements dated November 17, 2005 and November 22, 2005 of Hoy J. (collectively, the "Order") authorizing the sale of the Listed Assets. The relevant facts are set out in the Ruling. The claims officer held that the applicable standard of repair and restoration was set out in paragraph 5 of the lease dated July 27, 2000 between Galanda Properties Inc. ("Galanda") and Tiercon (the "Lease").
>
> The issue arises because the Order did not specify a standard of repair to be met by the Receiver notwithstanding that the parties were aware that the Listed Assets were tenant fixtures and that their removal would entail non-negligible repair costs. Instead, the Order provides that the parties agreed to defer determination of the scope of the Receiver's repair obligations to a further hearing.
>
> The decision of the claims officer is based on the conclusion that the power of the Receiver to remove and sell the Listed Assets is located in paragraph 5 of the lease. The claims officer reasoned that, by electing to exercise this right under the Lease, the Receiver was also bound by the obligations of Tiercon under the same provision. This principle is most clearly set out in paragraphs 47 and 48 of his Ruling.
>
> In paragraph 42 of the Ruling, the claims officer goes on to draw an important distinction. <u>He states that the Order permitted the removal and sale of the Listed Assets but that the adjudication of whether the Receiver had the legal right to do so was not addressed in the Order and therefore fell to be determined by the claims officer.</u> He determined that the Receiver had the legal right to remove and sell the Listed Assets pursuant to, and subject to, the provisions of paragraph 5 of the Lease rather than pursuant to the Order, which only approved the exercise of this right.
>
> [Emphasis added]
>
> Siegel J. agreed with this conclusion.

25 In the Interim Ruling, the Claims Officer also determined that, for Listed Assets, which were removed by the Receiver from the Premises and which were fixtures, the Receiver was responsible for repairing any damage occasioned to the Premises

by the installation or removal of the fixtures and to restore the Premises to the state that existed prior to such installation, reasonable wear and tear excepted. This ruling was appealed and the appeal was dismissed.

26 In the Interim Ruling, the Claims Officer explicitly stated at paragraph 43; "Since there was no dispute as to the scope of liability of the Receiver if the Listed Assets constituted chattels, I am assuming for the purposes of this ruling that all the Listed Assets constituted tenant's fixtures. He went on to determine that an issue for the final phase of the hearing was "whether any of the Listed Assets are fixtures" (see Interim Ruling, paragraphs 43 and 55)." This determination was not reversed on the appeal heard by Siegel J.

27 As a consequence, one of the issues for the final stage of the adjudication before the Claims Officer was whether any of the equipment removed was a fixture or a chattel. Furthermore, the Claims Officer directed that the parties set out their position on the issue of whether the Listed Assets were fixtures or chattels as part of his December 7, 2007 procedural order.

28 The issue was squarely addressed by Ms. Sims in her responding factum at paragraph 15 which reads as follows:

> Contrary to what is alleged in Galanda's Factum at paragraphs 2(a), 8 and 10, by implication elsewhere in Galanda's Factum what is inaccurately inferred from out of context passages quoted at paragraph 23 of Galanda's factum, there was no agreement or prior determination that the Listed Assets were fixtures. Galanda raises this position for the first time in its factum filed on this appeal. That Galanda has the temerity to raise this contention in appeal is all the more disturbing given that Galanda made submissions (written and oral) with respect to the issue of whether Listed Assets constituted fixtures or chattels before the Claims Officer. For example, at page 2, paragraph 7 of Galanda's costs submissions dated January 16, 2009, Galanda submitted that "[o]n one of the major legal issues that of fixtures or not, the law has been easy to state and hard to apply for decades and a detailed examination of the evidence is necessary no matter the quantum".

29 I am in agreement with this submission. In my view, the decisions of Lederman J., Hoy J. and Siegel J., as well as the Interim Ruling of the Claims Officer, do not reflect a determination that the Genres/Listed Assets were in themselves fixtures, nor do I see where this is recorded and confirmed by Siegel J. The determination of this issue was made by the Claims Officer on the Final Ruling.

30 It follows that any submissions made by counsel to the Landlord that are based on the assumption that a prior finding had been made that the Listed Assets were in themselves fixtures, are misguided. In my view, it is not necessary to consider the arguments of counsel to the Landlord in these points.

31 At the hearing that gave rise to the Final Ruling, the Claims Officer had available to him the affidavits and reports filed as evidence-in-chief, he heard *viva voce* evidence from the witnesses who were cross-examined at the hearing on January 28, 2008 to February 1, 2008 and from June 23, 2008 to June 27, 2008, he had the transcripts of the cross-examinations of witnesses, and he received both written and oral arguments from the parties.

32 The Final Ruling is 30 pages in length and is supported by four detailed schedules.

**The Issues**

33 At paragraph [13] above, I set out the issues raised by the Landlord, as recognized by counsel to the Landlord.

**Issue 1 - Whether the Claims Officer erred in not finding that all assets were fixtures**

34 This issue is thoroughly canvassed in the Final Ruling.

35 The Claims Officer set out the principles which he applied in making a determination of whether equipment constituted a fixture or a chattel. The principles considered are set out at paragraphs 52 to 54 of the Final Ruling. Specific reference is made to *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335 (Ont. Div. Ct.) at page 338 and *B.D.N. Mechanical Ltd. v. British Columbia*, 2006 BCSC 78 (B.C. S.C.).

36 In my view, the principles set out by the Claims Officer with respect to whether equipment constitutes fixtures or chattels are correct.

37 I am in full agreement with the submission of counsel to the Receiver at paragraph 27 of her factum where Ms. Sims states: "Having correctly set out the principles for consideration of whether equipment constituted a fixture or a chattel, the Claims Officer's determinations with respect to whether equipment located at the Plant constituted a fixture is effectively a decision of fact. It should only be interfered with if it is shown that the Claims Officer made a palpable and overriding error."

38 In my view, the Claims Officer's findings are supported by the record. I see no palpable and overriding error in the Claims Officer's assessment of the evidence. It follows that, the appeal with respect to the Claims Officer's determinations regarding whether equipment constituted fixtures or chattels is dismissed.

**Issue 2 - Whether the Claims Officer Erred in not Finding that all of the Listed Assets Were Fixtures**

39 The Listed Assets are set out on Schedule "A" to the Final Ruling. The Listed Assets can be grouped as:

(i) the Nine Bulk Storage Silos;

(ii) the Cooling equipment;

(iii) one Quincy "50" Air Compressor;

(iv) one Munk 20 Ton Bridge Crane

40 The Claims Officer addresses the issue of Listed Assets at paragraphs 55 - 67 of the Final Ruling. These findings have been summarized on Schedule D to the factum submitted by the Receiver which sets out the applicable references to the Claims Officer's reasons and to the evidence with respect to the Listed Assets.

41 In my view, the Claims Officer's findings that each of the Listed Assets constituted chattels are supported by the record and should not be interfered with. I am of the view that the Claims Officers made no extricable legal error and no palpable and overriding error in his determination that the Listed Assets were not fixtures.

**Issue 3 - Whether the Claims Officer erred in not finding that equipment at the Plant constituted a fixture or fixtures, removal of which engaged repair and restoration obligations set out in paragraph 5 of the Plant Lease**

42 This issue has been addressed at paragraphs 32 - 35 of the factum submitted by counsel to the Receiver.

43 Galanda argues that equipment located at the Plant constituted one large fixture and that all of the equipment (other than Listed Assets) constituted fixtures.

44 The Claims Officer determined that the equipment (other than the Listed Assets) removed by the Receiver were not fixtures.

45 I am in agreement with the submissions set out at 32 - 34 as well as the conclusion that there was no palpable and overriding error, or error at all, in the assessment of the evidence. In my view, the Claims Officer's findings that the assets removed constituted chattels should not be interfered with.

**Issue 4 - Whether the Claims Officer erred in dismissing the caims referenced in Schedule D of the Final Ruling as claims for which the Receiver had no liability as end of term obligations of the tenant**

46 This issue is addressed in Part VI of the Final Ruling at paragraph 68.

47 In reviewing this issue, I can do no better than to restate the comments of the Claims Officer:

> 68. The fourth group of heads of claim are those claims which I have found to be the responsibility of Tiercon and for which the Receiver has no responsibility since they are End of Lease Restoration Obligations. They are set out in Schedule "D" of this ruling. Generally, they are claims arising from the failure of Tiercon to honour its obligations set out in paragraph 4(j) of the Plant Lease which provides that upon termination of the Plant Lease, Tiercon had the obligation to remove from the premises all of its trade fixtures, including equipment and personal property and all improvements made by it to the demised premises, save and except for non-manufacturing improvements, such as the construction of the office, lunch room and washrooms. That paragraph also provided that Tiercon had the obligation to:
>
>> (a) restore and repair any damage caused to the building or the demised premises by the acts or omissions of the Lessee, its employees, agents, customers or others for which the Lessee was responsible at law;
>>
>> (b) to repair any damage caused by the removal of any of its trade fixtures, equipment, personal property and improvements other than Approval Lessee Improvements and to restore the portion of the building affected by such removal in accordance with the provisions of the Lease.

48 In this respect, it is necessary to consider the role of the Receiver. The Receiver does not assume the debtor's obligations but, instead, is in place for a limited period of time as an officer of the court to take possession of and secure assets and to assist with the exercise of stakeholders' rights, including asset liquidation. The Receiver pays rent only for its actual occupation and use of the property. The Receiver does not pay rent (including tax or other obligations of the tenant) for the period before it occupies the premises or after it ceases occupying the premises. Payment of such claims are subject to the relative priorities of all of the creditors of the debtor's estate. Further, if a Receiver damages premises while in occupation it may be liable for such damages. However, it is not responsible for damage done by the debtor prior to it occupying or for obligations which arise after it occupies. See *Consultoka Services Inc. v. Peat Marwick Ltd.*, [2000] O.J. No. 2736 (Ont. S.C.J.) at paras 38 - 44 and 50; *Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488 (N.S. C.A.) and s. 14.06 (1.2) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3.

49 The Claims Officer concluded that there was no evidence that the Receiver caused damage to the Plant with respect to the end of term claims. The claim of the Landlord for "end of term" obligations is against Tiercon as tenant. "End of term" claims are not properly claimed against the Receiver.

50 In my view, the determination by the Claims Officer that specific claims were end of term Obligations of Tiercon with no liability to the Receiver, should not be interfered with, absent a palpable and overriding error. His determinations were supported by the record. A summary with respect to the "end of term" claims referenced by the Landlord in its factum is set out in Schedule "E" to the factum submitted by counsel to the Receiver.

**Issue 5 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations on the basis of 15% to the receiver and 85% to Tiercon**

51 With respect to the allocation of responsibility of certain occupation obligations, the Claims Officer set out his findings at paragraphs 44 - 48 of the Final Ruling.

52 Counsel to the Landlord takes exception to these conclusions, submitting that the Claims Officer erred when he apportioned the obligations between the Receiver and Tiercon on a 15%/85% basis instead of all or substantially all as against the Receiver in respect the of duty to repair and maintain while in occupation. Counsel to the Landlord submits that the Claims Officer should have charged all damages to the Receiver on the Record before him and having regard to the guidelines set forth in *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004 CarswellOnt 2065 (Ont. C.A.)], 2004 CanLII 9852.

53 Counsel to the Landlord further submits that as to maintenance and repair standards to which the Receiver was bound while in occupation, the Lease provides, in respect of repair obligations, for such an obligation in paragraphs 4(f)(i), 4(f)(ii), 4(g) - (j), 4(o), 4(r), 5 and 10(b) and in respect of maintenance in paragraphs 4(k), 4(m), 4(s)(i) and (ii). Counsel submits that generally the Receiver had to maintain what it found and repair damage occurring on its watch and if there was a state of

disrepair, which it inherited, it could not let any situation get worse. The maintenance and repair intent, counsel submits, is captured in 4(f)(i). These obligations, he submits, are obligations at law were to be effected by the Receiver while in occupation/possession and that the Receiver failed to do so prior to giving up possession, which meant that it escaped not only the costs of repair and restoration, including supervision, but also the rent payable during such work, including Additional Rent such as taxes, insurance and utilities.

54 Counsel to the Landlord further submitted that the Claims Officer simply guessed or assumed the apportionment rate based on relative time of occupancy and use; and arguably, even if, like the Trial Judge in *Stellarbridge*, *supra*, his "objective in fixing the rate of the discount for "betterment" was clearly to arrive at what [s]he regarded as a fair assessment of Stellarbridge's damages", he erred. Counsel further submits that the evidence shows that the lack of repair and maintenance condition of the Premises at the end of the Receiver's occupation was attributable to the default of the Receiver; and, to apply the words of the Court of Appeal for Ontario in *Stellarbridge*, *supra*, the Receiver "bore the burden...of establishing *both* their entitlement to a "betterment" discount under the Lease *and* the rate of the discount that they claimed".

55 The portion of the Landlord's factum that deals with this issue commences at paragraph 157.

56 The Claims Officer determined in the Interim Ruling that the Receiver was not responsible for damages caused to the Premises by Tiercon as a result of the failure of Tiercon to repair, lack of maintenance by Tiercon or as a result of modifications to the Premises by Tiercon. The Claims Officer assessed damages against the Receiver with respect to the Receiver's occupation period. I am satisfied that in arriving at the allocation of 15% liability to the Receiver for the occupation obligation, the Claims Officer made an assessment of the evidence before him with respect to the claim and made the determination that this allocation of liability was appropriate in the circumstances.

57 The general burden to prove its damages as against the Receiver rests with the Landlord as the claimant. If the burden is not satisfied, then the issues related to betterment do not arise.

58 Counsel to the Receiver makes submissions at paragraph 49 of her factum to distinguish *Stellarbridge*, *supra*. Counsel submits that in *Stellarbridge*, *supra*, the Court of Appeal was assessing damages as against the tenant (and not as against a receiver), and the Court of Appeal found that there was uncontroverted evidence that the building was a brand new building at the beginning of the lease (which was the beginning of the tenant's occupation) and that it was the tenant who was asserting that it should receive a credit for "betterment" of the building to reduce damages assessed for its end-of-term obligations. As a result, counsel submits that the Court of Appeal found that the onus was on the tenant to prove betterment since:

> (a) the subject-matter of the allocation of betterment and reasonable wear and tear lay within the particular knowledge of the tenant and the tenant had had possession of the leased premises throughout the term, and
>
> (b) the tenant was claiming an exception to the general rule in seeking betterment discount which was consequent on the tenant's "knowing and admitted failure to honour repair and restoration obligation under the lease".

*Stellarbridge*, *supra*, at paragraphs 60, 66 and 68.

59 In contrast to the facts in *Stellarbridge*, in this case, counsel to the Receiver submitted that it was noteworthy that: (a) the Receiver is a Court appointed officer and not the tenant; (b) damages are being assessed with respect to the Receiver's occupation and not the end of a tenant's tenancy; (c) the Plant was not in a new and pristine state at commencement of the Receiver's occupation under the Appointment Order; (d) the Interim Ruling determined that the Receiver was not liable for any outstanding pre-appointment obligations of Tiercon (e.g. wear or tear or damage pre-receivership); (e) the Receiver is not bound by the end of term obligations Tiercon; and (f) unlike the tenant in *Stellarbridge*, the Receiver was not in possession of the Plant for the entire term of the Plant Lease and is not in the position of a tenant with particular knowledge of the Premises for the entire term of a lease.

60 I am in agreement with the submissions of counsel to the Receiver on this issue. I am satisfied that the Claims Officer made no error in his finding with respect to the Occupation Obligations. There was no error in principle in assessing damages and allocating these items as set out by the Claims Officer on the basis of his assessment of the evidence.

**Issue 6 - Whether the Claims Officer erred in assessing damages with respect to the Occupation Obligations (allocated between the receiver and Tiercon) and the Receiver's Repair Obligations**

61 The Claims Officer found that the standard of repair and maintenance applicable to the Receiver is to repair and maintain the building to the standard of a well-maintained heavy industrial building. The Claims Officer set out his determination with respect to assessment of damages in Part VII of the Final Ruling commencing at paragraph 69 and in Schedules "B", "C" and "D" with respect to particular items.

62 The Claims Officer determined that if there are two ways of performing a contract then the measure of damages for breach of the contract is the cost of the minimum performance. See *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303, 235 D.L.R. (4th) 193 (S.C.C.), at 198 -199.

63 Counsel to the Landlord submits that the Claims Officer slavishly chose the low bid in assessing damages.

64 Counsel to the Receiver addressed this issue commencing at paragraph 52 of her factum. I agree with the submissions set out by counsel to the Receiver on this issue. I am satisfied that the Claims Officer's finding with respect to Occupation Obligations (allocated between the Receiver and Tiercon) as set out in Schedule "B" of the Final Ruling and with respect to the Receiver's Repair Obligations as set out in Schedule "C" of the Final Ruling are correct. In my view, there was no error in principle in assessing damages and allocating these issues as set out by the Claims Officer on the basis of his assessment of the evidence.

**Issue 7 - Whether the Claims Officer erred in denying the claim for profit in assessing damages with respect to the Receiver repair and maintenance claims**

65 The ARG quote information and spreadsheets related to particular claims include a mark-up by ARG for profit and a mark-up on any work performed by trades for ARG.

66 The Claims Officer found that ARG Group Inc. was the alter ego of Galanda and as a result the Claims Officer denied the profit portion of the claim on the basis that an injured party is entitled to compensation for damages and not entitled to profits.

67 In my view, the Claims Officer was correct in concluding that a party who was entitled to compensatory damages for repairs is not entitled to profit earned in conducting the repairs itself or through an entity which is the alter ego of the claimant. See *Moore's Taxi (1961) Ltd. v. Shore* (1968), 73 W.W.R. 558 (Man. Co. Ct.) and S.M. Waddams, *The Law of Damages*, Looseleaf Edition. (Toronto: Canada Law Book, 2007) at para. 1.2339.

**Issue 8 - Whether the Claims Officer erred in determining that each party should bear its own costs and requiring the Receiver and Galanda to each pay one-half of the Claims Officer's costs**

68 The determination of a costs award is discretionary in nature. I am satisfied that the Claims Officer's decision in respect of costs was made after he considered relevant factors and I see no error in principle in his determination of the costs award.

**Disposition**

69 The role of the court on this appeal is to review the decision of the Claims Officer. It is not to conduct a trial *de novo*. In my view, there was ample evidence to support to support the findings of the Claims Officer and he was correct in his application of the law.

70 The appeal of Galanda of the Final Ruling is dismissed with costs. If the parties are unable to agree on quantum, brief written submissions (maximum 3 pages each) may be filed within 30 days.

*Motion dismissed.*

Footnotes

1 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at paras. 8, 10, 26 - 37; *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, 2002 CarswellOnt 1624 (Ont. S.C.J.); *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), leave to appeal to the S.C.C. refused 186 D.L.R. (4th) vii (note); *Padfield v. Martin* (2003), 64 O.R. (3d) 577 (Ont. C.A.); *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 (Ont. C.A.); *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.)

# TAB 2

2011 QCCS 4284
Cour supérieure du Québec

AbitibiBowater inc., Re

2011 CarswellQue 8946, 2011 QCCS 4284, 206 A.C.W.S. (3d) 10, EYB 2011-194732

# In the matter of the plan of compromise or arrangement of : . . . AbitibiBowater inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings inc. and The other Petitioners listed on Schedules "A", "B" and "C", Debtors, and Ernst & Young Inc., Monitor, v. The Woodbridge Company Limited, Woodbridge International Holdings, s.a. and Woodbridge International Holdings Limited, Petitioners

Gascon J.C.S

Heard: 2 may 2011 - 3 may 2011
Judgment: 23 august 2011
Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: *Me Stephen W. Hamilton et Me Patrick Dessaliers*, for Abitibi
Crawford G. Smith, Me Patrice Benoit, for Woodridge
John Finnigan, Helen M. Williams, Me Ronald Auclair, for the Monitor

***Gascon J.C.S*:**

**JUDGMENT ON MOTION IN APPEAL OF A CLAIMS OFFICER'S DETERMINATION (#876)**

**INTRODUCTION**

1 The Woodbridge Company Limited, Woodbridge International Holdings S.A. and Woodbridge International Holdings Limited (collectively, « *Woodridge* ») present a Motion [1] to vary the determination [2] of a Claims Officer [3] (the "*Determination*").

2 The Claims Officer's Determination concerned the value of Woodbridge's claim (the "*Claim*") arising from the repudiation of a call agreement [4] (the « *Call Agreement* ») between Woodbridge and Abitibi-Consolidated Sales Corporation ("*ACSC*"), a former subsidiary of Abitibi-Consolidated Inc. (« *Abitibi* »).

3 The Claims Officer's Determination was made pursuant to a Claims Procedure Order [5] (the « *CPO* ») issued by the Court in the context of Abitibi's *CCAA* [6] restructuring [7]. Woodridge filed the Claim against Abitibi on the basis of its guarantee of ACSC's obligations under the Call Agreement.

4 The Call Agreement repudiated by ACSC established the terms, arrangements and mechanisms between the latter and Woodridge with regard to the sale and buy-back of their respective interest in a partnership (the « *Augusta Partnership* »). Until recently, ACSC had a 52.5% interest in this partnership, with Woodbridge holding the balance of 47.5%. The partnership's principal asset was a 416,000 metric ton capacity mill (the "*Augusta Mill*").

5 While the Claims Officer's Determination valued it at US$24 million, Woodbridge contends that, when properly assessed, its Claim rather has a value of US$110 million.

6 It submits that the Claims Officer improperly disregarded the independent opinion of its financial experts [8]. It adds that, unknown to the Claims Officer, at the time of the hearing in front of him, Abitibi and Woodridge had entered into negotiations regarding the purchase of Woodridge's interest in the Augusta Partnership. Throughout these negotiations, the parties allegedly valued this interest at an amount equal or greater than the Claims Officer ascribed to the entire partnership.

7 According to Woodridge, to rule upon the Motion, the Court owes no deference to the Claims Officer's Determination. It pleads that the Court should reassess the evidence taking into consideration this new development and thus make its own determination of the correct value of the Claim.

8 Abitibi replies [9] that Woodbridge has failed to establish any error in law or any palpable and overriding error in fact in the Claims Officer's Determination.

9 It argues that, at this stage, the role of the Court is not to conduct a trial *de novo*. On questions of fact such as the ones raised by Woodridge, the appropriate standard of review rather commands that the Claims Officer's findings not be reversed unless one can point to a palpable and overriding error. In Abitibi's view, this is not the case here.

10 Abitibi adds that the new evidence submitted by Woodbridge on the sale of Woodridge's 47.5% interest in the Augusta Partnership subsequent to the Claims Officer's Determination is inadmissible, and, in any event, of no convincing probative weight.

11 The Monitor agrees with Abitibi and suggests that the Determination should not be varied.

**THE QUESTIONS AT ISSUE**

12 Three questions are at issue in this matter:

> 1. What is the standard of review of the Claims Officer's Determination? Should the Court proceed on the basis of a true appeal or *de novo*? What are the applicable criteria for the Court's intervention?
>
> 2. Is the evidence submitted by Woodbridge on the sale of its interest in the Augusta Partnership subsequent to the Claims Officer's Determination admissible? If so, what is the relevance or probative weight of this evidence?
>
> 3. Should the Court review the Claims Officer's Determination and, if so, on what grounds?

13 For the reasons that follow, the Court concludes that Woodridge's Motion should be dismissed.

14 The standard of review applicable to the Motion is that of a true appeal. Therefore, the Court should only intervene in case of an error of law or a palpable and overriding error in fact. Woodridge has not established any such errors. In addition, the additional evidence it sought to adduce is inadmissible. In any event, the Court considers that it would not have influenced the Claims Officer's findings in this matter.

15 Before expanding upon these reasons, a summary of the Augusta Partnership, the Call Agreement, the Claim's process, the Claims Officer's Determination, and the subsequent sale of Woodridge's Augusta Partnership's interest is necessary.

**BACKGROUND**

***a) The Augusta Partnership***

16 The Augusta Partnership between ACSC and Woodridge originated in 2001 when Woodbridge acquired the partnership interest previously held by Thomson Newsprint Inc ( »*Thomson* ») [10].

17 Woodbridge acquired Thomson's interest to facilitate the latter's desire to dispose of it (having sold virtually all of its newspaper operations in Canada and the United States), and Abitibi's long stated goal of acquiring full ownership of the Augusta Mill. The Augusta Mill was one of Abitibi's most cost effective mills in North America, strategically located to access the Southeastern U.S. marketplace.

18 At the time, Abitibi, Woodbridge and Thomson thus reached a deal by which:

a. Thomson sold its 50% interest in the Augusta Partnership to Woodbridge with Abitibi's consent;

b. the Call Agreement among Woodbridge, ACSC and Abitibi was executed; and

c. the partnership agreement was amended to reflect the new Augusta Partnership with Woodbridge rather than Thomson.

19 In 2004, at Abitibi's request, and to ensure that it could account for the Augusta Partnership on a consolidated basis, Woodbridge agreed to sell a 2.5% interest in the partnership to ACSC [11] . The consideration provided to Woodbridge for the sale of this 2.5% interest amounted to US$10.5 million. It was calculated based on the purchase price formula provided by the Call Agreement, with no minority discount.

20 At the same time, the partnership agreement was amended to provide that distributions to the partners would require the unanimous agreement of the partners' committee. At the May 2009 partners' committee meeting, it was decided that there would be no distributions until further notice. The last distribution by the partnership occurred in February 2009, namely, prior to Abitibi's filing for *CCAA* protection.

***b) The Call Agreement***

21 Amongst others, the Call Agreement established the terms of the fundamental economic arrangements between the parties and set out the mechanisms for Woodbridge to sell its interest in the Augusta Partnership to Abitibi, or failing an acquisition by Abitibi, to sell the partnership as Woodbridge saw fit.

22 Accordingly, pursuant to the Call Agreement, ACSC first had the right to purchase all of the issued and outstanding shares of Augusta Newsprint Inc. ("*ANI*") (the company through which Woodbridge held its interest). The price to exercise the option was initially set at US$190 million, subject to adjustments. That right, as amended, expired on December 31, 2009, at which point the adjusted call price would have been approximately US$208 to 215 million.

23 Second, if ACSC did not exercise its call right, it then had the option, for a full year, to sell the entire Augusta Partnership, including the portion owned by Woodbridge, on certain conditions.

24 Third, if ACSC did not sell the Augusta Partnership within the time period specified in the Call Agreement, that is, in 2010, Woodbridge finally had the option, for the whole year 2011, to force the sale of the entire Augusta Partnership.

25 Upon a sale of the Augusta Partnership by either ACSC or Woodbridge under these forced sale mechanisms, the terms of the Call Agreement provided that Woodbridge would be entitled to approximately the first US$215 million of the sale proceeds (subject to adjustments) prior to any recovery by ACSC.

26 In other words, under the Call Agreement:

a. ACSC had a call right, until December 31, 2009, to purchase Woodbridge's interest in the Augusta Partnership at a specified price that would have been around US$208 million;

b. If ACSC did not exercise its call right by December 31, 2009, ACSC had the option, until December 31, 2010, to sell the entire Augusta Partnership, including the portion owned by Woodbridge, with Woodbridge being entitled to approximately the first US$215 million in proceeds; and

c. If ACSC did not exercise its option by December 31, 2010, Woodbridge had the option, until December 31, 2011, to sell the entire Augusta Partnership, including the portion owned by ACSC, again with Woodbridge being entitled to approximately the first US$215 million in proceeds.

27 Over and above that, the Call Agreement provided for a guarantee by Abitibi of ACSC's obligations to Woodbridge in that regard [12].

28 When Abitibi filed for *CCAA* protection in April 2009, the value of the Augusta Mill was lower than the amount of the call right or the amount of the sale proceeds Woodbridge would be entitled to under any forced sale mechanisms.

29 On June 15, 2009, ACSC thus filed a motion in the concurrent Chapter 11 US proceedings pertaining to Abitibi, seeking authority to reject the Call Agreement. On October 27, 2009, the US Bankruptcy Court issued an order confirming the rejection by ACSC of the Call Agreement [13].

***c) The Claims Process***

30 As a result, on November 25, 2009, Woodbridge filed a proof of claim in the Chapter 11 US proceedings against ACSC due to this rejection of the Call Agreement. On the same date, Woodbridge also filed its Claim against Abitibi in the *CCAA* proceedings on the basis of Abitibi's guarantee of ACSC's obligations under the Call Agreement [14].

31 Woodridge initially valued its Claim at US$213 million less the value of the ongoing Augusta Partnership [15]. As it became clear that Abitibi would likely not go into liquidation, the Claim was eventually adjusted to US$110 million in 2010 [16].

32 By Notice of Revision or Disallowance dated June 30, 2010 [17], the Monitor revised the Claim to US$9 million. In response, Woodbridge filed a Notice of Dispute of the Monitor's Notice of Revision [18], contesting the revision by the Monitor.

33 Pursuant to the CPO, the Monitor referred the matter to the Claims Officer and a Dispute Package was delivered to him on August 18, 2010.

34 The hearing of Woodbridge's Claim took place on September 17, 2010. The Claims Officer had before him a written record, including affidavits and the other material that has been reproduced in the Court file on this Motion. In addition, the Claims Officer heard oral evidence from Mr. Morrison on behalf of the Monitor, Mr. Rougeau on behalf of Abitibi, and Mr. Pun and Mr. Dart on behalf of Woodbridge.

35 By his Determination of December 13, 2010 [19], the Claims Officer revised the Woodbridge Claim from US$9 million (as allowed by the Monitor) to US$24 million.

***d) The Claims Officer's Determination***

36 In front of the Claims Officer, the parties agreed that the proper measure of Woodbridge's Claim against Abitibi was the value of the Call Agreement repudiated by ACSC during the *CCAA* proceedings.

37 As well, since the Call Agreement provided that Woodbridge would be entitled to approximately the first US$215 million of the sale proceeds under any forced sale mechanism, and since the value of the Augusta Mill at the relevant time was lower than that, the method for calculating the value of the Call Agreement and the date for valuation purposes were not in dispute either.

38 Consequently, everyone accepted[20] that the value of the Call Agreement was to be determined as of April 16, 2009, on the basis of the difference between:

(1) the sale proceeds resulting from a forced sale of the Augusta Partnership pursuant to the Call Agreement (that is, the value of an hypothetical sale of the Augusta Mill without the Call Agreement); and

(2) the value of Woodbridge's 47.5% interest in the Augusta Partnership as a going concern, without the Call Agreement.

39 The disagreement between the parties arose from different assumptions used in the valuation exercise. For illustrative purposes, the values attributed to each side of the equation by Woodridge, the Monitor and the Claims Officer were as follows:

| | **(1) Value of Forced Sale of the Augusta Partnership** | **(2) Going Concern Value of Woodbridge's 47.5 % interest** |
|---|---|---|
| Woodbridge's Claim | US $145-180 million | US $45-60 million (Includes a 30 % minority discount as per their experts) |
| Monitor's Notice of Revision | US $90 million | US $81 million |
| Claims Officer's Determination | US $100 million | US $76 million |

40 As this chart shows, any increase in the forced sale value or decrease in the going concern valuation of Woodbridge's minority interest would result in an increase in Woodbridge's Claim.

*i) the Value of the Forced Sale of the Augusta Partnership*

41 On the one hand, on the value of the forced sale of the Augusta Partnership, the Claims Officer reviewed the assumptions submitted by the parties.

42 He determined that those of the Monitor were more practical and based on the actual situation "on the ground, as it were, relying on the experience in the newspaper industry". In its revision of Woodbridge's Claim, the Monitor had in fact considered the state of the North American newsprint market in April 2009, the customer base of the Augusta Mill, as well as the cost competitiveness of the mill.

43 Conversely, the Claims Officer found that the assumptions underlying the Woodbridge's assessment of damages were "very speculative and overly optimistic, . . . more theoretical, having the inherent weaknesses of forecasting future events in the economics fear in a troubled industry".

44 In making this assessment, the Claims Officer reviewed written submissions and affidavits filed by the parties. He also heard oral testimony. He accepted that the following factors should be considered in determining the forced sale value of the Augusta Partnership:

a. there had been a dramatic decrease in the demand for newsprint in North America;

b. excess capacity existed in the North American marketplace in 2009;

c. newsprint prices were trending downward long term, having only been stabilized by capacity withdrawals;

d. pursuant to the terms of the partnership agreement, Abitibi was required to operate the Augusta Mill at an operating rate of at least 90% despite the excess capacity in Abitibi's mill system. There would be no such requirement post-sale;

e. ACSC was contractually obligated to purchase all of the production of the Augusta Mill, which was required to operate at a minimum 90% capacity. The Augusta Mill had no third party customer order book. In the event of a forced sale to a third party, this obligation would be automatically terminated. Abitibi would reallocate the volumes produced by the Augusta Mill to other mills in its mill network to the extent of its excess capacity in the network. Therefore, the Augusta Mill would be sold as an idle plant;

f. establishment of a post-closing order book would be challenging for a third party purchaser because (a) 30% of the production of the Augusta Mill was sold to 4 large domestic customers who had contracts in place with Abitibi, and (b) a stand-alone independent mill would not be able to guarantee production to its customers as it would have no ability to divert production to another mill in the event of a production stoppage;

g. as there was an overcapacity in the newsprint market, a purchaser would not be able to "buy" an order book as other producers would match newsprint price reductions and/or the profitability of the Augusta Mill would decline as a result of declining gross margins;

h. the Augusta Mill appeared to be a relatively efficient mill and could be attractive to a buyer who had an inefficient or higher cost mill in its network. However, a purchaser would only be prepared to pay an amount for the Augusta Mill based on the cost savings achieved by moving production from an existing inefficient mill to the Augusta Mill;

i. there were a limited number of prospective buyers with an interest in expanding North American newsprint capacity or with the financial capacity to complete a transaction;

j. severance and termination costs had to be taken into consideration;

k. the newsprint produced by the Augusta Mill may not meet all standards for the export market which would limit the demand and pricing for the newsprint; and

l. as a stand-alone independent mill, the cost competitiveness of the Augusta Mill would be adversely affected for the following reasons: (a) selling costs would increase in the short term as brokers would be required to move volume until a sales force could be retained, (b) the Augusta Mill would no longer benefit from the bulk purchasing power of Abitibi (c) the sales footprint of the Augusta Mill would need to expand which would cause freight costs to increase as the number of customers and shipping distances would correspondingly increase, (d) a stand-alone independent mill would require a significant upfront investment of working capital, and (e) the key management of the Augusta Mill would be re-deployed within Abitibi which would create uncertainty for any purchaser of the Augusta Mill.

45 This notwithstanding, the Claims Officer determined that the Monitor did not however give sufficient weight to the particular and special interest of Abitibi and Woodbridge in acquiring full ownership of the Augusta Mill. In this respect, he agreed with Woodbridge that on any sale of the Augusta Partnership, Abitibi and Woodbridge would both be serious bidders.

46 He held that Abitibi was a very important producer in North America with vast expertise and concluded that if the Augusta Mill was put up for sale, it would very probably be a serious bidder. Woodbridge would also be a bidder in order to protect its investment and prevent the Augusta Mill from being sold for too low a price. It was accepted that any amount received from the sale of the Augusta Mill up to approximately US$215 million would go entirely to Woodbridge.

47 In the Claims Officer's view, the Monitor's evaluation of the Augusta Mill on a standalone basis in the context of a third party purchaser did not give sufficient weight to Abitibi's benefits and synergies (that would not be available to others) in acquiring full ownership.

48 He noted that in such circumstances, Abitibi would probably bid an amount higher than US$90 million to acquire the full Augusta Partnership. He therefore found that the Monitor's valuation of US$90 million, while acceptable for third party purchasers, did not sufficiently take into account the particular and special interest of Abitibi to acquire the mill or the protective interest of Woodbridge.

49 As a result, the Claims Officer added US$10 million to the Monitor's US$90 million valuation of the forced sale of the Augusta Partnership.

*ii) the Going Concern Value of Woodbridge's 47.5% interest*

50 On the other hand, the Claims Officer largely accepted the Monitor's submissions in respect of the going concern value of Woodbridge's 47.5% interest in the Augusta Partnership.

51 Abitibi's financial advisors had determined that the going concern value of the Augusta Mill, at the date of the *CCAA* filing and based on a discounted cash flow analysis, was US$170 million. This was an arm's length valuation prepared for Abitibi's creditors in the *CCAA* proceedings. This valuation was not materially different from Woodbridge's going concern valuation of US$145-US$180 million.

52 As Woodbridge owned 47.5% of the Augusta Mill, the Monitor valued its interest at US$81 million ($170 million x .475).

53 Woodbridge submitted that a minority discount of thirty percent (30%) should be applied to the Monitor's valuation of the 47.5% interest. In valuing Woodbridge's interest in the Augusta Mill, the Monitor did not consider it appropriate to do so as the valuation analysis prepared by Abitibi's financial advisors was based on a discounted cash flow analysis of the mill as a whole.

54 In its view, it was not appropriate to attribute a minority discount to the determination of going concern value as the proper assessment was the value of Woodbridge's retained interest in the Augusta Mill as a going concern, not the value of an independent sale of Woodbridge's minority interest. The process was to value the Augusta Mill as a whole, not to determine what a purchaser would pay for a minority interest therein.

55 The Claims Officer generally accepted the Monitor's reasoning in respect of the minority discount issue and ruled that a discounted cash flow method was the appropriate basis for establishing value.

56 Still, the Claims Officer again adjusted the Monitor's assessment of going concern value by reducing it of US$5 million on the basis that the Call Agreement had value to Woodbridge in providing the possibility of forcing a sale of the Augusta Mill for a one-year period starting on January 1, 2011. The Determination thus assessed the going concern value of Woodbridge's interest to be US$76 million (US$81 million - US$5 million).

57 In the end, the Claims Officer consequently valued the Claim at US$24 million, that is, the difference between (1) the forced sale value of the Augusta Partnership of US$100 million and (2) the going concern value of Woodridge's 47.5% interest of US$76 million.

***e) The Subsequent Sale of Woodridge's Augusta Partnership's Interest***

58 The Claims Officer issued his Determination in respect of the Woodbridge Claim on December 13, 2010.

59 Barely a few weeks later, on January 14, 2011, Woodbridge completed the sale of its 47.5% interest in ANI to ACSC resulting in ACSC owning 100% of the Augusta Partnership as of that date [21] .

60 The value of the consideration for the sale was approximately US$125 million and consisted of the following:

a. US$15 million in cash;

b. a US$90 million secured, interest bearing, first priority promissory note issued by the partnership to Woodbridge [22] ;

c. US$17 million representing a 47.5% share of the partnership's cash and liquid assets to be distributed to Woodbridge immediately prior to the closing of the transaction; and

d. approximately US$2 million in subsequent payments.

61 The sale was the product of discussions that were initiated in June 2010. The discussions took place over a number of months and involved numerous meetings, calls and draft term sheets.

62 Despite this, the parties' initial positions did not differ significantly in relation to the value of Woodbridge's 47.5% interest in the Augusta Partnership. Woodbridge began negotiations ascribing a value of close to US$135 million (US$120 million plus approximately US$15 million for its expected share of the partnership's cash) to its interest, whereas ACSC began roughly at US$105 million (US$90 million plus approximately US$15 million for the partnership's cash).

63 On September 23, 2010, shortly after the hearing before the Claims Officer, the parties had in fact agreed on a deal that included a value of US$105 million (plus what was ultimately almost a US$20 million share of the Augusta Partnership cash).

64 The share purchase agreement itself was executed as of December 23, 2010[23].

65 Afterwards, the sale was the subject of an approval hearing in the US Bankruptcy Proceedings, which granted it on January 7, 2011. The US Bankruptcy Court noted that the sale allowing ACSC to obtain 100% ownership of the Augusta Partnership was negotiated at arms' length and entered into in good faith[24].

**ANALYSIS**

***1) THE STANDARD OF REVIEW***

66 In this case, the parties have had the benefit of a thorough adversarial proceeding before the Claims Officer. Both sides presented affidavit evidence with documents production, including expert reports. Viva voce testimonies with cross-examinations were allowed at the hearing. Counsel made oral and written submissions.

67 In such a context, it is the Court's opinion that the standard of review on an appeal of the Claims Officer's Determination is that of an appellate court[25]. The role of the Court is not to conduct a trial *de novo* and plainly set aside the findings of the Claims Officer, reassess the matter and substitute its own discretion.

68 Both the case law and the wording of the CPO at issue justify this conclusion.

*i) the applicable case law*

69 Woodbridge asserts that there is limited jurisprudence on the deference, if any, to be accorded by a court to a decision of a claims officer in a *CCAA* restructuring context. This is incorrect.

70 To the contrary, there is a strong line of Canadian cases (from the Ontario Appeal and Superior Courts, the Saskatchewan Court of Queen's Bench and the British Columbia Supreme Court) that directly address the « standard of review » issue in such a situation[26]. These cases emphasize that the role of the Court is not to proceed on a *de novo* basis; its role is rather to decide the Motion applying the criteria of a true appeal.

71 In the leading case of *Tiercon Industries*[27], Morawetz J. summarized as follows the applicable criteria in that regard:

> [11] The Claims Procedure Order provides that a party may appeal a final determination of the Claims Officer.
>
> [12] The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:
>
>> (a) <u>With respect to pure questions of law, the standard of review is correctness.</u>
>>
>> (b) <u>With respect to questions of fact, the standard of review is</u> that such findings are not to be reversed unless it can be established that the decision maker made a <u>palpable and overriding error</u>.
>>
>> (c) With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an « extricable » legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.

(d) With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.

[ . . . ]

[69] <u>The role of the court</u> on [ . . . ] appeal is to review the decision of the Claims Officer. It <u>is not to conduct a trial de novo</u>.

[ . . . ]

[Our emphasis]

72 The Ontario Court of Appeal affirmed this decision.

73 In *Triton Tubular*[28], the Ontario Superior Court refused to conduct a *de novo* hearing when, like here, the proceeding before the claims officer was a « full-blown trial like proceeding » and not a summary one[29]. It rightfully noted that:

[14] [ . . . ] If the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the CCAA and the Commercial List practice.

74 The Court agrees with these findings.

75 In that regard, the *Canadian Airlines*[30] decision heavily relied upon by Woodbridge is of no assistance. In that case, the Alberta Court of Queen's Bench held that on an appeal from a claims officer's decision, while the latter's ruling deserved respect, the court was still free to substitute its own discretion.

76 However, in *Canadian Airlines*, the appeal at issue was solely concerned with matters of law. In addition, this case was decided prior to *Tiercon Industries*, *Triton Tubular* and the other judgments referred to before that have constantly favour a stricter standard of review.

77 The standard of review established by this trend of cases is palpable and overriding error for findings of fact and correctness for findings of law. In fact, the standard of review applied in the end to the decision of the claims officer in *Canadian Airlines* would have been the same under the criteria identified in these cases. From that standpoint, the *Canadian Airlines* case is consistent with the standard of review of these more recent *CCAA* cases.

78 That said, the analogy drawn by Woodridge between the standard of review of a decision made by a claims officer and the standard of review of a decision made by a clerk under Article 42 *C.C.P.* is misguided and inappropriate. Contrary to the relevant wording of the CPO at issue here, Article 42 *C.C.P.* specifically refers to a review process, not an appeal process.

79 A better analogy indeed exists with the standard of review on appeal of a trustee's notice of disallowance under Section 135(4) *BIA*. Similarly to the CPO, this provision refers to an appeal. In addition, the rationale underlying that standard of review, as it relates to the need to preserve the efficiency of a claims adjudication process set up pursuant to bankruptcy and insolvency laws, is equally present in a *CCAA* claims process.

80 Recently, the Ontario Court of Appeal explained that rationale in the following terms[31]:

24 At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance, will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: Charlestown Residential School (Re) (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.

> 25 I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the BIA is not intended to be a trial de novo but rather a true appeal: Galaxy Sports Inc. (Re) (2004), 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency.
>
> 26 <u>This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency in the operation of the bankruptcy scheme would be lost</u>. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. <u>This, it seems to me, would impact on the objective implicit in the BIA, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality</u>: Galaxy Sports at para. 41.

[Our emphasis]

81 A similar analogy can also be drawn with the appeal process of a registrar decision under Section 192(4) *BIA*, which proceeds as a true appeal and not *de novo* [32] .

82 Bearing this in mind, with respect to questions of fact, which are the sole basis for its Motion, Woodbridge is therefore required to establish that the Claims Officer made palpable and overriding errors.

83 As well, since this is not a *de novo* hearing, the oral evidence offered by Woodbridge on the Motion is inadmissible. Normally, a court does not admit such evidence in appeal. The Court cannot simply accept it as a substitute for the lack of transcripts of the September 17, 2010 hearing before the Claims Officer.

84 The relevant record in this case consists only of the Claims Officer's Determination, which includes a summary of facts, reasons and conclusions, as well as the affidavits and exhibits filed before him. No official recording was made of the hearing in front of the Claims Officer. Neither a tape recording of the proceedings, nor a transcript of the hearing is thus part of the current record.

85 Woodbridge was aware that there was no stenographic record of the proceedings before the Claims Officer. It apparently made no effort to request that one be kept. There is no evidence either that such records are generally made or kept in the ordinary course of *CCAA* claims hearings.

86 Following the hearing of September 17, 2010, and in connection with this Motion, Woodbridge asked the Claims Officer for a copy of the transcript of the recording he had made. This request was denied. The Claims Officer advised that the recording had been made for his "personal use" and that there was no transcript [33] .

87 No reasonable person, particularly a sophisticated party duly represented such as Woodbridge, could have inferred from the presence of a dictating machine on the Claims Officer's desk that the hearing was officially recorded. The hearing was held in a conference room of a law firm where neither an official stenographer nor a clerk was present.

88 As a result, Woodbridge cannot put in front of the Court the oral evidence made during the hearing before the Claims Officer on September 17, 2010, namely the stenographic notes of the four witnesses then examined (Mr. Dart from Woodbridge, Mr. Pun from RBC, Mr. Morrison for the Monitor, and Mr. Rougeau from Abitibi).

89 Having sat silent, Woodbridge cannot now try to use the fact that there is no stenographic record to transform this appeal into a *de novo* hearing.

90 By choosing not to request to have the hearing before the Claims Officer recorded by an official stenographer, Woodbridge took the chance that the factual determinations and conclusions of the Claims Officer could not meet the standard of « palpable and overriding errors » in case the decision was not favourable to it.

91 In the context of this Motion, Woodbridge must abide by the consequences of its choice.

92 In similar circumstances, the Quebec Court of Appeal has ruled that when an appellant fails to put in front of the appellate court all the evidentiary record before the first judge, the factual determinations and conclusions of the latter cannot be reviewed. The appellate court must take for granted the facts as reported by the first judge in his decision [34].

93 While the parties agreed to make available to this Court the same witnesses who testified before the Claims Officer for the purposes of the Motion, this agreement was expressly made without prejudice to Abitibi's right to argue on the appropriate standard of review and on the admissibility of any or all of such evidence [35].

94 Hearing on the current Motion the same witnesses who testified in front of the Claims Officer illustrated the differences that exist between a *de novo* process and an appeal based on the record as it stands. It indeed showed the awkward consequences of trying to consider the matter as an appeal and a *de novo* hearing at the same time. Simply put, it is impossible for this Court to properly recreate what took place at the hearing before the Claims Officer. From that perspective, it must rely on the Claims Officer's comments on this oral evidence, and nothing else.

95 Of course, it is well settled that even in the absence of a transcript, or where there is no statutory duty to record hearings, a court sitting in appeal will still proceed to the appeal unless, exceptionally, the record put before it does not allow for a proper disposal of the application for appeal [36].

96 Here, the record as it stands is adequate for this Court to rule upon the Claims Officer's Determination. It limits however the review in terms of the oral evidence. The findings of the Claims Officer in that regard must be taken as they are and his assessment thereof must be accepted as correct. It would be dangerous and unjust, if not wrongful, for this Court to reassess the probative value of evidence it has not heard and which is not before it [37].

*ii) the wording of the CPO*

97 The wording of the CPO at issue leads to a similar result on the applicable standard of review.

98 At paragraph 13, it precisely indicates that Woodridge « *may appeal a Claims Officer's determination to this Court* ». The paragraph further states that *« if an appeal is not filed* », the Claims Officer's determination is « *final and binding* ».

99 This wording may be compared to the one applicable on an appeal of a Grievance Claims Officer, which is dealt with at paragraph 23 of the CPO. In that case, it is specifically indicated that « *for the purpose of such an appeal, the Court shall apply the criteria applicable to judicial reviews* ».

100 As a general rule, the true meaning of the word « *appeal* » is not that of a *de novo* hearing. In the context of the CPO at issue, this is reinforced by the specific distinction made between an appeal of a Claims Officer's determination and an appeal of a Grievance Claims Officer's determination, with the latter being subject to the criteria applicable to judicial reviews.

101 To conclude that the review process of the Claims Officer's Determination is a *de novo* hearing would ignore this CPO wording. This cannot be the expected result.

102 Moreover, the CPO issued in this case is, for all intents and purposes, similar if not identical to the CPO considered by the Ontario courts in the cases referred to before. Its purpose is to provide for efficient and rapid means of resolution so that the creditors may vote on a plan as soon as possible.

103 To consider this appeal as a *de novo* hearing would defeat such purpose and render rather useless the recourse to a claims officer process. This is even truer when one considers the credentials of the Claims Officers designated by the Court in the Abitibi *CCAA* claims process, including the one designated in the current Claim.

104 That said, contrary to another assertion put forward by Woodridge in argument, to make the Claims Officer's Determination subject only to an appeal process is perfectly acceptable. In such a situation, the final say remains with the Court, and not with the Claims Officer. It is only the criteria for intervention that vary.

105 In short, Woodridge would like to have a second full trial of its Claim, after having had the benefit of a complete and due trial process in front of the Claims Officer. This is wrong and inappropriate.

106 Put to its utmost limit, it would impose a much too onerous burden on restructuring judges in any *CCAA* process of relative importance. This would defeat the whole purpose that justifies the issuance of CPOs. The CPOs are aimed at providing summary mechanisms for creditors to file and value their claims against a debtor company. They help to bring finality to the process and facilitate the timely vote on a proposed plan. They are geared towards an orderly and efficient completion of the *CCAA* proceedings. From that perspective, they are in accordance with the wording of the applicable sections of the *CCAA*.

107 No one disputes that a *CCAA* court has the authority to issue a CPO and impose a claims process for the benefit of an entity that has filed for *CCAA* protection. It is now accepted that one of the *CCAA* distinguishing features is to grant a broad and flexible authority to the supervising court to make orders necessary to facilitate the reorganisation of a debtor and achieve the *CCAA's* objectives[38].

108 In closing on this first issue of the standard of review, the Court cannot avoid mentioning that in its own Motion, despite its argument that the matter should proceed as a *de novo* hearing, Woodridge pleaded that the Claims Officer allegedly erred and that his errors were « *reversible errors of law and where applicable palpable and overriding errors of facts as well*"[39].

109 Interestingly, this refers to the exact wording of the criteria summarized in *Tiercon Industries*, namely the ones applicable for the standard of review of a true appeal as opposed to a *de novo* hearing.

***2) THE ADDITIONAL EVIDENCE ON THE MOTION***

110 Turning to the palpable and overriding errors on the part of the Claims Officer, Woodbridge submits that the latter's Determination was wrong primarily because of the value given by the parties to its 47.5% minority interest in a sale finalized in early 2011.

111 In that regard, Woodridge describes "*the fundamental problem with the Claims Officer's Determination, and the position advanced by Abitibi, »* as being the failure *« to have regard to the proper values of the Augusta Partnership as evidenced by the discussions which were taking place between Woodbridge and Abitibi and which ultimately resulted in the sale of Woodbridge's 47.5% interest in the Augusta Partnership »*[40].

112 Accordingly, Woodbridge describes the fundamental problem with the Determination as arising out of evidence that was not put before the Claims Officer. With respect, there can be no criticism of the Determination based on evidence that Woodbridge did not put before the Claims Officer.

113 In this regard, the real issue is whether the evidence of these negotiations is admissible and probative. The test for the introduction of new evidence on appeal was articulated by the Supreme Court[41] along the following lines; to introduce it, a party must convince the court that:

a. The evidence was not available at the time of trial;

b. The evidence is relevant in the sense that it bears on a potentially decisive issue;

c. The evidence is credible; and

d. The evidence is expected to have affected the result.

114 Based on these criteria, the additional evidence sought to be adduced by Woodbridge is neither admissible nor probative. Four reasons warrant such a conclusion.

115 First and foremost, this evidence was available to Woodbridge before the Claims Officer released his Determination. Had Woodbridge acted diligently, it would have raised the issue in front of him. It did not.

116 In fact, not only did Woodbridge not seek to put it before the Claims Officer. Worse, it offered no convincing explanation for not presenting it then.

117 The negotiations of the eventual sale of Woodridge's 47.5% interest to ACSC began in June 2010. An agreement on the US$105 million value was reached on September 23, 2010. A motion to approve this settlement was prepared and signed on December 1, 2010.

118 Even if the share purchase agreement was executed on December 23, 2010 and the closing finalized in January 2011, all of these occurred before the issuance of the Claims Officer's Determination of December 13, 2010.

119 The mere fact that the transaction only closed in late December 2010 and early January 2011 is insufficient to justify Woodridge's assertion that this evidence was not available at the time of the hearing in front of the Claims Officer.

120 Woodridge and ACSC were not only very close on their respective positions on value as early as June 2010; they had indeed reached a deal on that aspect barely a week after the hearing in front of the Claims Officer, that is, on September 23, 2010.

121 The motion for approval of the transaction in front of the US Bankruptcy Court was even prepared, signed and served prior to the issuance of the Claims Officer Determination.

122 At best, Woodbridge knew enough to raise the issue in front of the Claims Officer. It willingly chose not to do so.

123 Similarly, the fact that nothing was officially finalized at the date of the hearing in front of the Claims Officer is without basis. The issue is not whether the new evidence was available at the time of the hearing, but whether it was available at trial level. This includes the trial process up to the issuance of the Claims Officer's Determination.

124 Certainly, Woodridge could have at least asked for a reopening of the evidence based on what it knew. Again, it chose to stay quiet, no doubt with a full understanding of the potential consequences.

125 Second, the parties agreed that the valuation exercise was to be conducted on the basis of the facts known to the parties as at April 2009. The many challenges facing Abitibi and the pulp and paper producers generally at that time are described in the Determination. The industry was in crisis. Demand and prices were falling. Many competitors were restructuring and pulp mill prices were depressed.

126 A potential purchase of Woodbridge's 47.5% minority interest for some US$120 million in January 2011 was not a fact known by the parties in April 2009.

127 Third, it is wrong to suggest that the purchase of Woodbridge's 47.5% interest in 2011 at around US$120 million can be extrapolated as evidence that the Augusta Mill was worth over US$200 million in 2009.

128 On the one hand, the purchase price is not all in cash. It includes a US$90 million note « secured » by the assets of the Augusta Mill. This cannot be treated as equivalent to cash.

129 On the other hand, there is no suggestion in the evidence that the US$120 million agreed to be paid by Abitibi to Woodbridge for its minority interest was anything more than the price that Abitibi was willing to pay to acquire it, and relieve itself from the burden of the support agreements to the Augusta Partnership. No evidence suggests that this price was based on any assessment of the value of the mill as a whole.

130 In other words, the value in 2011 of 47.5% of a partnership with the significant support obligations of Abitibi is not probative of the value in 2009 of 100% of the partnership's assets excluding the support arrangements.

131 In short, this additional evidence is not probative of the values to be used on the formula agreed for determining the amount of Woodbridge's Claim for the repudiation of the Call Agreement as of April 2009. Most probably, this evidence would not have affected the result of the valuation exercise.

132 Fourth and final, the Court cannot conclude that this alleged new evidence was indispensable. In all likelihood, it could have only affected the second part of the applicable equation for the determination of Woodridge's Claim. As such, this new evidence could have merely influenced the going concern value of Woodridge 47.5% interest, and nothing more.

133 From that standpoint, there appears to have been good reasons for Woodridge not to raise this issue in front of the Claims Officer. The transaction eventually finalized between Woodridge and ACSC gave an higher value (namely over US $120 million) to the going concern value of its minority interest than the ones put forward by either the Monitor's Notice of Revision[42] or Woodridge's own Claim[43]. This alleged new evidence of Woodridge would have consequently rendered more difficult the acceptance of its own financial experts' opinion in that regard.

134 Therefore, if the Claims Officer had taken such a fact into consideration, it may have diminished the value of Woodridge's Claim rather than increase it. As stated earlier, it is a decrease in the going concern valuation of Woodridge's minority interest that could result in an increase in Woodridge's Claim, not the reverse. This may well explain why Woodridge chose to remain silent when it had all the elements to speak up in front of the Claims Officer on this point.

135 This evidence cannot and should not affect this Court's review or assessment of the Claims Officer's Determination.

***3) THE CLAIMS OFFICER'S DETERMINATION***

136 Once the Court concludes that this is not a *de novo* hearing and that the evidence of the January 2011 sale of Woodridge's minority interest is inadmissible, there remains not much left convincing, if anything, in Woodridge's assertions against the Claims Officer's Determination.

137 In the Court's opinion, Woodridge does not establish a palpable and overriding error on the questions of fact analyzed by the Claims Officer. His findings on the value of the Woodbridge Claim were open to him on the basis of the evidence presented and to which he extensively referred in his decision.

138 Woodridge's representations in that regard are factual in nature. They amount to mere disagreements on this analysis of the evidence. This falls short of a palpable and overriding error that would justify the Court's intervention.

139 Again, the gist of Woodridge's arguments on the Claims Officer's palpable and overriding error revolves around the inference one could allegedly draw from the sale of its minority interest finalized in late 2010 and early 2011.

140 Woodridge's reasoning in this respect is summarized at paragraph 43 of its Outline of Argument:

> 43. The Call Agreement gave Woodbridge the right to force a sale of 100% of the Augusta Partnership and to retain the first approximately US $215 million in proceeds. The sale confirms the value of Woodbridge's 47.5% in 2010 at US $120 million — that issue is no longer a matter of competing valuations, it is settled. As a matter of common sense, given that Abitibi valued a 47.5% interest in the Augusta Partnership at US $120 million then ownership of the entire partnership must be worth substantially more than that (certainly over US $200 million). The Determination, however, reaches the opposite conclusion; namely, that on a sale of the entire Augusta Partnership, Abitibi would have bid just US $100 million or, US $20 million *less* than it paid to acquire Woodbridge's 47.5% interest. Clearly, the Determination is wrong.

141 Aside from the fact that this evidence is inadmissible for the reasons stated before, the inference so drawn by Woodridge has no support in the proof offered on the Motion.

142 True, this sale may provide an indication of value for Woodridge's 47.5% minority interest, namely the second element of the formula agreed upon by everyone to determine the damages incurred as a result of the rejection of the Call Agreement. However, to suggest that this automatically entails that the entire Augusta Partnership is therefore worth more than US$200 million is a leap that none of the evidence presented allows one to make.

143 The evidentiary support for the two elements of the general formula that everyone adopted was very different. The determination of one value did not necessarily allow the corollary determination of the value of the other. It was by no means limited to a simple matter of « common sense » as Woodridge argued.

144 Over and above its insistence on the inference to be drawn from this evidence that the Court concludes is inadmissible, Woodridge's arguments are centered around three other points: 1) the Claims Officer's improper analysis of the Woodridge's experts valuations of the forced sale value of the Augusta Partnership; 2) his failure to take into account the cash built up in the Augusta Partnership between the evaluation date chosen and the date on which a likely forced sale would have taken place; and 3) his failure to apply a 30% minority discount to the going concern value of Woodridge's 47.5% interest.

145 None of these additional complaints amount to a palpable and overriding error on the part of the Claims Officer.

146 First, on the value of the Augusta Mill, the Claims Officer concluded in the end that the Monitor's assumptions were more realistic and less speculative than those of Woodridge's experts.

147 He agreed that the Augusta Mill would be sold as a standalone operation and he accepted several of the Monitor's and Abitibi's arguments as to the challenges the mill would face. This conclusion that the Augusta Mill would be sold on a standalone basis was not inconsistent with the fact that one of the most likely bidder for the Augusta Partnership would be Abitibi.

148 The challenges identified by the Claims Officer that the Augusta Mill would likely face were realistic and supported by the evidence presented in front of him. They were premised on an assertion that the sale would be to a purchaser with no built-in ability to address factors such as no sales force, order system, or buying power.

149 Mr. Rougeau's affidavit notably explained why the value of the 47.5% partnership interest retained by Woodbridge was, if anything, greater than the value of the Augusta Partnership if sold under the forced sale provisions of the Call Agreement in early 2010.

150 As to the value obtainable on a forced sale in early 2010, as summarized at paragraphs [42] to [44] of this judgment, the Claims Officer considered many factors highlighted in Mr. Rougeau's affidavit and in the Monitor's submissions. For instance:

> a. Even if Abitibi would have been an interested buyer of the Augusta Mill in a forced sale proceeding, there was no reason to assume that Abitibi would pay more than the amount necessary to top the price which it could reasonably assume an arm's length third party purchaser would pay;
>
> b. The value to be compared under the Call Agreement was the « consideration representing fair market value for the Partnership based on market conditions existing at the time ». The time of the valuation was April 2009, assuming a sale in early 2010. Abitibi was in bankruptcy proceedings in April 2009, and had no assurance of having a bankruptcy plan done by early 2010, nor indeed any assurance that it would have financing longer than the DIP financing already then approved by the Court and due to expire in November 2009. Newsprint demand had declined by 29% between 2004 and 2008 and Abitibi had substantial excess capacity;
>
> c. The Monitor's submissions provided ample evidence both as to the lack of financial capacity of Abitibi and its affiliates in 2009 and indeed up to the time of emergence, as well as the state of the relevant markets;
>
> d. A third party buyer under a forced sale scenario would not inherit the senior management employees seconded by Abitibi to the Augusta Mill and would not benefit from ACSC buying 100% of the output of the Mill on trade terms more favourable than in the industry, nor from the low commission rates paid for sales, the low prices paid for

supplies and freight and the guaranteed operating rates in a marketplace with such overcapacity. Any such third party would purchase a mill with no customers, no order book and no sales force in an oversupplied market.

151 This evidence led the Claims Officer to make the following crucial factual determinations in his decision:

> [51] Amongst the persons who testified, the only one with experience in the day to day operation of newsprint mills is Mr. Rougeau. His affidavit sets out the important advantages and benefits the Augusta Partnership enjoys which flow from the Sales Agreement, the Partnership Agreement as well as the involvement of ABH, all of which would no longer exist in the Standalone situation of the Augusta Mill after a Forced Sale. He describes the considerable hurdles which a third party purchaser would face in operating the Augusta Mill as a Standalone Operation. When Mr. Rougeau testified at the hearing, he acknowledged that the Augusta Mill was « a good mill » and stated that the AbitibiBowater Group would be a natural for being a full owner and would very probably be amongst those bidding for it.
>
> [52] I have concluded that if one places oneself back to April 16, 2009, having regard to the fact that Woodbridge refuses to consent to the distribution of any of the profits from the operation of the Augusta Mill, the AbitibiBowater Group would, at the earliest opportunity (January 1, 2010) proceed with a Forced Sale of the Augusta Partnership. Even taking into account that the Augusta Mill is one of the more cost-efficient mills in North America, the prevailing situation was one of cut backs in newsprint production and the closing of entire mills. In addition, newsprint producers were seeking protection under the insolvency statutes in both Canada and the United States. It could not be reasonably forecast that the situation would be appreciably better in early 2010.
>
> [53] The four largest customers who account for sales equivalent to 30% of the production of the Augusta Mill have long-term contracts with the AbitibiBowater Group. There are also long-term contracts with other customers. It is not likely that they would change their suppliers of newsprint. It should also be considered that the AbitibiBowater Group and other producers would likely react to counter any discount initiated by Woodbridge.
>
> [54] I have also concluded that it is probable that the AbitibiBowater Group (ACSC) would, being the only purchaser of the entire newsprint production of the Augusta Mill, transfer to its other mills the production of newsprint ordered by its customers. Furthermore, the two key personnel of the Augusta Mill, the Mill Manager and Comptroller, were on loan from the AbitibiBowater Group and would no longer be with the Augusta Mill. Thus, as at the date of a Forced Sale, the Augusta Mill would have no customer base, no order book and no sales force.
>
> [ . . . ]
>
> [58] In my view the assessment by the Monitor is a more practical one based on the actual situation, on the ground, as it were, relying on experience in the newsprint industry, taking into account the current situation and the changes, if any, which one could (in April 2009) anticipate for early 2010. I find that the approach of Woodbridge, although well presented is, nonetheless a more theoretical one having the inherent weaknesses of forecasting future events in the economic sphere in a troubled industry.

[Our emphasis]

152 The alleged errors raised by Woodridge are disagreements with factual findings of the Claims Officer in weighing the evidence of Mr. Rougeau as contrasted with the evidence offered by Woodbridge's experts.

153 Disagreements on assessment of the evidence of witnesses cannot form the foundation of an appeal of the Claims Officer's Determination. Such assessments of fact are the very function the Court has delegated to the Claims Officer.

154 Second, it is wrong to assert that the Claims Officer failed to take into account the cash built up in the Augusta Partnership between the evaluation date chosen and the date on which a likely forced sale would have taken place.

155 The parties directly addressed this issue in their submissions. The Monitor's reply explained its position in that regard [44] and the influence, if any, of this situation upon the forced sale value of the partnership. In the end, the Claims Officer weighed the arguments of both sides on the assessment of this value. He preferred the approach of the Monitor over the valuations proposed by Woodridge's financial experts.

156 The accumulated cash in the partnership was one of the elements factored into account in the calculations made by both sides. There was no error on the part of the Claims Officer in retaining the position put forward by the Monitor in that regard.

157 Third, as again summarized at paragraphs [51] to [55] of this judgment, the Claims Officer had reasonable grounds to prefer the Monitor's submissions on the minority discount issue over those of Woodridge's experts. On that point, in his Determination, the Claims Officer generally accepted the Monitor's reasoning in respect of the discount; he ruled that a discounted cash flow method was the appropriate basis for establishing value.

158 In addition, the terms of the Partnership Agreement provided a lot of leverage to Woodridge and gave it the ability to negotiate on an equal footing with Abitibi. The potential rationale that would otherwise justify a minority discount of any importance was most likely not present here. Indeed, as Abitibi pleaded, no such discount was applied when ACSC acquired a 2.5% interest of Woodridge in 2004. None was applied either to the sale of the 47.5% interest finalized in early 2011.

159 That said, it must be remembered that Abitibi did not determine Woodbridge's Claim. The Monitor appointed by the Court in the *CCAA* proceedings did. At the hearing before the Claims Officer, Abitibi supported the Monitor's determination but still argued that, if anything, it was too high. Yet, the Determination attacked by the Motion substantially increased the Monitor's Notice of Revision of Woodridge's Claim.

160 Be that as it may, only Woodridge now contests the assessment of the Claims Officer. Despite its many arguments, no matter from which angle one analyzes the Claims Officer's Determination, there are no valid grounds to vary his findings.

**FOR THESE REASONS, THE COURT:**

161 *DISMISSES* the Motion;

162 *WITH COSTS.*

**Appendix**

*SCHEDULE « A »*

*ABITIBI PETITIONERS*

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*
4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*
6. *3834328 CANADA INC.*
7. *6169678 CANADA INC.*
8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

*SCHEDULE « B »*

*BOWATER PETITIONERS*

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

*SCHEDULE « C »*

*18.6 CCAA PETITIONERS*

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Footnotes

1 Notice of Motion and Motion in Appeal and Revision of the Claims Officer's Determination dated December 23, 2010 (#876) (the « **Motion** »).

2 Determination of the Claims Officer dated December 13, 2010, Exhibit B-6.

3 The Honorable Joseph R. Nuss, Q.C.

4 Amended and Restated Call Agreement, as amended, Exhibits A-8, A-9 and A-10.

5 Claims Procedure Order (Review and Determination of Claims) dated January 18, 2010.

6 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ( »***CCAA*** »).

7 On December 9, 2010, Abitibi emerged from the *CCAA* process it had initiated on April 16, 2009.

8 Affidavit of Stephen Mitchell and RBC Capital Markets Value Assessment Report, with revisions, Exhibits C-5 and C-6.

9 Debtors' Contestation of the Motion in Appeal and Revision of the Claims Officer's Determination dated February 18, 2011 (#886).

10 Exhibit A-6.

11 Exhibit A-8.

12 Exhibit A-7.

13 Exhibit B-1.

14 Exhibit B-3.

15 Exhibit C-1.

16 Exhibit C-3.

17 Exhibit B-4.

18 Exhibit B-5.

19 Exhibit B-6.

20 Paragraphs 36 and 37 of the Determination.

21 Affidavit of Mr. Dart, Exhibit F.

22 Exhibit F-4.

23 Exhibit F-1.

24 Exhibit F-3.

25 See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

26 See *General Motors Corporation v. Tiercon Industries Inc.*, 2009 CanLII 72341 (Ont. S.C.), paras. 11, 12 and 69, confirmed at 2010 ONCA 666 (CanLII); *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (Ont S.C.), paras. 4 to 7; *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (Ont. S.C.), paras. 13 to 16; *Big Sky Farms Inc.*, *Re*, 2010 SKQB 255 (CanLII), paras. 8 to 10; *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356 (CanLII), paras. 8 to 13.

27 *General Motors Corporation v. Tiercon Industries Inc.*, 2009 CanLII 72341 (Ont. S.C.), paras. 11, 12 and 69, confirmed at 2010 ONCA 666 (Ont. C.A.).

28 *Triton Tubular Components Corp. v. Steelcase Inc.*, 2005 CanLII 33299 (Ont. S.C.), paras. 13 to 16.

29 See also to the same effect, *1587930 Ontario Inc., Re*, 2006 CanLII 34422 (Ont. S.C.), paras. 4 to 7 and 19 to 22.

30 *Canadian Airlines Corp. (Re)*, 2001 ABQB 146 (CanLII).

31 *Credifinance Securities Limited v. DSLC Capital Corp.,* , 2011 ONCA 160 (CanLII).

32 See *Cockfield Brown Inc. (In re): Giroux* v. *Réseau de télévision T.V.A. Inc*., [1988] R.J.Q. 1807 (C.A.).

33 Exhibits R-11 and R-12.

34 See *Québec (Sous-ministre du Revenu) v. 9087-3118 Québec inc.*, 2010 QCCA 1470, para. 14; *3979229 Canada inc. v. Commission des normes du travail*, 2010 QCCA 1412, para. 12, and *Centre commercial Innovation inc. v. Lafleur*, 2009 QCCA 845, para. 8.

35 See Procès-verbal dated January 31, 2011, and Procès-verbal dated May 2, 2011.

36 *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793.

37 *Syndicat des employés de soutien de l'Université de Sherbrooke v. Frumkin*, 2010 QCCS 1641, leave to appeal denied, 2010 QCCA 1572.

38 *Century Services Inc. c. Canada (Attorney General)*, [2010] 3 S.C.R. 379, at paras. 15, 19 and 65.

39 Paragraph 29 of the Motion.

40 Woodridge's Outline of Argument dated April 15, 2011, para. 40.

41 *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

42 Exhibit B-4.

43 Exhibit C-3.

44 Exhibit D-3, paragraph 14.

# TAB 3

2018 BCCA 93
British Columbia Court of Appeal

8640025 Canada Inc. (Re)

2018 CarswellBC 557, 2018 BCCA 93, [2018] 7 W.W.R. 339, 291 A.C.W.S. (3d) 21, 420 D.L.R. (4th) 385, 58 C.B.R. (6th) 257, 8 B.C.L.R. (6th) 225

# In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp., 8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp. (Respondents / Petitioners) and TNW Networks Corp.

Teliphone Corp., Cloud-Phone Inc., ChoiceTel Networks Ltd., Titan Communications Inc., 8583498 Canada Ltd., 9151-4877 Quebec Inc., dba Dialek Telecom, Orion Communications Inc., Investel Capital Corporation, New York Telecommunication Exchange Inc.. operating as NYTEX, United American Corp. (US Florida), formerly Teliphone USA Corp., Coastline Broadcasting Ltd., and Benoit Laliberte (Applicants / Appellants) and Ernest & Young Inc., Court-Appointed Monitor for the Petitioners (Respondent / Respondent)

Newbury, Kirkpatrick, Fisher JJ.A.

Heard: January 30, 2018
Judgment: March 14, 2018
Docket: Vancouver CA44978

Counsel: H.C.R. Clark, Q.C., for Appellant, Teliphone Corp.
G.F. Gregory, for all other Appellants
G.G. Plottel, S. Nelligan, for Respondent, Ernst & Young Inc., Court-Appointed Monitor of 8640025 Canada Inc. and Teliphone Data Centres Inc.
K.A. Robertson, for Respondent, Navigata Communications Ltd.
R.J. Argue, for Respondent, Bond Mezzanine Fund III Limited Partnership

**Headnote**
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles
Purchaser wanted to acquire all assets of integrated telecommunications business carried on by several corporations comprising TNW group (TNW) — Insolvent respondents were part of TNW and sought protection of Companies' Creditors Arrangement Act — Other members of TNW, including applicants, were neither insolvent nor part of proceedings under Act — Issues arose concerning business assets that monitor could sell — Monitor was instructed to carry out derivative analysis of properties in issue for determination of ownership — Difficulty in determining which assets related to respondents' business assets as opposed to assets of other companies in TWN asserting ownership, remained — Monitor was successful in its application for order approving asset purchase agreement of sale of purchased assets, however on appeal, order was set aside — Monitor reached revised agreement with purchaser under which disputed assets were to be carved out of proposed sale — After holding it was commercially reasonable, chambers judge granted monitor's vesting order authorizing monitor to carry out disputed claims process respecting disputed assets — Monitor began disputed claims process, embarked on analysis of disputed assets and disallowed all claims — Purchaser exercised its option to acquire some of disputed assets, conditional on court's approval, and second vesting order was sought — Chambers judge found that matter was true appeal and approved sale after not being persuaded monitor made palpable and overriding error — Applicants appealed — Appeal allowed — Leave to appeal was granted on sole issue of what standard of review applied to monitor's determination concerning ownership in course of proof

of claim process — Appeal from monitor's determination of proof of claim was true appeal and was subject to standards of review applicable to most civil appeals, standard of correctness for extricable questions of law, and standard of palpable and overriding error for questions of fact or mixed fact and law — Conclusion was consistent with authorities in insolvency field, statutory context and practical realities of Act's administration.

**Table of Authorities**

**Cases considered by *Newbury J.A.*:**

*AbitibiBowater inc., Re* (2011), 2011 QCCS 4284, 2011 CarswellQue 8946 (C.S. Que.) — followed

*Alternative Fuel Systems Inc., Re* (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 346 A.R. 28, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 320 W.A.C. 28 (Alta. C.A.) — considered

*Canadian Airlines Corp., Re* (2001), 2001 ABQB 146, 2001 CarswellAlta 240, [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 294 A.R. 253 (Alta. Q.B.) — considered

*Credifinance Securities Ltd., Re* (2011), 2011 ONCA 160, 2011 CarswellOnt 1218, 74 C.B.R. (5th) 161, (sub nom. *DSLC Capital Corp. v. Credifinance Securities Ltd.)* 277 O.A.C. 377 (Ont. C.A.) — considered

*Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266, 120 D.L.R. (4th) 127, 32 C.P.C. (3d) 126, 52 B.C.A.C. 59, 86 W.A.C. 59, 1994 CarswellBC 532 (B.C. C.A.) — considered

*Eskasoni Fisheries Ltd., Re* (2000), 2000 CarswellNS 116, 16 C.B.R. (4th) 173, 187 N.S.R. (2d) 363, 585 A.P.R. 363 (N.S. S.C.) — considered

*Galaxy Sports Inc., Re* (2004), 2004 BCCA 284, 2004 CarswellBC 1112, 240 D.L.R. (4th) 301, 20 R.P.R. (4th) 1, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 200 B.C.A.C. 184, 327 W.A.C. 184 (B.C. C.A.) — considered

*General Motors Corp. v. Tiercon Industries Inc.* (2009), 2009 CarswellOnt 8164, 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — followed

*General Motors Corp. v. Tiercon Industries Inc.* (2010), 2010 ONCA 666, 2010 CarswellOnt 7587, 70 C.B.R. (5th) 223 (Ont. C.A.) — referred to

*Hertz v. 1593658 Ontario Inc.* (2011), 2011 SKQB 379, 2011 CarswellSask 923, (sub nom. *Hertz v. 1593658 Ontario Inc. (Bankrupt))* 410 Sask. R. 1 (Sask. Q.B.) — referred to

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — followed

*Laidlaw Inc., Re* (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

*Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.* (2008), 2008 NLTD 9, 2008 CarswellNfld 19, 41 C.B.R. (5th) 137, (sub nom. *Lacey (J.J.) Insurance Ltd. (Bankrupt), Re)* 274 Nfld. & P.E.I.R. 314, (sub nom. *Lacey (J.J.) Insurance Ltd. (Bankrupt), Re)* 837 A.P.R. 314 (N.L. T.D.) — considered

*McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53, 18 B.C.A.C. 286, 31 W.A.C. 286, 9 C.P.C. (3d) 1, 96 D.L.R. (4th) 558, 1992 CarswellBC 282 (B.C. C.A.) — considered

*Port Chevrolet Oldsmobile Ltd., Re* (2004), 2004 BCCA 37, 2004 CarswellBC 354, 23 B.C.L.R. (4th) 335, [2004] G.S.T.C. 8, 193 B.C.A.C. 114, 316 W.A.C. 114, 49 C.B.R. (4th) 146 (B.C. C.A.) — considered

*Royal Oak Mines Inc., Re* (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) — referred to

*Sran v. Sands & Associates* (2010), 2010 BCSC 937, 2010 CarswellBC 1751, 69 C.B.R. (5th) 99 (B.C. S.C.) — referred to

*Target Canada Co. (Re)* (2017), 2017 ONSC 2595, 2017 CarswellOnt 9021 (Ont. S.C.J.) — considered

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

*Transglobal Communications Group Inc., Re* (2009), 2009 ABQB 195, 2009 CarswellAlta 464, 4 Alta. L.R. (5th) 157, 53 C.B.R. (5th) 122, [2009] 9 W.W.R. 165, 473 A.R. 167 (Alta. Q.B.) — considered

*Triton Tubular Components Corp., Re* (2005), 2005 CarswellOnt 4439, 14 C.B.R. (5th) 264 (Ont. S.C.J.) — referred to

*8640025 Canada Inc. (Re)* (2017), 2017 BCCA 303, 2017 CarswellBC 2250, 51 C.B.R. (6th) 171, 100 B.C.L.R. (5th) 256, 415 D.L.R. (4th) 758, [2018] 2 W.W.R. 683, 2017 BCSC 1167 (B.C. C.A.) — referred to

*8640025 Canada Inc., Re* (2017), 2017 BCSC 303, 2017 CarswellBC 487 (B.C. S.C.) — referred to

**Statutes considered:**

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

Generally — referred to

s. 2 "trustee or licensed trustee" — considered

s. 81(2) — considered

s. 124 — considered

s. 135 — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 135(2) — considered

s. 135(4) — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company " — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 13 — considered

s. 20 — considered

s. 20(1)(a)(iii) — considered

s. 20(1)(b) — considered

s. 20(2) — considered

s. 22(1) — considered

s. 23 — considered

s. 23(1)(k) — considered

s. 36 — considered

*Mineral Tenure Act*, R.S.B.C. 1996, c. 292

Generally — referred to

***Newbury J.A.*:**

1 This is the second time this court has been asked to intervene in connection with a proposed sale on behalf of the petitioning companies 8640025 Canada Inc. ("864") and a subsidiary thereof, Teliphone Data Centres Inc., of certain business assets to a purchaser ("Distributel") pursuant to s. 36 of the *Companies' Creditors Arrangement Act* ("*CCAA*"). It is also the second time that the proposed sale has foundered on the issue of whether the petitioners in fact own the assets in question such that the assets can be sold in the *CCAA* proceeding. Uncertainty on that point arises because the purchaser wishes to acquire all the assets pertaining to a complex and highly integrated telecommunications business (the "Business") carried on by several corporations comprising the "TNW Group of Companies". The petitioners are part of that Group and are insolvent. They have sought the protection of the *CCAA*. Other members of the Group, appellants in this court, are *not* insolvent and are therefore not part of the *CCAA* proceeding. (We were not told what exactly membership in the 'Group' entails.)

**Factual Background**

2 Nothing about this *CCAA* proceeding has been simple or typical. It began as a proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), when the petitioners filed a bankruptcy proposal on November 18, 2016 following the collapse of 864's relationship with an important supplier. Later in November, the petitioners returned to the Supreme Court of British Columbia seeking an initial order under the *CCAA*, including a stay of proceedings in the usual form, the appointment of a monitor, and permission to file a plan or plans of compromise and arrangement. On December 21, 2016, various creditors sought and obtained an order of the Supreme Court discharging the original monitor and replacing it with Ernst & Young Inc. (the "Monitor".) The order was granted and the Monitor was:

> . . . authorized and directed <u>as part of the Petitioners' restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners</u> or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise (the "Solicitation Process") on the terms set out in this order . . . .[Emphasis added.]

From this point, the Monitor became largely occupied with the possible sale of the assets of the Business as a going concern rather than with a compromise or arrangement with creditors. This proved to be an arduous task, given the complexity of the Group's organization and the fractious relations amongst its members and former members.

3 The relevant chronology begins prior to the *BIA* filing when, as I understand it, customer agreements and accounts receivable listed in a proof of claim filed by various companies (including Teliphone Corp., formerly the parent company of 864) were assigned to TNW Networks effective January 1, 2016. Later in January, six creditors of the petitioners sought unsuccessfully to have TNW Networks, Teliphone Corp. and its subsidiary Teliphone Canada Corp. joined as petitioners in the *CCAA* proceeding. Mr. Justice Affleck dismissed the creditors' application in the absence of evidence that the three corporations were insolvent as required by the definition of "debtor company" in s. 2 of the *CCAA*. (See 2017 BCSC 303 (B.C. S.C.).)

4 As observed by this court in previous reasons, various issues arose among members of the Group concerning the assets of the Business that could eventually be sold by the Monitor. Part of the problem was solved in February 2017 when TNW Networks was required by court order to assign to the Monitor all of its assets used in or necessary for the Business, including certain customer contracts. But the problem was not solved completely.

5 On April 6, 2017, Mr. Justice Bowden made an order that joined Teliphone Canada Corp. as a petitioner and approved a 'dual-track' plan. It gave the Monitor enhanced powers of management of the petitioners' operations (which powers the Supreme Court later described as "receiver-like"). The Monitor was given the authority to pursue a compromise or arrangement, subject to the direction that doing so was not to delay a "Solicitation Process" for marketing the "Property" as a going concern. ("Property" was defined to mean all the property of the three petitioners and any property of TNW Networks "derived from" property of the petitioners.) The order also addressed the problem of ownership of the assets, instructing the Monitor to carry out a "derivative" analysis of the properties in question:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, <u>and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report</u>

the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis. [Emphasis added.]

6 This court in later reasons (2017 BCCA 303 (B.C. C.A.)) summarized para. 6 of Bowden J.'s order as having given the Monitor:

> . . . the authority to sell, subject to the approval of the court, all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded by the process established in para. 6. Nothing in the April 6 order authorizes the Monitor to sell any other assets. [At para. 24; emphasis added.]

The order was not appealed.

7 Despite the April order, the difficulty of determining which assets relating to the Business were assets of the petitioners or TNW Networks, as opposed to assets of other companies in the Group that were asserting ownership (the "Claiming Persons") continued. For example, Teliphone Corp. had filed a proof of claim for some $45 million, based an alleged sale of the shares of the petitioners to Investel Corp. as of the end of 2013. Teliphone asserted it had taken back security for some $22 million, but the Monitor was skeptical, given that no evidence of a registered security interest was located and given the lateness of the claim.

8 In July 2017, the Monitor applied to the Supreme Court for an order approving an "Asset Purchase Agreement" for the sale of the "Purchased Assets" described therein, to Distributel. The appellants opposed the application on the basis that the Monitor lacked the authority to sell those assets that were property of entities other than the petitioners or TNW Networks.

9 The Court had before it the Monitor's seventh report, dated June 27, 2017. In it, the Monitor had described its efforts to determine finally the ownership of the assets "of the Business". However, the Monitor reported:

> 119. . . . the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly and would likely conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors. The Monitor notes that:
>
> > a) the Business is managed by the same personnel;
> >
> > b) customer billings are deposited to the same bank account;
> >
> > c) cash disbursements are made from the same bank account and financed using the same sources of funds including customer billings and loans advanced by the DIP Lender, both prior to and after the commencement of these insolvency proceedings; and
> >
> > d) the transactions of the Business are all accounted for using a common general ledger.
>
> 120. The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets. The Monitor is of the view the complexity of the organizational structure is entirely unnecessary given the relative simplicity of the operating model of the Business.
>
> . . .
>
> 122. Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any

*was not derived directly* or indirectly from the Property of the Petitioners, their subsidiaries, *or any other entities subject to the security interests of the Secured Creditors*.

123. If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking. [Emphasis by underlining added.]

10 The chambers judge who heard the application on July 18, 2017 no doubt shared the Monitor's frustration. He concluded that it would be a waste of time and money to require further efforts on the Monitor's part and that such work was not required. In his words:

The ownership and transfer of assets among the group of companies owned and controlled by the respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's Eighth Report, dated July 7, 2017, which contains an acknowledgement and undertaking on behalf of the respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor. [At para. 20; emphasis added.]

As noted later by this court, the order not only vested the Purchased Assets in the purchaser but also "expunged and discharged" the "ownership or other adverse claims" of various Group members, including Teliphone Corp. The Court approved the sale on the terms sought by the Monitor.

11 It was this order that came before this court, with leave, on August 14, 2017. I can do no better than quote from Mr. Justice Hunter's reasons concerning the issues before the Court on the appeal and its conclusions:

Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA [Asset Purchase Agreement], we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets *of the Business* lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order [of Bowden, J.] conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category. Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.

These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.

The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8 th Report in these terms:

> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as Appendix "H" to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.

The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process. [At paras. 42 — 55; emphasis by underlining added.]

12 In this court's analysis, the evidence suggesting that some of the assets to be sold belonged to Teliphone Corp. or "other entities not before the Court", together with the Monitor's inability to confirm that the assets were assets of the petitioners, had precluded the court below from approving the Asset Purchase Agreement. In the words of Hunter J.A., "The *CCAA* Court had *no jurisdiction* to authorize the sale of assets other than the assets of the petitioners and TNW Networks Corp." (My emphasis.) The appeal was allowed and the order of July 18, 2017 approving the Asset Purchase Agreement was set aside. The stay of proceedings was extended to give interested parties an opportunity to consider the implications of the judgment.

***September Application***

13 The parties were next before the Supreme Court in September, 2017. By this time, the Monitor had issued its twelfth report and a supplement thereto, in which it described its renewed efforts to clarify ownership of the "Disputed Assets." This report

stated that except for assets listed in a schedule as belonging to TNW Networks and customer accounts identified as belonging to other parties, the Disputed Assets consisted primarily of unused domain names, trademarks and tradenames associated with so-called "Legacy Entities" and did not have "material value." TNW Networks claimed ownership of some of these.

14 The Monitor had reached a revised agreement with Distributel under which the Disputed Assets were to be 'carved out' out of the sale that was now proposed, except for the "Critical Disputed Property" (certain domain names described at para. 102 and an AS number) which the purchaser considered important to the Business, and customer contacts "purportedly assigned to [TNW Networks] in January 2016, which in the Monitor's view is the property of the Petitioners." The purchase price was unchanged from that under the previous agreement, but was subject to later adjustment in certain events, including "if the vendor is unable to vend title to the Disputed Assets." In the meantime, the "Required Purchased Assets" were to be sold and the purchaser was given an option to buy Disputed Assets found to be saleable to it, at a later date. The Monitor's analysis of these was set out at pp. 42 — 44 of the twelfth report.

15 On September 15, 2017, the Monitor sought a vesting order approving the sale of the Required Purchased Assets to a Distributel nominee pursuant to the Revised Asset Purchase Agreement. A judge in chambers pronounced the transaction to be "commercially reasonable" and granted the order. Para. 2 of the order stated:

> This Court orders and declares that the Required Purchased Assets (as defined in the Sale Agreement and pursuant to the revised Schedule M to the Sale Agreement) <u>are rightfully owned by the Companies and capable of being sold to the Purchaser</u> by the Monitor pursuant to the terms and conditions of the Sale Agreement. [Emphasis added.]

As before, all encumbrances listed in the schedule to the order, and for greater certainty, "all of the Encumbrances affecting or relating to the Required Purchased Assets", were expunged and discharged as against those Assets. (At para. 3; my emphasis.)

16 Para. 12 of the order authorized the Monitor to carry out a "Disputed Claims Process" in respect of the Disputed Assets. Specifically, the Monitor was to:

> (a) return some or all of the Disputed Assets to the person or persons, other than the Petitioners, who claim ownership of such Disputed Assets (the "Claiming Person"), <u>on terms that are agreed to by the Monitor, the Claiming Person, and the Purchaser</u>; or
>
> (b) consult, in its discretion, with Glen Gregory and Sandeep Panesar, who would be afforded reasonable supervised access to the Petitioners' books, records, executive management personnel and premises, <u>to seek a consensus</u> on whether a Disputed Asset may be determined to be:
>
> > i) beneficially owned by a Petitioner or otherwise able to be sold by the Monitor pursuant to the Sale Agreement (collectively or individually, a "Saleable Asset"), in which case the Purchaser shall have the right to immediately exercise the Option (as defined in the Sale Agreement) with respect to such Saleable Asset without further order of this court; or
> >
> > ii) beneficially owned by a Claiming Person and not a Saleable Asset, in which case the Monitor shall release such asset as soon as practicable to such Claiming Person;
>
> (c) failing an agreement referred to in subparagraph (a), or a determination of a Saleable Asset pursuant to subparagraph (b)(i) on or before October 2, 2017, the Claiming Person shall deliver to the Monitor no later than October 13, 2017, a proof of claim, verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the Disputed Asset to be identified. For clarity, such proof of claim may include more than one Disputed Asset. The Monitor shall then, <u>within 15 days of receipt of such proof of claim, on notice to the Claiming Person, either admit the claim or advise that the claim is not admitted</u>. Unless an application is brought in this proceeding to appeal the Monitor's determination within 15 days of notice of the Monitor's determination, the Monitor shall either:

1) release the Disputed Asset, if the claim is admitted; or

2) be entitled to classify such asset as a Saleable Asset, if the claim is not admitted.

(the "Disputed Claims Process".)

Upon conclusion of this process, the Monitor was to file a report and seek any consequential orders. Importantly for purposes of this case, the order stated that any person dissatisfied with the Monitor's decision could appeal to the Supreme Court.

17 I understand the closing of the sale of the Required Purchased Assets took place in the fall of 2017, although the purchase price may not yet have been paid in full.

18 The Monitor duly began the Disputed Claims process. Proofs of claims were filed by counsel on behalf of TNW Networks, Teliphone Corp. and other "Claiming Persons", who are appellants herein. The Monitor responded by letters dated October 4 and 16, 2017 to counsel for the appellants. In the letters, it again recounted the various steps and court orders summarized above, including the April 2017 order and the August 2017 appeal. The Monitor acknowledged the effect of this court's reasons as follows:

> Paragraph 24 of the Court of Appeal Reasons for Judgment [quoted above at para. 11 of these reasons] confirmed that, pursuant to the April 6 Order, the Monitor has the authority to sell, subject to approval of the Court, all of the assets of the Petitioners, together with those assets of TNW Networks that are not excluded by the process established by paragraph 6 of the April 6 Order.
>
> Paragraph 51 of the Court of Appeal Reasons for Judgment states that the April 6 Order sets up a mechanism for separating assets <u>of TNW Networks</u> Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets <u>of TNW Networks C</u>orp. that were not in the former category.
>
> <u>The Court of Appeal Reasons for Judgment also make clear that the Monitor did not have jurisdiction to sell assets merely because they belonged to a subsidiary of one of the Petitioners, or because they may be subject to the interests of the secured creditors. The derivation test set out in the April 6 Order still had to be assessed by the Monitor to confirm whether it did not have jurisdiction to sell the assets.</u>
>
> Accordingly, the Court of Appeal Reasons for Judgment confirm that TNW Networks property, including the customer accounts, that is available to be sold <u>is to be determined in accordance with the derivation test set out in paragraph 6 of the April 6 Order</u>. [Emphasis added.]

As far as I am aware, none of the parties challenges the Monitor's assumption that the "derivation process" contemplated by Bowden J.'s April order was to continue in effect.

19 The Monitor then embarked on an analysis of the Disputed Assets, classified according to each Claiming Person. It stated in the October 4 letter that it had:

> . . . undertaken the following analysis for each Claiming Person claiming ownership of the customer accounts that were assigned to TNW Networks Corp. by the Assignor Companies. This analysis concludes that the customer accounts were either (i) acquired directly by the Petitioners from Teliphone Corp. in 2013; (ii) assigned by one of the Subsidiaries to TNW Networks Corp.; (iii) <u>assigned to TNW Networks Corp. by other entities that are subject to Secured Creditor's security</u>; or (iv) do not form part of the Purchased Assets and will not be sold (an "Excluded Asset").

20 I do not intend to describe each analysis in detail but will refer to some that may be of interest from a legal point of view. I note that at the outset of its analysis, the Monitor provided a table which purported to categorize the source of its "authority

to vend property". The table had a column headed "Derived from Entity subject to Security of the Applicants", another headed "Derived from Subsidiary of Petitioners" and another headed "Owned by/Derived indirectly from the Petitioners."

21 With respect to Teliphone Corp., the Monitor was satisfied that the petitioners had acquired its assets in return for the issuance of Class B shares of 864 on January 1, 2013. Accordingly, the Monitor concluded, the customer accounts were property of the petitioners and not of TNW Networks and were therefore "not subject to the derivation analysis".

22 The Monitor added, however, that "another basis" for finding the accounts were not TNW Networks property for purposes of the April 6 order was that Teliphone Corp. had granted Bell Canada a general security agreement (GSA") in June 2012. Mr. Panesar of TNW Networks had disputed that Teliphone Corp. was subject to the GSA "as its debts were paid". The Monitor expected that Bell Canada would not recover its debt in full from the *CCAA* proceedings, so that there would be a shortfall that Bell could seek to recoup as against Teliphone Corp. under the GSA. The Monitor concluded:

> Thus, if Teliphone Corp. did not sell its assets to 864, Teliphone Corp. clearly purported to assign its customer accounts to TNW Networks as noted on the [January 1, 2016] Assignment Letter. Accordingly, <u>those accounts were derived from an entity that was subject to the applicants' security, a criterion pursuant the April 6 Order</u>. [Emphasis added.]

23 With regard to a company called Cloud-Phone Inc., Teliphone Corp. had adduced evidence to show that it was a subsidiary of Teliphone Corp., rather than of one of the Petitioners, but this assertion had not been substantiated by minute book records, share certificates, etc. The Monitor took the view that disputed contracts previously owned by Cloud-Phone Inc. were either property of 864 that had been assigned to TNW Networks, or that there was insufficient evidence to determine that they were Networks Property in accordance with the April order. The Monitor concluded that the accounts were "derived from a Subsidiary and were not, therefore, Networks Property within the terms of the April 6 order."

24 Similar reasoning applied to a company called Coastline Broadcasting. The Monitor rejected evidence it had received to the effect that this company was owned by Teliphone Corp. It concluded that Coastline's accounts that had been assigned to TNW Networks were "property of a Subsidiary" that had been assigned to TNW. They were therefore not Networks Property.

25 With respect to two companies — 9151-4877 Quebec Inc. and Orion Communications Inc. — the Monitor found that they had been acquired by Teliphone Corp. prior to the January 2016 transaction under which the Petitioners had acquired the assets of Teliphone Corp. According to the Monitor, the assets of each of these companies had been conveyed to the Petitioners under that transaction. The Monitor considered that evidence tendered by or on behalf of the Claiming Persons was not sufficient to prove that customer accounts derived from these companies were held by TNW Networks and had not been derived "directly or indirectly from an entity subject to the Applicants' security." (The Applicants were the secured creditors who were named as applicants in the text of the April 6 order.) In the result, these accounts were determined not to be Networks Property and were saleable by the Monitor.

26 With respect to TNW Networks itself, the Monitor said it understood that TNW Networks was claiming accounts of customers with whom it had entered directly into service agreements after January 1, 2016. However, the petitioners had paid all of TNW Networks' costs of doing so, including the costs of personnel and maintenance of infrastructure. TNW Networks, on the other hand, had not maintained a ledger to account for such transactions. The Monitor concluded that the accounts were "derived directly or indirectly from the Property of the Petitioners". As well, it noted, TNW Networks was subject to security held by Bond Mezzanine Fund III Limited Partnership ("Bond III") in the form of a GSA granted prior to the April 6 Order. The Monitor continued:

> That general security agreement attaches to all present and after-acquired property of TNW Networks. As a result, the Monitor has determined that all of the contracts that were assigned to TNW Networks Corp. on and after January 1, 2016 are subject to the Applicants' security and are therefore Property of the Petitioners available for sale. [Emphasis added.]

27 The Monitor ended its letter of October 4 with the following summary:

> Based on the factors described above, and in particular the following factors, the Monitor has determined that all of the customer accounts assigned to TNW Networks Corp. pursuant to the Assignment Letter are capable of being sold by the Monitor pursuant to the April 6 Order:
>
> 1. the customer accounts were assigned to TNW Networks by the Assignor Companies on or about January 1, 2016, as evidenced by the Assignment Letter;
>
> 2. all of the customer accounts assigned to TNW Networks were determined by the Monitor to be used in or necessary for the business of the Petitioners;
>
> 3. the customer accounts were assigned to the Monitor pursuant to the Irrevocable Assignment;
>
> 4. the April 6 Order authorizes the Monitor to market and sell the assets and undertakings of the Companies (being the Petitioners and TNW Networks), other than assets the Monitor determines were not derived directly or indirectly from the property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security; and
>
> 5. all of the customer contracts and accounts (except for the Excluded Assets) have been determined by the Monitor to have not been derived, directly or indirectly, from the Property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security.
>
> Accordingly, the Proof of Claim of the Claiming Persons relating to the customer accounts, apart from the Excluded Assets, is not admitted, pursuant to the Vesting Order. [Emphasis added.]

28 In its letter of October 16, 2017, the Monitor reviewed the reasons it had previously expressed for rejecting the proof of claim of the Claiming Persons. It summarized its reasons under three headings — "Claiming Persons were identified as shell companies", "Teliphone Corp. transferred its assets to the Petitioners" and "The derivation of assets held by TNW Networks". The Monitor also provided a table which again summarized its findings with respect to specific assets held by specific companies.

29 In the end, the Monitor disallowed all the claims of the Claiming Persons.

***The December 2017 Application***

30 On November 27, 2017, the purchaser under the Revised Purchase Agreement exercised its option to acquire certain of the Disputed Assets, conditional on Court approval. On December 14, 2017, counsel again appeared before the chambers judge below seeking a second vesting order and the Court's approval of the sale of the assets under the option. Although we are told that no formal notice of appeal was filed, the Court (see para. 6 of the reasons) and counsel treated the hearing as an appeal of the Monitor's disallowance of the proof of claim. (As noted earlier, the order of September 2017 had stated that anyone not satisfied with the Monitor's decisions to allow or reject proofs of claim could appeal to the Court.)

31 The submissions of counsel occupied eight days and the Agreement was subject to a deadline of December 28 — a fact that made it impossible for the judge to deliver complete reasons at the end of the hearings on December 14. However, he provided a summary of his conclusions, acknowledging they were "inevitably conclusory, not analytical."

**The Chambers Judge's Reasons**

32 The chambers judge noted the difficulties concerning ownership that had persisted throughout the *CCAA* process in this case, and this court's comments on those difficulties. He continued:

> The difficulties arise in large part for three reasons, in my view. The first and most important is that the management of the TNW Group made a decision before this *CCAA* process began to operate the Group as if it was a single company. For example, the whole of the business has been managed by the same people, all customer billings had been deposited

> to a pooled bank account, and all transactions, regardless of which company in the Group was involved in a particular transaction, have been records in a common general ledger.
>
> The second reason for difficulty in determining ownership of assets is that although the Monitor has asked for records of various important transactions to be provided, in several instances no such documents were forthcoming. There may be legitimate reasons for the absence of documents, one of which may be that they do not exist, but that has added to the difficulties, and it is for the appellants to demonstrate to the Monitor what they own. They have not provided readily accessible particulars of the claimed assets.
>
> A third reason for the difficulties is that affidavits proffered in this proceeding by the appellants have in some instances challenged the accuracy of audited financial statements long after they have been prepared.
>
> I will also comment that the reliability of affidavits made by the management of the TNW Group of companies has been called into question. The Monitor, in my opinion, has properly considered them with a critical eye. [At paras. 8 — 11.]

33 A "salient feature" of the appellants' argument, the judge observed, was that the standard of review applicable on the appeal to the Monitor's determination was one of correctness. The chambers judge said he did "not agree entirely." He found that the leading authority on the question of standard of review was *AbitibiBowater inc., Re*, 2011 QCCS 4284 (C.S. Que.), which (the judge stated at para. 13 of his reasons) indicated that a *reasonableness* standard applied to the Monitor's decision to reject the Claiming Persons' proof of claim. In his analysis, the Monitor's determinations about the ownership of assets had largely involved questions of *fact*: the proof of claim was "rejected principally because the management of the TNW Group was unable to provide the Monitor with satisfactory evidence of ownership."

34 *Abitibi* involved the findings of a *claims officer* appointed by a *CCAA* monitor to determine, *inter alia*, the *value* of a claim asserted by a company, "Woodbridge", against a subsidiary of Abitibi Consolidated Corp. Inc., which was in *CCAA* proceedings. I note that s. 20 of the CCAA, which deals with the determination of the values or "amounts" of claims, does not state expressly by whom they are to be decided, although under s. 20(2) it is the company, or petitioner, that "may admit the amount of a claim for voting purposes under reserve of the right to contest liability" and that may divide the claims into classes under s. 22(1). Thus the Alberta Court of Appeal observed in *Alternative Fuel Systems Inc., Re*, 2004 ABCA 31 (Alta. C.A.):

> A company which invokes the *CCAA* process retains a great deal of control over it. Under the *CCAA* claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)(a)(iii) [now s. 20(1)(a)(iii)] states, "if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor".
>
> Section [20(2)(a)(iii)] permits different treatment of different claims. The company can admit a claim, or refer it to a court to determine by summary application or trial. In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination. [At paras. 52 — 3.]
>
> If the company does not admit a proof of claim, the amount is to be determined by the court on summary application under s. 20(1)(a)(iii) or s. 20(1)(b).

35 Appeals are dealt with in more general terms under s. 13, which provides:

> 13. Except in Yukon, <u>any person dissatisfied with an order or a decision made under this *Act* may appeal</u> from the order or decision on obtaining leave of the judge appealed from or of the court in which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [Emphasis added.]

36 The claims officer in *Abitibi* had had a written record before him as well as *viva voce* evidence from various witnesses. He ultimately adopted a value of $24 million (U.S.), considerably more than the $9 million (U.S.) that the monitor had allowed. As will be discussed more fully below, the Court decided that the appeal from the claims officer's decision to the Court was

"not to proceed on a *de novo* basis" but to be decided applying the criteria of a "true appeal". (At para. 70.) The standards of review applicable to the appeal were to be those enunciated in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.).

37 The chambers judge acknowledged that the case at bar did not involve a decision made after an adversarial proceeding before a claims officer. But, he observed, the Monitor here had been given "receiver-like powers" by the Court and had conducted its own inquiry into the proofs of claim in accordance with the April 2017 order. The appellants had put their full case before the Monitor and provided numerous affidavits. The judge then stated his conclusion on the question of standard of review:

> As in *Abitibi* I view the matter before me <u>as a true appeal</u>. The appellants <u>must demonstrate the Monitor fell into overriding and palpable error</u>. In my view, the Monitor properly made its determinations on the evidence before it. I do not agree with Mr. Gregory that it ignored relevant and probative evidence. Even when considering the evidence and making findings of fact, the Monitor is entitled to a margin of error. If I disagree with a factual finding of the Monitor, that is not sufficient in itself to set it aside. <u>It must be an overriding and palpable error; a clear and obvious mistake</u>. I am not persuaded the Monitor fell into that type of error. [At para. 15; emphasis added.]

It will be noted that this standard was *not* one of reasonableness, which the judge had approved earlier in his analysis.

38 After dismissing some of the more specific arguments made by counsel, the chambers judge approved the "sale, assignment, transfer and conveyance of all of the [O]ptional [P]urchased [A]ssets" listed in a schedule to the Monitor's fifteenth report. Para. 3 of the order stated:

> This Court orders and declares that all of the Schedule "A" Assets are rightfully owned by the Companies and capable of being sold to the Purchaser by the Monitor pursuant to the terms and conditions of the APA.

**The Appeal**

39 It is from this order that the appellants now appeal, with leave. I emphasize that leave was granted for an appeal limited to the following question:

> Did the chambers judge err in holding that in *Companies' Creditors Arrangement Act* proceedings the standard of review on an appeal from a determination made by a Court-appointed Monitor conducting a proof of claim process with respect to the ownership of disputed assets is "overriding and palpable error; a clear and obvious mistake", as opposed to "correctness"?

40 Thus this court is not asked to rule on any particular finding on any specific proof of claim made by the Monitor and affirmed by the chambers judge, but simply to answer the question posited. Nevertheless, the appellants who are represented by Mr. Gregory seek in their factum an order that:

> a. This appeal from the order of [the chambers judge] be allowed,
>
> b. The appeal from the Monitor's decisions respecting 8583498 Canada Ltd. (often referred to as "Rocket") and ChoiceTel
>
> > i. be allowed;
> >
> > ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and
> >
> > iii. those assets be returned to them forthwith.
>
> c. The appeal from the Monitor's decisions respecting all of the hard assets attributed to the remaining appellants
>
> > i. be allowed;

ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and

iii. those assets be returned to them forthwith.

d. The remaining issues be remitted to Mr. Justice Affleck for decision in accordance with this decision.

Teliphone Corp. on the other hand seeks an order setting aside the chambers judge's order dated December 14, without more.

41 In my view, we ought not to undertake any issues beyond the one posed in the leave order. I would word the question slightly differently: what standard(s) of review was the chambers judge required to apply to the Monitor's determination, in the course of whether to allow or reject the proof of claim before it, of which assets could be sold to the purchaser? My answer is that the appeal to the Supreme Court was a "true appeal" in this case and was subject to the standards of review applicable to most civil appeals — the standard of correctness for *extricable* questions of law, and the standard of "palpable and overriding error" for questions of fact or mixed fact and law. In my opinion, this conclusion accords not only with the binding authority of *Housen* and persuasive Canadian authorities in the insolvency field (including *Abitibi)*, but also with the statutory context and the practical realities of a *CCAA* administration. I turn briefly to these factors.

***The CCAA***

42 As is well-known, the *CCAA* began its life as a very short statute in 1933 to "preserve enterprise value, jobs and good will through amicable settlement with creditors": see Janis Sarra, ″The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments″, (2011) 50 *Can. Bus. L.J.* at 212. In her text *Rescue! The Companies' Creditors Arrangement Act* (2007), Professor J. Sarra defines the purposes of the *CCAA* as "providing a court-supervised process to facilitate the negotiation of compromise and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors." (At 1.)

43 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Supreme Court described the purpose of the *CCAA* as being to permit insolvent debtors to "continue to carry on business and, where possible, avoid the social and economic cost of liquidating [their] assets." The Court noted that at the time of its enactment, the *Act* was "innovative", since it allowed the insolvent debtor to "attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation." (At para. 16.) The Court also described three ways of "exiting *CCAA* proceedings":

> The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor is compromised or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the organization's regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations. [At para. 14.]

44 The Supreme Court described the *BIA* and *CCAA* as "forming part of an integrated body of insolvency law" (at para. 78) and suggested that courts should rely first on an interpretation of the provisions of the statute before turning to inherent or equitable jurisdiction to "anchor measures taken in a *CCAA* proceeding." Deschamps J. for the majority agreed with Professor Sarra and Justice G. Jackson that "When given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives." (At para. 65.)

45 In recent years, the *CCAA* has often been invoked in so-called "liquidating *CCAA*s" in which the sale of substantially all the assets of the debtor company takes place and the company ceases to operate. Although this development has been questioned as contrary to the original purpose of the *CCAA* (see A. Nocilla, "Is Corporate Rescue Working in Canada?" (2013) 53 *Can. Bus.*

*L.J.* 382), innovation has been the hallmark of the evolution of the *CCAA* and in some instances, a liquidation may turn out to be the best way to avoid the "social and economic cost" attendant upon an insolvency. In the case at bar, the fact that a liquidation was undertaken led to the 'innovation' that the Monitor was given the task of deciding not the *values* of *creditors'* claims, but the *ownership of assets* claimed by other persons. To some extent, then, we are in unchartered territory under the statute.

46 Finally, I note the time-pressured environment in which decisions must be made in *CCAA* proceedings — perhaps more so than under the *BIA*. As Yamamuchi J. observed in *Transglobal Communications Group Inc., Re*, 2009 ABQB 195 (Alta. Q.B.):

> Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in *Re Androscoggin Energy LLC***,** 2005 CarswellOnt 589; 8 C.B.R. (5th) 11 at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in *Re Royal Oak Mines Inc.*, 1999 CarswellOnt 792; 7 C.B.R. (4th) 293 at para. 5 (Ont. Ct. Just. Gen. Div.):
>
>> Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.
>>
>> [At para. 48.]

There is no reason to suggest that liquidations are any less time-sensitive than the more usual compromises or restructurings under the *CCAA*.

***The Role of the Monitor***

47 The use of court-appointed monitors has also been an innovation in the courts' treatment of *CCAA* cases. Prior to 1997, monitors were appointed pursuant to the inherent jurisdiction of the superior courts. They reviewed the financial and business affairs of the debtor, provided independent information to the court on the progress of the proceedings, and assisted in administrative matters such as notifying creditors and organizing and managing meetings of creditors: see Sarra, *Rescue* at 257.

48 The professionalism and impartiality of the monitor's role were codified in 1997 following the recommendations of a task force that reported in 1994: see Sarra at 258. Section 11.7(1) now requires that a monitor be appointed by a court on the initial application and that the person so appointed be a trustee within the meaning of s. 2(1) of the *BIA*. Section 11.7(2) disqualifies certain persons who would have an interest in the debtor or would not be seen to be impartial. As officers of the court, monitors must remain impartial and "objectively look out for be concerned for the interests of all stakeholders": see *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]), *per* Farley J.

49 Section 23 sets out the various duties of monitors, which apply unless the court orders otherwise. Generally, these are duties of monitoring the company's business affairs and reporting to the court thereon, carrying out appraisals or investigations considered necessary by the monitor, assisting the company's creditors in certain respects, advising the court on the "reasonableness and fairness" of any proposed compromise or arrangement, making certain documents publicly available and carrying out "any other functions in relation to the company that the court may direct." Courts have used s. 23(1)(k) liberally to assign additional functions to monitors that go beyond investigating and reporting to the court. As noted by Yaad Rotem in "Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada", (2008) 3 *Va. L.& Bus. Rev*. 125, monitors have been authorized to act as financial advisors to the parties or the court, to facilitate or mediate between management and creditors, and to fulfill certain functions of directors or managers. (At 148.) The monitor may even effectively replace the board of directors and senior management of a corporation: see *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) Thus Professor Sarra writes:

> Long gone are the days when the monitor acted as a passive observer, reporting to the court. Monitors now play a range of roles, including mediator or facilitator in the negotiations, debtor advisor, creditor assuager and officer of the court. The recent amendments bolster this authority, requiring in a number of instances, such as DIP Financing and the sale of assets to related parties, that the court consider the views of the monitor. However, the court has observed that while the support or approval of the monitor is an important factor, it is not decisive in and of itself. The courts continue to stress the need for independence and impartiality of the monitor. In approving a series of agreements that provided the debtors with certainty with respect to ongoing funding, the resolution of inter-company issues, and a settlement with taxing authorities, <u>the court held it was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement</u>. [*Evolution, supra* at 234 — 5; emphasis added.]

In this case, it will be recalled, the April order 'enhanced' the Monitor's powers: it contemplated that the Monitor would carry out the day-to-day management of the petitioners' operations.

50 In recent years, Canadian courts have also adopted the practice of appointing claims officers to assist in determining the "amount represented by a claim of any secured or unsecured creditor" under s. 20 of the *CCAA*. Various provinces have developed model claims process orders, but these vary widely across Canada. Where the order provides for the appointment of a claims officer, that officer may be given the authority to determine the procedure for adjudicating such claims and may reach a determination of the value that is often stated to be final and binding on the company or creditor, subject to any further order of the court.

51 The general role of a claims officer was dealt with in *Abitibi*, which as we have seen was cited with approval by the chambers judge in the case at bar. As noted, *Abitibi* involved a motion to vary the determination of a claims officer who had in accordance with a claims procedure order valued a claim at $24 million (U.S.) The creditor contended that the value was much greater and that in ruling upon the motion, the Court owed no deference to the claims officer's determination. It urged the Court to reassess the evidence, and to consider new evidence that had not been before the officer, and thus to make its own determination of the correct value of the claim. (At paras. 6-7.) Abitibi responded that Woodbridge had failed to establish "any error in law or any palpable and overriding error in fact" in the claims officer's determination.

52 The Court in *Abitibi* formulated the first of three series of questions before it as follows:

> What is the standard of review of the Claims Officer's Determination? Should the Court proceed on the basis of a true appeal or *de novo*? What are the applicable criteria for the Court's intervention?

53 Beginning its analysis at para. 66, the Court noted that a "thorough adversarial proceeding" had taken place before the claims officer at which both sides presented affidavit evidence, including expert reports. *Viva voce* testimony with cross-examination had also been allowed and counsel had made oral and written submissions. In the circumstances, the role of the Court was not to "conduct a trial *de novo* and plainly set aside the findings of the claims officer, reassess the matter and substitute its own discretion." (At para. 67.) This conclusion was found to be supported by case law, including the decision of Morawetz J. in *General Motors Corp. v. Tiercon Industries Inc.* (2009), 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), *aff'd* 2010 ONCA 666 (Ont. C.A.) and *Triton Tubular Components Corp., Re* (2005), 14 C.B.R. (5th) 264 (Ont. S.C.J.), which also involved a "full blown trial-like proceeding" before a claims officer under the *CCAA*. Lederman J. noted in the latter case that:

> By seeking a hearing *de novo* on this file, Steelcase is requesting a second trial. If the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the *CCAA* and the Commercial List practice. [At para. 14.]

(Cf. *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9 (N.L. T.D.) at paras.14-8.)

54 As was noted in *Abitibi*, the Court in *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.) had reached the opposite conclusion, but the appeal in that case had been "solely concerned with matters of law," and it had been decided prior to *Tiercon* and *Triton*. (At para. 76.) The *Abitibi* Court also found guidance in the decision of the Ontario Court of Appeal in *Credifinance Securities Ltd., Re*, 2011 ONCA 160 (Ont. C.A.), where LaForme J.A. had stated for the Court:

> At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: *Charleston Residential School (Re)* (2010), 70 C.B.R. (5$^{th}$) 13 (Ont. S.C.) at paras. 1 and 18.
>
> I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the *BIA* is not intended to be a trial *de novo* but rather a true appeal: *Galaxy Sports Inc. (Re)* (2004) 1 C.B.R. (5$^{th}$) 20 (B.C.C.A.) at para. 40. <u>The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency</u>.
>
> <u>This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency and the operation of the bankruptcy scheme would be lost</u>. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the *BIA*, <u>which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality</u>: *Galaxy Sports* at para. 41. [At paras. 24-6; emphasis added.]

55 With respect to standard of review, the Court in *Abitibi* also adopted the conclusions of Morawetz J. in *Tiercon*, who had summarized the standard of review applicable to a claims officer under a *receivership* order, essentially in the terms used in the seminal case of *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), as follows:

> The Claims Procedure Order provides that a party may appeal a final determination of the claims officer.
>
> The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:
>
> > a. With respect of pure questions of law, the standard of review is correctness.
> >
> > b. With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.
> >
> > c. With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.
> >
> > d. With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.
> >
> > . . .
>
> The role of the court on . . . appeal is to review the decision of the Claims Officer. It is not to conduct a trial *de novo*. [*Tiercon*, at paras. 11 — 12.]

(See also Morawetz J.'s comments in *Target Canada Co. (Re)*, 2017 ONSC 2595 (Ont. S.C.J.) regarding a claims officer's determination of the value of claims under the *CCAA*, at paras. 11 — 13; and *Triton Tubular* at para. 15, adopting the *Housen* standards.)

56 In the result in *Abitibi*, the Court rejected the possibility of a *de novo* hearing, observing an "appeal process" was "perfectly acceptable" given that the final say remained with the Court and not with the claims officer. (At para. 104.) The Court applied

the standard of palpable and overriding error to the questions of *fact* that had been analyzed by the claims officer, finding that no such error had been shown. The appeal was dismissed. (Paras. 138, 145, 160.)

57 As mentioned earlier, the chambers judge in the case at bar followed *Abitibi* to the extent that he viewed the matter before him as a "true appeal" in which the appellants had the onus to demonstrate that the Monitor had fallen into overriding and palpable error. (At para. 15, quoted earlier in these reasons.) At the same time, he rejected the proposition advanced by counsel for the appellants that the governing authority in British Columbia was *Galaxy Sports Inc., Re* [2004 CarswellBC 1112 (B.C. C.A.)]. That case involved various decisions made by a trustee under s. 135 of the *BIA*, which provides that a trustee shall determine whether an unliquidated claim is provable and if so, the value thereof. As this court noted, s. 135(4) provides that a trustee's decision as to the value of such a claim or the disallowance of any claim under s. 135(2) is "final and conclusive" unless it is appealed within 30 days. (At para. 31.)

58 The first issue raised in *Galaxy* that is relevant to this appeal concerned whether the hearing in the Supreme Court was a trial *de novo* in which the Court was entitled, without recourse to the *Palmer* criteria for the admissibility of "fresh evidence", to consider evidence that was not before the trustee. This court noted that *Eskasoni Fisheries Ltd., Re* (2000), 16 C.B.R. (4th) 173 (N.S. S.C.) and *Port Chevrolet Oldsmobile Ltd., Re*, 2004 BCCA 37 (B.C. C.A.) had proceeded on the basis that the chambers judge could consider, *as a matter of course*, material that had not been before the trustee in deciding whether the proof of claim had complied with s. 124 of the *BIA*. (See para. 36.) In *Galaxy*, however, we held that the Supreme Court's hearing of an appeal under s. 135(4) was not intended to be a trial *de novo* but a "true appeal", citing *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53 (B.C. C.A.) and *Dupras v. Mason* (1994), 120 D.L.R. (4th) 127 (B.C. C.A.), both of which dealt with appeal proceedings under the *Mineral Tenure Act*. The Court stated in *Galaxy:*

> . . . similar considerations apply in this case with respect to the expertise of trustees in bankruptcy. As I have already mentioned, they can be expected to have considerable experience and expertise in the area of business financing, restructurings and insolvency. If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal *as a matter of course*, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality. [At para. 41]

As I read *Abitibi*, the Court agreed with this conclusion, as did the chambers judge in the case at bar.

59 With respect to standard of review, we were referred by counsel in *Galaxy* to the standard of review analysis in administrative law and in particular "the pragmatic and functional" approach that was applied to decisions of administrative tribunals at that time. On a consideration of the "contextual" factors mandated by that approach, this court saw:

> . . . no reason to disagree with the longstanding principle enunciated in *Re McCoubrey* [(1924) 5 C.B.R. 248 (Alta. T.D.)] which <u>requires the application of a "correctness" standard where compliance with a "mandatory provision</u>" (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. [At para. 39; emphasis added.]

Into the former category, the Court placed a decision of the chair of the creditors' meeting rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, the Court placed the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). (At para. 39.)

60 Since *Galaxy* was decided, administrative law has changed substantially and the standards of review in ordinary civil appeals have solidified, beginning with *Housen*. Matters of mixed fact and law are now subject to the same standard as purely factual matters. I am doubtful that administrative law considerations should be injected into the analysis of standard of review in this case — except for the fact that the chambers judge appears to have conflated the "palpable and overriding error" standard

(adopted at para. 15 of his reasons) with that of "reasonableness" (referred to in para. 13.) Although he purported to agree with *Abitibi*, the *Housen* standard — *not* reasonableness — was held to apply to the findings of fact or mixed fact and law at issue in that case. (That said, the two are probably not far apart: where a palpable and overriding error as to a factual matter is made, it would be difficult to say the analysis is nonetheless reasonable.)

***Application to this Case***

61 What then is the standard of review applicable to the determinations made by the Monitor in this instance as to the saleability (i.e., ownership) of the Disputed Assets in the course of determining the appellants' proofs of claims? As Teliphone Corp. observed in its factum, the *CCAA* does not expressly contemplate property ownership disputes. There appears to be no decision of an appellate court that establishes an appropriate process to determine *ownership* issues, or determines the applicable standard of review. Nevertheless, since the *CCAA* and *BIA* are to be regarded as parts of a larger scheme of insolvency legislation it is useful to consider comparable decision-makers under the *BIA*. *Galaxy* determined the decision of a trustee concerning compliance with a 'mandatory' provision under the *BIA* — an issue of law — was reviewable on a correctness standard. Subsequent lower court decisions have adopted similar reasoning with respect to decisions of trustees allowing or rejecting proofs of claim under s. 81(2): see *Sran v. Sands & Associates*, 2010 BCSC 937 (B.C. S.C.) at paras. 46-7; and *Hertz v. 1593658 Ontario Inc.*, 2011 SKQB 379 (Sask. Q.B.) at para. 38.

62 The process followed by the Monitor in the case at bar was not the creature of any statute but of the Supreme Court's order of September 2017. As the Monitor states in its factum:

> The Disputed Property Claims Process was customized for the purpose of these *CCAA* proceedings. The Monitor was authorized to fulfill the function of the arbiter, as it had developed considerable knowledge of this factually complex *CCAA* matter, was less costly than involving an outside party, and was unable to do so to meet the urgency of the circumstances. An extremely compressed timeline was involved, and no outside party could realistically fulfill the role in the circumstances. [At para. 53.]

As mentioned earlier, the order specified that any Claiming Party dissatisfied with the Monitor's decision could appeal to the court; as well, s. 13 of the *CCAA* provided an appeal with leave.

63 The Process followed by the Monitor did not entail a formal hearing of witnesses' testimony, but clearly involved the examination of many documents, public and private, and lengthy affidavits of representatives of interested persons. The Monitor asserts that by making it the "arbiter" of the parties' disputes regarding assets, those parties could be taken to have understood that the Monitor would consider the information, documents and evidence it had amassed over the previous nine months, as well as any further evidence that the Claiming Persons were invited to file if they wished. Thus, the Monitor says, there was never any expectation of a "record" in the sense of a formal body of evidence to be considered by it. The Monitor analogizes the process it followed to the "reasonable investigations" normally conducted by trustees in bankruptcy in reviewing claims, citing paras. 39 and 42 of *Sran v. Sands & Associates*. It goes on to assert that without a "record", it was "frankly impossible for the *CCAA* judge to consider the Monitor's *factual* determination on the basis of *correctness*." (My emphasis.)

64 I agree that *factual* determinations and those of *mixed fact and law* are not subject to a correctness standard, but should now be subject to a standard of palpable and overriding error. However, in this case, the fact a sale of assets was being proposed made it necessary for the Monitor to determine exactly what assets were property of the petitioners or TNW Networks — a decision likely to involve issues of law not usually made by monitors under the *CCAA*. This court's decision of August 17, 2017 leaves no doubt, for example, that the Monitor here did not have the authority, as a matter of law, to approve the sale of assets belonging to entities other than the Petitioners and TNW Networks. Obviously, this court regarded this principle as one of law, and indeed of jurisdiction.

65 In my view, these considerations all support the conclusion that the appeal contemplated by the September order was correctly regarded as a "true appeal" (at least in the absence of any determination that a *de novo* hearing was required to avoid a miscarriage of justice); and that the standard of review, on *extricable* questions of *law*, was correctness. To the extent that

questions of law — for example the question of whether the assets of a company that is not in *CCAA* proceedings may be sold by reason of the fact that its *parent company* is in *CCAA* proceedings — can be 'extricated', the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, *most* such issues (including the valuation of creditors' claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

66 This result recognizes that although a formal adversarial process did not take place before the Monitor, the Monitor considered a great deal of evidence and *viva voce* testimony as well as taking advantage of his pre-existing familiarity with the factual background of the matters before him. Indeed, this is one of the reasons the Monitor was chosen to conduct the disputed claims process. Given that the Monitor is an officer of the Court, that it is expected to be 'above the fray' and that it is qualified to act as a trustee under the *BIA* and thus has some special expertise, it seems to me that its decisions of fact or mixed fact and law made in the course of ruling on proofs of claim are appropriately assessed on the deferential standard of 'palpable and overriding error'. This conclusion is also consistent with the objectives of efficiency, certainty and cost-saving that underlie *CCAA* proceedings.

**Disposition**

67 I would therefore allow the appeal, set aside the chambers judge's order and answer the question posed on this appeal as indicated in these reasons. I would also remit the matter of the Monitor's rejection of the proof of claim to the Supreme Court of British Columbia to be dealt with in accordance with these reasons.

***Kirkpatrick J.A.*:**

I agree

***Fisher J.A.*:**

I agree

*Appeal allowed.*

# TAB 4

2001 CarswellOnt 221
Ontario Superior Court of Justice

1307347 Ontario Inc. v. 1243058 Ontario Inc.

2001 CarswellOnt 221, [2001] O.J. No. 257, 102 A.C.W.S. (3d) 1061, 4 C.P.C. (5th) 153

# 1307347 Ontario Inc., Plaintiff and 1243058 Ontario Inc. Operating as Golden Seafood Restaurant, Defendant

1243058 Ontario Inc. Operating as Golden Seafood Restaurant, Plaintiff by counterclaim and
1307347 Ontario Inc. and The Bank of China (Canada) and Yuk Chen Jo, Defendants by counterclaim

Nordheimer J.

Heard: January 25, 2001

Judgment: January 26, 2001 *
Docket: 00-CV-197213CM

Proceedings: additional reasons to 2001 CarswellOnt 16 (Ont. S.C.J.); additional reasons at 2001 CarswellOnt 492 (Ont. S.C.J.)

Counsel: *Christine A. Zablocki*, *Robert J. Osborne*, for Plaintiff/Defendant by counterclaim.
*Duncan C. Boswell*, for Defendant/Plaintiff by counterclaim.

**Headnote**

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Mandatory orders

Landlord brought action against tenant related to dispute over tenant's operation of restaurant in plaza owned by landlord — Landlord brought motion for interlocutory injunction restraining tenant from operating on 24 hour basis — Tenant brought motion for interim orders regarding garbage disposal and regarding disputed areas adjacent to leased premises — Motion by landlord was granted — Motion by tenant was dismissed — Order was issued restraining tenant from operating its restaurant at times other than between 7:00 a.m. and 12:00 a.m. and from advertising its hours as other than those stipulated by order — Tenant violated order — Landlord brought further motion to find tenant in contempt of order — Motion granted — Tenant's assertion that order was not understood was not acceptable — Decision had been translated and tenant had benefit of advice of counsel — Tenant must have been able to determine meaning of order because tenant submitted evidence that order was complied with as of specific date.

Judges and courts --- Contempt of court — Punishment for contempt — Remedies available to court — Fine or costs

Landlord brought action against tenant related to dispute over tenant's operation of restaurant in plaza owned by landlord — Landlord brought motion for interlocutory injunction restraining tenant from operating on 24 hour basis — Tenant brought motion for interim orders regarding garbage disposal and regarding disputed areas adjacent to leased premises — Motion by landlord was granted — Motion by tenant was dismissed — Order was issued restraining tenant from operating its restaurant at times other than between 7:00 a.m. and 12:00 a.m. and from advertising its hours as other than those stipulated by order — Tenant violated order — Landlord brought further motion to find tenant in contempt of order — Motion was granted — Tenant's assertion that order was not understood was not acceptable — Fine of $2500 imposed against tenant — If fine is to be applied as sanction for contempt then it ought to be imposed directly and not obliquely through award of punitive damages — Award of punitive damages was not appropriate sanction since punitive damages would flow to landlord rather than to justice system — Justice system, rather than landlord, was first and foremost harmed by tenant's contempt — Relieving landlord of its undertaking as to damages was not appropriate sanction.

Practice --- Practice on interlocutory motions and applications — General

Landlord brought action against tenant related to dispute over tenant's operation of restaurant in plaza owned by landlord — Landlord brought motion for interlocutory injunction restraining tenant from operating on 24 hour basis — Tenant brought

motion for interim orders regarding garbage disposal and regarding disputed areas adjacent to leased premises — Motion by landlord was granted — Motion by tenant was dismissed — Order was issued restraining tenant from operating its restaurant at times other than between 7:00 a.m. and 12:00 a.m. — Tenant did not present evidence to corroborate its contention that had operated for most of its existence on 24 hour basis, or that injunction would cause considerable financial hardship — Tenant brought further motion for rehearing of motion based on new evidence — Motion dismissed — Failure to re-open matter based on new affidavit evidence filed would not lead to miscarriage of justice — Affidavits did not show evidence of fraud or perjury, or that court was being actively misled — Evidence was not such that court would "probably" have reached different conclusion — Evidence as to tenant's loss of business fell short of establishing irreparable harm — Balance of convenience was still in favour of landlord — Evidence could have been obtained with reasonable diligence.
Practice --- Practice on appeal — Staying of proceedings pending appeal — General
Landlord brought action against tenant related to dispute over tenant's operation of restaurant in plaza owned by landlord — Landlord brought motion for interlocutory injunction restraining tenant from operating on 24 hour basis — Tenant brought motion for interim orders regarding garbage disposal and regarding disputed areas adjacent to leased premises — Motion by landlord was granted — Motion by tenant was dismissed — Order was issued restraining tenant from operating its restaurant at times other than between 7:00 a.m. and 12:00 a.m. — Tenant brought further motion for stay of order pending hearing of motion for leave to appeal — Motion dismissed — Irreparable harm would be occasioned to landlord if order were stayed — Any damage occasioned to tenant from order was quantifiable and was covered by undertaking as to damages.
**Table of Authorities**
**Cases considered by *Nordheimer J.*:**

*Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554, 43 D.L.R. (3d) 498 (Ont. C.A.) — referred to

*Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585, 48 D.L.R. (3d) 641, 19 C.C.C. (2d) 218 (Ont. H.C.) — applied

*Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1975), 11 O.R. (2d) 167, 29 C.C.C. (2d) 325, 65 D.L.R. (3d) 231 (Ont. C.A.) — considered

*Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 (Ont. Gen. Div.) — considered

*Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257, [1935] 1 D.L.R. 432, 49 B.C.R. 28 (B.C. C.A.) — considered

*DeGroote v. Canadian Imperial Bank of Commerce*, 1998 CarswellOnt 1628, 71 O.T.C. 252 (Ont. Gen. Div.) — applied

*DeGroote v. Canadian Imperial Bank of Commerce*, 1999 CarswellOnt 1902, 121 O.A.C. 327 (Ont. C.A.) — considered

*Hill v. Church of Scientology of Toronto*, (sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, 184 N.R. 1, (sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130 (S.C.C.) — applied

*Mele v. Royal Bank* (1994), 29 C.P.C. (3d) 3 (Ont. Gen. Div.) — considered

*Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440)* 110 O.A.C. 297, (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440)* 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. *Ogden Entertainment Services v. Kay)* 43 C.L.R.B.R. (2d) 48 (Ont. C.A.) — applied

*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 46 O.R. (3d) 760, 48 C.C.L.T. (2d) 79, 128 O.A.C. 46, 183 D.L.R. (4th) 488, 2 B.L.R. (3d) 1, 41 C.P.C. (4th) 107 (Ont. C.A.) — applied

***Nordheimer J.*:**

1 There are two further motions that were brought before me yesterday in this matter. These motions arise from my decision of January 9, 2001 wherein I granted an injunction restraining the defendant, until the trial of this action or further order of the court, from operating its restaurant at 4466 Sheppard Avenue East at all times other than between the hours of 7:00 a.m. and 12:00 a.m. seven days a week or from advertising, displaying or representing its hours of operations as other than these stipulated hours. First, there is a motion by the defendant for a rehearing of the motion based on new evidence that has been obtained and for a stay of the order pending the hearing of a motion for leave to appeal. Second, there is a motion by the plaintiff to find the defendant in contempt of the order.

**Motion for rehearing**

2 In my reasons for decision of January 9, 2001, I was critical of the defendant for its failure to place before the court evidence that ought to have been available to it to corroborate the defendant's contention that it operated for most of its existence on a 24 hour basis. I was also critical of the fact that the defendant had failed to put before the court any financial information regarding its restaurant business in support of its contention that an injunction would cause considerable financial hardship to the defendant. On this motion for a rehearing, I am now presented with no less than ten new affidavits which are directed at either or both of these criticisms.

3 The test for reopening a matter after a decision has been rendered has been the subject of a number of cases although, as counsel pointed out, all of the available authorities appear to deal with reopening matters after a trial as opposed to after the hearing of a motion. However, I do not see any reason why a different test would be applied. In fact, it seems to me that an argument could be advanced that the test for reopening a motion ought to be more stringent since a motion does not usually result in the final determination of a matter. It normally involves, as is the case here, an interim determination that is going to be subject to a more thorough consideration at a trial. Having said that, I recognize that interim relief, such as an injunction, can still have a significant impact on the parties.

4 The test is most recently stated by the Court of Appeal in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 183 D.L.R. (4th) 488 (Ont. C.A.) where Sharpe J.A. said, at p. 499:

> It was common ground between the parties before the trial judge and before this court that, in the circumstances of this case, the appellant had to establish two points:
>
> 1. that the evidence "might probably have altered the judgment" and,
>
> 2. that the evidence "could not with reasonable diligence have been discovered sooner".
>
> (See *Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 (Ont. C.A.) at p. 557, (1974), 43 D.L.R. (3d) 498 (Ont. C.A.).)

5 The defendant has retained new counsel. Mr. Boswell, fairly and frankly, acknowledges that the information contained in these new affidavits was probably available to the defendant prior to the original motion. However, it is submitted that this information was not put before the court because of a miscommunication between the defendant and its former counsel arising, at least in part, because of the language difference between Mr. Lo (the owner of the defendant) and Mr. Hodder (the defendant's former counsel).

6 The defendant also submits that the reasonable diligence requirement can be avoided if the court is satisfied that the failure to reopen a hearing would result in a miscarriage of justice being visited on a party notwithstanding that the new evidence could have been obtained with reasonable diligence. The defendant relies on *Mele v. Royal Bank* (1994), 29 C.P.C. (3d) 3 (Ont. Gen. Div.) where Davidson J. said, at p. 10:

> In considering the grounds urged for reopening the motion for summary judgment I consider that my discretion should be guided by the concerns expressed in all of the above cases but that I must not lose sight of the fact and, indeed, in my opinion I should be guided by exercising a discretion which will avoid a miscarriage of justice.

7 The defendant also relies on *Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216 (Ont. Gen. Div.) where Mr. Justice D. Lane, at p. 223, adopted the following approach of the British Columbia Court of Appeal in *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 (B.C. C.A.) at p. 441:

> The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

8 There is some criticism of the decision in *Castlerigg* arising from the fact that Mr. Justice D. Lane was not referred to the decision of the Court of Appeal in *Becker Milk Co. v. Consumers' Gas Co.*, *supra*, which sets out the two-prong test that I have referred to above. That issue was raised but not decided in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, where Sharpe J.A. said, at p. 502:

> I would add here that we were not asked to consider whether a trial judge has a broad discretion to reopen the trial "to avoid a miscarriage of justice": see *Castlerigg Investments Inc. v. Lam*, *supra*; *Scott v. Cook*, *supra*. As I have concluded that the appellant has met the test set out in *Becker Milk Co. Ltd. v. Consumers' Gas Co.*, *supra*, it is unnecessary for me to consider this issue.

9 I would consider it to be beyond peradventure that a court will not knowingly allow a miscarriage of justice to occur. As well, until the matter is determined otherwise, I accept that, to avoid such a miscarriage, a trial judge or a motions judge has the discretion to permit a matter to be reopened and new evidence to be admitted even if the evidence could have been placed before the court in the first instance. However, it is also my view that a miscarriage of justice involves more than just a finding that a different result might have occurred. It involves a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the court would be countenanced — see *DeGroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 (Ont. Gen. Div.); aff'd. [1999] O.J. No. 2313 (Ont. C.A.).

10 I am far from satisfied that the failure to re-open this matter based on the new affidavit evidence filed would lead to a miscarriage of justice. I have reviewed each of the affidavits which the defendant now seeks to rely upon. I am also mindful of the fact that none of these affidavits have been the subject of cross-examination. I do not find in these affidavits any basis upon which I could conclude that a fraud was being perpetrated on the court nor do I see any basis upon which I could conclude that perjury was being committed or that the court was being actively misled.

11 The evidence which the defendant now seeks to put before the court goes solely, in my view, to the balance of convenience part of the test for an interlocutory injunction. It was during the consideration of that aspect of the test that I referred to the evidence that was not put forward by the defendant. While two of those affidavits do address the issue of the 24 hour operation of the restaurant, the other affidavits are directed to the issue of loss of business. Those latter affidavits, I must say, still fall considerably short of establishing irreparable harm to the defendant from the impact of the injunction. What they do establish is that any loss of business is likely quantifiable. I also note that even with the advent of these additional affidavits, there is still no specific financial information forthcoming from the defendant regarding its operations.

12 Given my conclusion that a miscarriage of justice will not result from a failure to re-open this matter, I must consider the two-prong test which I set out above from *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*. While I am prepared to admit that had these affidavits been filed on the original motion, the consideration of the balance of convenience would have been made more difficult, I do not believe that I would "probably" have reached a different conclusion with respect to that issue. I am still of the view that the restriction on the defendant's operating hours constitutes a lesser inconvenience than a continuing violation of the site plan and the potential for harm to the other tenants of the Plaza that would arise from permitting the defendant to continue to operate on a 24 hour basis. On this latter point, I do consider the proposal which now emanates from the defendant, that it would arrange for off-site and valet parking to avoid a breach of the site plan, as properly being covered by the colloquialism "too little, too late". In any event, even that proposal fails to address the problems and concerns which the other tenants and the plaintiff have generally regarding the impact of permitting a 24 hour operation in the Plaza.

13 In terms of the second prong of the test, that is, whether the evidence could have been obtained with reasonable diligence, it is clear to me that it could have been. Indeed, it is clear to me that the reason that these affidavits are now forthcoming from the defendant is the direct consequence of the criticisms which were levelled against the defendant in my reasons. While the defendant suggests that his former counsel never asked for this information (a fact which I am told the defendant's former counsel disputes), it seems to me that such a contention is not a reason to relieve against the reasonable diligence requirement. Otherwise, it would altogether become too easy for parties to gain "a second shot" at their desired relief simply by changing

counsel and then claiming that the first counsel failed to address some issue that was fatal to their first attempt. I agree with Madam Justice Lax (and with Mr. Justice Wilkins whom she quotes) when she said in *DeGroote v. Canadian Imperial Bank of Commerce*, *supra*, at para. 14:

> Unquestionably, there is prejudice to the defendants in this case. There is a long history to this litigation. The defendants properly brought a motion before the court under Rule 20 of the *Rules of Civil Procedure*. The plaintiffs resisted the hearing of the motion and were unsuccessful in that effort. They were also unsuccessful on the merits of the motion. It is no passing coincidence that it was only after reasons for judgment were released that the plaintiffs sought to re-open the judgment. As was aptly stated by Wilkins J. in *Strategic*, supra, at p. 421:
>
>> After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of loser.

14 Therefore, notwithstanding the very able submissions of Mr. Boswell, I have concluded that the defendant's motion for a rehearing must be dismissed.

**Motion for a stay**

15 The defendant also moves for a stay pending its motion for leave to appeal. I am told that the motion for leave to appeal is scheduled to be heard on Monday next.

16 The principle to be applied to granting a stay is set out in *Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (Ont. C.A.) where Robins J.A. said, at p. 450:

> In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

17 I noted in my reasons on the original motion that the site plan precludes parking between 12:00 a.m. and 7:00 a.m. I have already found that there would be irreparable harm occasioned to the plaintiff if the injunction was not granted and it follows from that that there would be irreparable harm to the plaintiff if the injunction were stayed. I have also found that any damage that may be occasioned to the defendant from the injunction is quantifiable and is covered by the undertaking as to damages. For all of these reasons, I am not persuaded that a stay of the order should be granted in the circumstances of this case. This, of course, does not preclude a judge of the Divisional Court granting a stay if leave to appeal is granted if he or she is considers that a stay is then warranted. I understand a stay is part of the relief being sought by the defendant on its motion to the Divisional Court.

**Contempt motion**

18 Regarding the plaintiff's motion for a finding of contempt, counsel for the defendant again fairly conceded that the evidence put forward by the plaintiff establishes a breach of the order by the defendant in respect of the sign advertising that the restaurant was open 24 hours and in respect of the evidence of the private investigator regarding the events of January 16/17, 2001. However, counsel for the defendant contends that there is no other evidence which could establish any other breach beyond a reasonable doubt. As well, the defendant has now filed an affidavit which says that, at least from January 17, 2001, the defendant has been complying with the order.

19 There is a statement made by Mr. Lo that he did not understand what was meant by the phrase "operating" in the order. I find that assertion very difficult to accept. Mr. Lo had the decision translated to him and had the benefit of the advice of counsel. Further, an order that prohibits a restaurant from operating between certain hours is not a particularly complicated or complex issue to understand. I also note that it appears that Mr. Lo was eventually able to determine what that prohibition means because he also swears to the fact that as of January 17, 2001 the defendant has been abiding by the order and, indeed, the steps set out in his affidavit sworn January 23, 2001 would appear to constitute compliance with the order.

20 Rather, I believe that a fair reading of Mr. Lo's affidavit is that he had outstanding reservations at the time that the order was made, which reservations would be adversely affected by the order, and that he consciously chose to honour those reservations notwithstanding that in so doing he might well breach the terms of the order. In addition, while I accept that Mr. Lo's affidavit does not establish a continuous breach of the order, it clearly establishes that some additional breaches of the order likely occurred in addition to the ones set out in the plaintiff's evidence.

21 There is also a submission in the defendant's factum that there could not be a finding of contempt because the formal order has not been signed and entered. This submission was not pursued in argument. That seems just as well since I do not believe that the authorities would sustain it, particularly in the case of an injunction. An injunction operates from the time that it is pronounced and no formal order need be taken out in order for a contempt finding to be made — see *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 (Ont. H.C.); aff'd. (1976), 11 O.R. (2d) 167 (Ont. C.A.).

22 In the end result, I am satisfied beyond a reasonable doubt that the defendant failed to comply with the terms of the order of January 9, 2001 in one or more respects on at least four occasions, namely, January 11, 12, 13 and 17, 2001. I therefore find the defendant in contempt of the order in respect of those occasions.

23 In terms of the sanctions to be applied to the defendant arising from its contempt of the order, the plaintiff sought a number of different remedies. One of the remedies was that the plaintiff be relieved from its undertaking as to damages as a consequence. I do not know of any authority, and none was referred to me by counsel for the plaintiff, in which a party obtaining an injunction was released from their undertaking as to damages as a consequence of the other party's failure to abide by the injunction. While I suppose that there might be circumstances where that relief would be warranted, in my view it would only be so in the rarest of cases and this is not such a case. The plaintiff also sought an award of punitive damages. However, I do not view punitive damages as an appropriate sanction for contempt. Punitive damages are said to be "in the nature of a fine" — see *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 (S.C.C.) at p. 186. In my view, if a fine is to be applied as a sanction for contempt then it ought to be done so directly and not obliquely through an award of punitive damages. Further, punitive damages would flow to the plaintiff whereas a fine flows to the system. When a party is guilty of contempt, it is not the other party who is principally harmed, it is the system of justice which is first and foremost harmed and it is the system, therefore, to which the penalty should be paid.

24 I consider the appropriate sanction to be applied to the defendant for its contempt is the imposition of a fine. I therefore order the defendant to pay a fine for its contempt of the order of January 9, 2001 in the amount of $2,500.

**Costs**

25 In my view, the plaintiff is entitled to the costs of both of these motions. While the costs of the motion for a rehearing should be on the normal party and party scale, I believe that, given the inherent nature of the motion for contempt, the costs of that motion should be on a solicitor and client scale, although I am prepared to receive submissions on this latter view. I am also prepared to fix the costs of both motions on receipt of appropriate submissions in that regard unless the parties can agree on the quantum. The plaintiff's submissions are to be filed within 10 days of the release of these reasons and the defendant's response is to be delivered within 10 days thereafter. No reply is to be filed without leave. I will reiterate my usual request in this regard which is that I would appreciate it if counsel could keep their submissions brief.

*Order accordingly.*

Footnotes

* Additional reasons given (February 20, 2001), Doc. 00-CV-197213CM (Ont. S.C.J.).

# TAB 5

2018 ONSC 6894
Ontario Superior Court of Justice

Potentia Renewables Inc. v. Deltro Electric Ltd.

2018 CarswellOnt 19726, 2018 ONSC 6894, 299 A.C.W.S. (3d) 753, 67 C.B.R. (6th) 148

## POTENTIA RENEWABLES INC. (Applicant) and DELTRO ELECTRIC LTD. (Respondent)

McEwen J.

Heard: November 15, 2018
Judgment: November 26, 2018
Docket: CV-17-587425-00CL

Counsel: George Benchetrit, Michael Kril-Mascarin, for Applicant
Michael C. Mazzuca, Fred A. Platt, for Respondent

**Headnote**
Debtors and creditors --- Receivers — Appointment — General principles
Respondent alleged applicant had breached letter of intent agreement with respect to development of solar power project in Barbados — Applicant denied breach but accepted agreement was at end — Applicant applied for declaration respondent was indebted to it for US$2 million, judgment for that amount and order appointing receiver — Application was granted on terms giving respondent 30 days to pay US$2 million before interim receiver was appointed — Respondent objected to first receiver nominated by applicant and sought opportunity to cross-examine second with respect to any conflict of interest — Opportunity was granted and respondent examined receiver with counsel present — Respondent took issue with presence of counsel and with number of receiver's answers and undertakings, and brought motion for leave to conduct further examination with respect to receiver's relationship with applicant's counsel — Motion dismissed — Receiver had given unequivocal evidence that it had no prior relationship with applicant — While it acknowledged having had previous dealings with applicant's counsel, it was well-known that various firms regularly interacted with one another in insolvency proceedings — There was, in absence of actual conflict, nothing improper about that — Absent evidence of anything untoward in relationship between receiver and applicant's counsel, respondent should not be permitted to undertake fishing expedition — Permitting it to do would be completely out of proportion, unproductive and expensive — Receiver should be appointed as interim receiver as previously ordered.
Civil practice and procedure --- Judgments and orders — Final or interlocutory — Miscellaneous
Reopening — Respondent alleged applicant had breached letter of intent agreement with respect to development of solar power project in Barbados — Applicant denied breach but accepted agreement was at end — Applicant applied for declaration respondent was indebted to it for US$2 million, judgment for that amount and order appointing receiver — Application was granted on terms — Respondent appealed and brought motion to reopen order to allow argument on whether it could have repudiated letter of intent when it was not party to letter of intent — Motion dismissed — While final order had not yet been entered, only outstanding issue was appointment of interim receiver which had now been resolved — Order could be reopened only to avoid miscarriage of justice, spectre not raised by respondent's argument with respect to repudiation which could have been made at original hearing — Issue should, in any event, be left for Court of Appeal to determine.
Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Miscellaneous
New evidence — Respondent alleged applicant had breached letter of intent agreement with respect to development of solar power project in Barbados — Applicant denied breach but accepted agreement was at end — Applicant applied for declaration respondent was indebted to it for US$2 million, judgment for that amount and order appointing receiver — Application was granted on terms — Respondent appealed and brought motion to reopen order to admit new evidence on issue of final approval and repudiation — Motion dismissed — New evidence sought to be admitted was equivocal and non-specific — It could have

been produced on original motion with reasonable diligence — Refusing to admit it would not result in any miscarriage of justice — It did not, in any event, alter finding with respect to repudiation.

**Table of Authorities**

**Cases considered by *McEwen J.*:**

*Brown (Trustee of) v. Municipal Property Assessment Corp., Region 14* (2014), 2014 ONSC 7137, 2014 CarswellOnt 17302, 31 M.P.L.R. (5th) 77 (Ont. Div. Ct.) — considered

*Smurfit-Stone Container Canada Inc., Re* (2009), 2009 CarswellOnt 6554, 61 C.B.R. (5th) 92 (Ont. S.C.J. [Commercial List]) — considered

*1307347 Ontario Inc. v. 1243058 Ontario Inc.* (2001), 2001 CarswellOnt 221, 4 C.P.C. (5th) 153 (Ont. S.C.J.) — referred to

***McEwen J.*:**

1 This matter has returned before me, once again, to deal with issues arising out of my Reasons for Decision dated July 27, 2018 (the "Reasons"). The respondent, Deltro Electric Ltd., raises three issues and I will deal with each in turn. Since the appeal is pending and Deltro must shortly perfect its appeal I am releasing these reasons by way of endorsement.

**Should KSV Advisory be appointed as Receiver?**

2 In my Reasons I afforded Deltro the opportunity to repay $2 million, failing which an interim receiver would be appointed to determine if a sensible plan of repayment could be made. If not, Potentia would be entitled to have a receiver appointed to effect a sale.

3 As noted in para. 138 of my Reasons, Deltro objected to BDO being appointed. For the reasons noted I agreed that BDO should not be appointed and that another receiver would be appropriate.

4 Potentia proposes that KSV be appointed as the interim receiver and, if necessary, the receiver.

5 Deltro requested that it be able to cross-examine KSV with respect to issues of conflict.

6 By way of Endorsement dated October 3, 2018, I ordered that Deltro would be allowed to conduct an oral cross-examination not to exceed 60 minutes of a KSV representative. I ordered that the cross-examination would be limited to the proposed receiver's pre-retainer relationship, if any, with Potentia.

7 The examination has taken place.

8 KSV had counsel present during the cross-exmination. Deltro takes the position that it was inappropriate for KSV to be represented by counsel. I disagree and I see nothing inappropriate with this. In my view, given the acrimonious dispute Potentia and Deltro, KSV was prudent to have counsel present, particularly where I ordered the limited cross-examination and it may be appointed as interim receiver by way of my earlier order.

9 Deltro also objects to the fact KSV filed a factum on this motion. Once again, I see no problem with this having taken place. KSV did not take a partisan position in favour of Potentia in its factum, but rather simply provided the court with legal argument generally concerning the issue of its impartiality.

10 The unequivocal evidence that has been given on behalf of KSV confirms that they had no prior relationship with Potentia. Deltro takes issue with some of the answers and undertakings. I have reviewed them and see nothing untoward. Deltro's questions have been reasonably answered.

11 Counsel for Deltro now also wishes to conduct a further examination of KSV to examine its relationship with Potentia's counsel, Chaitons LLP.

12 I do not propose to allow any further questioning.

13 Chaitons LLP concedes that it has had previous dealings with KSV. This is not surprising. Deltro's submission ignores the commercial realities of insolvency proceedings. It is well-known that various professional firms regularly interact with each other in insolvency proceedings. In the absence of an actual conflict there is nothing improper with this.

14 As stated in para. 21 of the decision of *Smurfit-Stone Container Canada Inc., Re* [2009 CarswellOnt 6554 (Ont. S.C.J. [Commercial List])], 2009 CanLII 58586:

> If one were to insist on independent counsel and an independent court officer for every instance of perceived conflict of interest, restructuring proceedings of corporate groups would become completely unwieldy and unproductive.

15 If I was to allow an unfettered right of cross-examination to determine if conflicts existed, such as is being proposed by Deltro, these proceedings would become similarly unyielding, unproductive, expensive, and completely out of proportion. There is no evidence to suggest any untoward relationship between Chaitons LLP and KSV. I am not prepared to allow what would amount to a fishing expedition.

16 Based on the above, I am therefore satisfied that KSV should be appointed as the interim receiver and, if necessary, receiver to effect the sale.

**Should leave be granted to Deltro to reargue its position that it did not repudiate the LOI?**

17 In this regard Deltro submits that it could not have repudiated the May 15, 2016, LOI since it was not a party to the LOI.

18 Deltro submits that I have broad discretion to reopen and hear argument on this discrete issue since the final order has not yet been entered.

19 While it is accurate that the final order has not yet been entered, the only remaining issue involves the choice of receiver which I have now resolved. The parties recently reattended in front of me to settle several disputes concerning the form of the order and those have been settled.

20 Notwithstanding the fact that the order has not yet been entered I am of the view that the decision of the Divisional Court in *Brown (Trustee of) v. Municipal Property Assessment Corp., Region 14*, 2014 ONSC 7137 (Ont. Div. Ct.), resonates in this case. At para. 19 Justice Nordheimer wrote:

> In my view, the mere fact that the technical requirements for the finality of the earlier order are missing, because the order was not signed and entered, does not permit a judge to vary that order in whatever manner s/he happens to consider to be appropriate at a later date. The principle of finality, that underlies the *functus officio* principle, weighs against that scope of authority and that type of alteration. Parties have a right to expect that once a matter is determined by a judge, it is over. Our rules of procedure do not envisage that parties will be allowed to reargue matters, except in very narrow circumstances.

21 Based on the case law, I am of the view that it would only be open to me to reopen the case to avoid a miscarriage of justice: *1307347 Ontario Inc. v. 1243058 Ontario Inc.*, 2001 CarswellOnt 221 (Ont. S.C.J.) [*1307347 Ontario Inc.*].

22 The argument now advanced by Deltro was available when the matter first appeared before me. I have, however, reviewed my Reasons, the documents Deltro produced for this motion, and considered Deltro's argument. I see no basis to change the relevant findings in my Reasons. This is particularly so in light of Deltro's admission at this motion that the January 28, 2017, letter sent by counsel for the "Deltro Group of Companies" to Potentia included both/either Deltro and DGL.

23 Given that this matter is under appeal and will be heard by the Court of Appeal in February 2019, I believe it would be inappropriate to comment further and respectfully leave the issue now raised by Deltro to be determined on appeal.

**Should leave be granted to Deltro to introduce new affidavit evidence?**

24 In my view, the affidavit evidence should not be admitted.

25 In reaching this conclusion I am guided by the decision of Justice Nordheimer in *1307347 Ontario Inc.*, *supra*, wherein he stated:

> 4. The test is most recently stated by the Court of Appeal in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 183 D.L.R. (4th) 488 (Ont. C.A.) where Sharpe J.A. said, at p. 499:
>
> It was common ground between the parties before the trial judge and before this court that, in the circumstances of this case, the appellant had to establish two points:
>
> > 1. that the evidence "might probably have altered the judgment" and,
> >
> > 2. that the evidence "could not with reasonable diligence have been discovered sooner".
>
> (See *Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 (Ont. C.A.) at p. 557, (1974), 43 D.L.R. (3d) 498 (Ont. C.A.).)
>
> . . .
>
> > 9 I would consider it to be beyond peradventure that a court will not knowingly allow a miscarriage of justice to occur. As well, until the matter is determined otherwise, I accept that, to avoid such a miscarriage, a trial judge or a motions judge has the discretion to permit a matter to be reopened and new evidence to be admitted even if the evidence could have been placed before the court in the first instance. However, it is also my view that a miscarriage of justice involves more than just a finding that a different result might have occurred. It involves a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the court would be countenanced - see *DeGroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 (Ont. Gen. Div.); affd. [1999] OJ. No. 2313 (Ont. C.A.).
> >
> > . . .
> >
> > 13 In terms of the second prong of the test, that is, whether the evidence could have been I obtained with reasonable diligence, it is clear to me that it could have been. Indeed, it is clear to me that the reason that these affidavits are now forthcoming from the defendant is the direct consequence of the criticisms which were levelled against the defendant in my reasons. While the defendant suggests that his former counsel never asked for this information (a fact which I am told the defendant's former counsel disputes), it seems to me that such a contention is not a reason to relieve against the reasonable diligence requirement. Otherwise, it would altogether become too easy for parties to gain "a second shot" at their desired relief simply by changing counsel and then claiming that the first counsel failed to address some issue that was fatal to their first attempt. I agree with Madam Justice Lax (and with Mr. Justice Wilkins whom she quotes) when she said in *DeGroote v. Canadian Imperial Bank of Commerce*, *supra*, at para. 14:
> >
> > > Unquestionably, there is prejudice to the defendants in this case. There is a long history to this litigation. The defendants properly brought a motion before the court under Rule 20 of the *Rules of Civil Procedure*. The plaintiffs resisted the hearing of the motion and were unsuccessful in that effort. They were also unsuccessful on the merits of the motion. It is no passing coincidence that it was only after reasons for judgment were released that the plaintiffs sought to re-open the judgment. As was aptly stated by Wilkins J. in *Strategic*, *supra*, at p. 421:
> > >
> > > > After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of loser.

26 In this regard, I should initially note that I do not take serious issue with Drs. Lowe and Estwick's explanation that they could not have provided affidavit evidence earlier when they were sitting members of government (they are no longer

so). They did not, however, indicate this when the letters were originally filed, nor did counsel for Deltro advise of this fact at the hearing of the application.

27 I did note in para. 79 of my Reasons that affidavit evidence would have been preferable. Nevertheless, I considered the letters authored by Drs. Lowe and Estwick on their merits. As noted, I held that they were equivocal and non-specific.

28 Furthermore, while the affidavit evidence of Drs. Lowe and Estwick now states that Final Approval had been obtained, all of this evidence could have been provided at the hearing of the application. It was well-known to Deltro that Potentia took the position that Final Approval had not been obtained and, as I noted at para. 79 of my Reasons, Deltro proceeded at the hearing without any further documentation or efforts to provide *viva voce* evidence. Specifically, no efforts were made to obtain further evidence from Drs. Lowe and Estwick.

29 As was the case in *1307347 Ontario Inc.*, *supra*, the affidavits have now been produced to respond to the criticisms in my Reasons leveled against the evidence of Drs. Lowe and Estwick. All of this evidence, albeit without accompanying affidavits, could have been produced with reasonable diligence along with an explanation as to why affidavit evidence could not be obtained from Drs. Lowe and Estwick. As was the case *1307347 Ontario Inc.*, it is my view that Deltro is now looking for a "second shot" to address the exact issue in dispute i.e. Final Approval.

30 I accept that I should exercise my discretion to permit new evidence if a miscarriage of justice would take place.

31 As stated in *1307347 Ontario Inc.*, however, a miscarriage of justice involves more than just a finding that a different result might have occurred. In this regard, the courts have generally considered issues such as fraud and deliberate misleading.

32 This case falls well short of such an exceptional circumstance. The affidavit evidence simply produces additional evidence that Deltro now seeks to rely upon. The affidavits remain equivocal. Both affiants depose that they are not aware of any official documentation that would be provided by the government for Final Approval. I accept Potentia's submission that these statements simply constitute the affiants' personal belief and do not constitute any cogent evidence on the issue on behalf of the Government of Barbados. I also find it strange that the affiants would not be aware of such documentation and I still question the fact that none exists.

33 Further, the new evidence does not change my finding that Deltro repudiated the Agreements. Beginning at para. 100 of my Reasons, I found that Deltro repudiated the Agreements concerning the Barbados Project by way of its counsel's January 28, 2017 letter.

34 As noted in my Reasons, Deltro, as a result of the dispute concerning the DR LOI took the position that it was no longer obliged to honour any contractual obligations to Potentia — including the Barbados Project.

35 At the time of Deltro's repudiation the parties were still within the 12 month period in which Deltro could have achieved Final Approval. It is therefore uncertain as to whether Deltro would have repudiated the Agreements in circumstances where Final Approval had been previously granted as alleged by Drs. Lowe and Estwick.

36 If Deltro would have repudiated the Agreements in any event, the new affidavit evidence even if accepted, would not have affected the outcome of the Application. This was not argued before me at the original hearing.

**Disposition**

37 For the reasons above, KSV is appointed as interim receiver and, if necessary, receiver.

38 Deltro's motion to reopen the application is dismissed.

39 KSV is not seeking costs. Potentia was successful on the motion. If the parties cannot agree on costs, written submissions can be provided to me, not to exceed three pages, excluding bills of costs. Deltro is to provide its submissions within 14 days with Deltro to respond seven days thereafter and any reply by Potentia to follow within five days.

*Motion dismissed.*

# TAB 6

2016 NLTD(G) 30
Newfoundland and Labrador Supreme Court (Trial Division)

Loblaw Properties Ltd. v. Mount Pearl (City)

2016 CarswellNfld 46, 2016 NLTD(G) 30, [2016] 4 C.T.C. 204,
1176 A.P.R. 192, 263 A.C.W.S. (3d) 846, 379 Nfld. & P.E.I.R. 192

## Loblaw Properties Limited, Appellant and City of Mount Pearl, Respondent

Deborah J. Paquette J.

Heard: May 6, 13, 2015; June 30, 2015
Judgment: February 11, 2016
Docket: 201301G4007

Counsel: Michael J. Crosbie, Q.C., for Appellant
Jamie M. Smith, Q.C., for Respondent

**Headnote**

Municipal law --- Municipal tax assessment — Valuation — Method of assessment — Market value — Income capitalization

Property owner owned and occupied distribution warehouse, which was assessed as having market value of $5,454,500 for 2013 taxation year on basis of income capitalization approach — Owner appealed, maintaining that correct valuation was $3,700,000 on basis primarily of direct comparison approach and also of income capitalization approach — Assessment Review Commissioner dismissed appeal — Commissioner did not accept comparison approach as most appropriate method because properties relied on by owner were dated and not comparable in size, and accepted evidence respecting market rental rate given adjustment of gross rent to reflect large size of property — Owner appealed — Appeal dismissed — Commissioner's decision was reasonable — Owner did not establish that Commissioner acted without any evidence — Commissioner was entitled to reject owner's evidence as being dated and to be satisfied that assessor's rental rates were applied properly — Commissioner's application of evidence to income approach to property valuation and based on generally accepted appraisal principles did not constitute error of law, measured by standard of reasonableness.

Municipal law --- Municipal tax assessment — Practice and procedure on assessment appeals and objections — Procedural requirements — Miscellaneous

Property owner owned and occupied distribution warehouse, which was assessed as having market value of $5,454,500 for 2013 taxation year — Owner app unsuccessfully appealed to — Assessment Review Commissioner dismissed owner's appeal and rejected owner's claim that correct valuation was $3,700,000 — Owner appealed — Appeal dismissed — Owner was not denied procedural fairness — Owner was represented at assessment appeal hearing by two experienced appraisers — Owner did not request further information during appeal hearing and was not given assurances of assistance from assessors in advance of hearing — Owner prepared its own expert report — Although Commissioner's reasons were brief, they could not be said to disclose no consideration of evidence or appropriate property valuation methodology — Contextual analysis, including record of appeal hearing, two valuation reports, and range of possible outcomes, supported finding that sufficiency of reasons did not support quashing Commissioner's decision.

Tax --- Provincial taxation — Newfoundland — Property or land transfer tax

Property owner owned and occupied distribution warehouse, which was assessed as having market value of $5,454,500 for 2013 taxation year on basis of income capitalization approach — Owner appealed, maintaining that correct valuation was $3,700,000 on basis primarily of direct comparison approach and also of income capitalization approach — Assessment Review Commissioner dismissed appeal — Commissioner did not accept comparison approach as most appropriate method because properties relied on by owner were dated and not comparable in size, and accepted evidence respecting market rental rate given adjustment of gross rent to reflect large size of property — Owner appealed — Appeal dismissed — Commissioner's decision was reasonable — Commissioner was entitled to reject owner's evidence as being dated and to be satisfied that assessor's rental rates were applied properly — Commissioner's application of evidence to income approach to property valuation and based on generally accepted appraisal principles did not constitute error of law, measured by standard of reasonableness — Owner was not denied procedural fairness — Although reasons were brief, they could not be said to disclose no consideration of evidence or appropriate property valuation methodology — Contextual analysis, including record of appeal hearing, two valuation reports, and range of possible outcomes, supported finding that sufficiency of reasons did not support quashing Commissioner's decision.

**Table of Authorities**

**Cases considered by *Deborah J. Paquette J.*:**

*A.T.A. v. Alberta (Information & Privacy Commissioner)* (2011), 2011 SCC 61, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 339 D.L.R. (4th) 428, 28 Admin. L.R. (5th) 177, 52 Alta. L.R. (5th) 1, [2012] 2 W.W.R. 434, *(*sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.))* 424 N.R. 70, *(*sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association)* [2011] 3 S.C.R. 654, *(*sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 519 A.R. 1, *(*sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 539 W.A.C. 1 (S.C.C.) — considered

*British Columbia (Securities Commission) v. McLean* (2013), 2013 SCC 67, 2013 CarswellBC 3618, 2013 CarswellBC 3619, 366 D.L.R. (4th) 30, [2014] 2 W.W.R. 415, *(*sub nom. *McLean v. British Columbia Securities Commission)* 452 N.R. 340, 53 B.C.L.R. (5th) 1, *(*sub nom. *McLean v. British Columbia (Securities Commission))* [2013] 3 S.C.R. 895, *(*sub nom. *McLean v. British Columbia Securities Commission)* 347 B.C.A.C. 1, *(*sub nom. *McLean v. British Columbia Securities Commission)* 593 W.A.C. 1, 64 Admin. L.R. (5th) 237 (S.C.C.) — considered

*Calgary (City) v. Lougheed Tomasson Inc.* (2000), 2000 CarswellAlta 208, 255 A.R. 179, 220 W.A.C. 179, 2000 ABCA 81 (Alta. C.A.) — considered

*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.* (2015), 2015 CarswellAlta 1618, 2015 CarswellAlta 1619 (S.C.C.) — referred to

*Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)* (2015), 2015 ABCA 85, 2015 CarswellAlta 324, 382 D.L.R. (4th) 85, 80 Admin. L.R. (5th) 240, [2015] 5 W.W.R. 547, 34 M.P.L.R. (5th) 204, 599 A.R. 210, 643 W.A.C. 210, 12 Alta. L.R. (6th) 236 (Alta. C.A.) — considered

*Hiscock Estate v. St. John's (City)* (2014), 2014 NLTD(G) 110, 2014 CarswellNfld 274, 29 M.P.L.R. (5th) 89, 1108 A.P.R. 184, 356 Nfld. & P.E.I.R. 184 (N.L. T.D.) — distinguished

*JUNVIR Investments Ltd. v. Municipal Property Assessment Corp.* (2015), 2015 ONSC 1526, 2015 CarswellOnt 3818, 35 M.P.L.R. (5th) 122, 86 O.M.B.R. 212 (Ont. Div. Ct.) — considered

*Joyce Avenue Apartments Ltd. v. New Brunswick (Director of Assessment)* (1993), 1993 CarswellNB 572 (N.B. Q.B.) — considered

*Kensington Foundation v. Municipal Property Assessment Corp., Region No. 9* (2013), 2013 CarswellOnt 17768, 2013 ONSC 7694, 20 M.P.L.R. (5th) 202, 79 O.M.B.R. 177, 316 O.A.C. 210 (Ont. Div. Ct.) — considered

*Labatt Brewing Co. v. St. John's (City)* (2011), 2011 NLCA 75, 2011 CarswellNfld 387, 91 M.P.L.R. (4th) 6, 981 A.P.R. 100, 315 Nfld. & P.E.I.R. 100, 32 Admin. L.R. (5th) 291, 344 D.L.R. (4th) 478 (N.L. C.A.) — considered

*Mouvement laïque québécois v. Saguenay (City)* (2015), 2015 SCC 16, 2015 CSC 16, 2015 CarswellQue 2626, 2015 CarswellQue 2627, 382 D.L.R. (4th) 385, 34 M.P.L.R. (5th) 1, 22 C.C.E.L. (4th) 1, 470 N.R. 1, 83 Admin. L.R. (5th) 183, [2015] 2 S.C.R. 3, 332 C.R.R. (2d) 183 (S.C.C.) — considered

*Murphy, Re* (1994), 117 Nfld. & P.E.I.R. 243, 365 A.P.R. 243, 1994 CarswellNfld 76 (Nfld. T.D.) — considered

*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2011), 2011 SCC 62, 2011 CarswellNfld 414, 2011 CarswellNfld 415, D.T.E. 2012T-7, 340 D.L.R. (4th) 17, *(*sub nom. *Nfld. and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 2011 C.L.L.C. 220-008, *(*sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board))* 424 N.R. 220, *(*sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board))* [2011] 3 S.C.R. 708, 213 L.A.C. (4th) 95, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 986 A.P.R. 340, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 317 Nfld. & P.E.I.R. 340, 97 C.C.E.L. (3d) 199, 38 Admin. L.R. (5th) 255 (S.C.C.) — considered

*New Brunswick (Board of Management) v. Dunsmuir* (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, *(*sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d)

1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65, 2008 CSC 9 (S.C.C.) — followed

*Newterm Ltd., Re* (1988), 41 M.P.L.R. 69, 74 Nfld. & P.E.I.R. 328, 1988 CarswellNfld 26, 2 R.P.R. (2d) 264, 231 A.P.R. 328 (Nfld. C.A.) — considered

*Office Specialty Ltd. v. Ontario Regional Assessment Commissioner, Region No. 14* (1974), [1975] 1 S.C.R. 677, *(*sub nom. *Office Specialty Ltd. v. York Assessment Office, Assessment Commissioner)* 49 D.L.R. (3d) 471, *(*sub nom. *York Assessment Office, Assessment Commissioner v. Office Specialty Ltd.)* 2 N.R. 612, 1974 CarswellOnt 237, 1974 CarswellOnt 237F (S.C.C.) — considered

*St. John's International Airport Authority v. St. John's (City)* (2015), 2015 NLTD(G) 175, 2015 CarswellNfld 477, 60 R.P.R. (5th) 82, 42 M.P.L.R. (5th) 226 (N.L. T.D.) — considered

*Tervita Corp. v. Canada (Commissioner of Competition)* (2015), 2015 SCC 3, 2015 CSC 3, 2015 CarswellNat 32, 2015 CarswellNat 33, 380 D.L.R. (4th) 381, 79 Admin. L.R. (5th) 1, 467 N.R. 97, [2015] 1 S.C.R. 161 (S.C.C.) — considered

*Vancouver Assessor, Area No. 9 v. Bramalea Ltd.* (1990), 3 M.P.L.R. (2d) 206, *(*sub nom. *Bramalea Ltd. v. British Columbia (Assessor of Area #09 - Vancouver))* 76 D.L.R. (4th) 53, 52 B.C.L.R. (2d) 218, 1990 CarswellBC 287, B.C. Stated Case 277 (B.C. C.A.) — considered

*Vancouver Assessor, Area No. 9 v. Bramalea Ltd.* (1991), 4 M.P.L.R. (2d) 244 (note), 55 B.C.L.R. (2d) xxxiii (note), 79 D.L.R. (4th) vi (note) (S.C.C.) — referred to

*3163083 Canada Ltd. v. St. John's (City)* (2005), 2005 NLTD 32, 2005 CarswellNfld 38, 5 M.P.L.R. (4th) 272, 245 Nfld. & P.E.I.R. 1, 730 A.P.R. 1 (N.L. T.D.) — considered

**Statutes considered:**

*Assessment Act, 2006*, S.N. 2006, c. A-18.1

Generally — referred to

s. 2(a) "actual value" — considered

s. 17(1) — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(3) — considered

s. 32(4) — considered

s. 32(5) — considered

s. 39(3) — considered

s. 39(5) — considered

*Municipal Government Act*, R.S.A. 2000, c. M-26

Generally — referred to

**Tariffs considered:**

*Rules of the Supreme Court, 1986*, S.N. 1986, c. 42, Sched. D

R. 55, App., Pt. II, column 3 — referred to

***Deborah J. Paquette J.*:**

**Introduction**

1 Loblaw owns and occupies a large distribution warehouse in Mount Pearl. The property was assessed for the City of Mount Pearl by the Municipal Assessment Agency Inc. as having a market value of $5,454,500 for the 2013 taxation year. Loblaw

appealed to the Assessment Review Commissioner maintaining that the correct valuation was $3,700,000. The property has a second floor office space and a ground floor distribution/warehouse space. Loblaw did not dispute Mount Pearl's assessment of the office space.

2 The Commissioner upheld Mount Pearl's assessment. Loblaw claims that the Commissioner made mistakes in her decision and asks the Court to order that the property be valued at $3,700,000 for municipal taxation purposes.

***The Legislation***

3 Subsection 17(1) of the *Assessment Act, 2006*, S.N.L. 2006. c. A-18.1 (the "*Act*") provides that real property valuations for municipal tax assessment purposes are based on a property's actual value as of the base date, in this case 1 January 2011.

4 "Actual value" is defined at subsection 2(a) of the *Act* as the market value of the fee simple interest in the property. Market value is not defined in the *Act* but has been interpreted as "interchangeable and synonymous" with actual value (*Office Specialty Ltd. v. Ontario Regional Assessment Commissioner, Region No. 14* (1974), [1975] 1 S.C.R. 677 (S.C.C.), at 681, (1974), 49 D.L.R. (3d) 471 (S.C.C.)).

5 In *Vancouver Assessor, Area No. 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218, 76 D.L.R. (4th) 53 (B.C. C.A.), leave to appeal dismissed [1991] S.C.C.A. No. 52 (S.C.C.), the British Columbia Court of Appeal wrote at paragraph 10:

> 10 ...The *Act* nowhere defines the meaning of "actual value," that task being left to the courts. The courts have held that "actual value" means the price which property would fetch if sold in the market on the statutory valuation date in a cash transaction between informed parties both free from duress and influenced neither by speculative considerations nor by any "special value" which the property might have to a particular purchaser, which it would not otherwise have. "Actual value" lies somewhere in the middle of the range within which such parties would settle, neither "unduly high" nor "unduly low": *Sun Life Assur. Co. of Can. v. Montreal*, [1950] S.C.R. 220, [1950] 2 D.L.R. 785; *Stock Exchange Bldg. Corp. v. Vancouver*, 61 B.C.R. 205, [1945] 2 W.W.R. 248, [1945] 2 D.L.R. 663 (C.A.).

6 The British Columbia Court of Appeal in *Bramalea* explains the challenges of arriving at a property's "actual value" at paragraphs 20 to 22:

> 20 If "actual value" were a figure which could in all cases be arrived at by one single accepted mathematical formula, no conflict between the two principles mentioned could arise; if all assessments were at "actual value" according to such a formula, they would necessarily be equitable — that is to say the assessed value of every parcel would necessarily bear a "fair and just relation" to that of every other.
>
> 21 In fact there is no single mathematical formula for arriving in all cases at actual value; this is something which the *Act* recognizes, and the present case may well illustrate.
>
> 22 In a relatively new residential subdivision of similar houses of which, say, 10 per cent change hands every year, the market could be expected to provide a ready indication of actual value. In the case of commercial and industrial properties which have peculiar features and change hands rarely, and often as parts of larger transactions involving other assets, the market provides only indirect guidance. Instead of applying average sales data for similar properties at the relevant assessment date, the assessor in these cases must rely instead on other approaches. The assessor can, for instance, use basic land value plus inflated and depreciated cost of improvements or, as here, capitalized value of income to be expected from the property in the hands of the reasonably efficient operator. Along the way adjustments must be made from actual cost, sales, and revenue data, sometimes on a highly judgmental basis, to accommodate features of individual properties which involve variance from the norm, and to eliminate speculative or subjective elements.

7 A commercial assessor with the Municipal Assessment Agency Inc. prepared an Appraisal Report of the subject property. The Assessor considered three methods of valuation, relying on the income capitalization approach. Loblaw engaged

a professional appraiser who completed an Estimate of Market Value. He relied upon the direct comparison approach and the income capitalization approach, with primary reliance on the direct comparison approach.

8 The Commissioner was given both reports. Loblaw was represented at the hearing by the author of the Estimate of Market Value and another senior professional appraiser. Two commercial assessors with the Municipal Assessment Agency Inc. were present at the hearing, including the author of the Appraisal Report.

9 Green, J. (as he then was) in *Murphy, Re* (1994), 117 Nfld. & P.E.I.R. 243, 365 A.P.R. 243 (Nfld. T.D.) at paragraphs 24 and 26 discussed the different approaches to market valuation for purposes of the *Act*:

> **24** In the *Sun Life* case *supra*, pp. 89-90, the Judicial Committee referred without disapproval to statements in the lower courts that there are, generally, five ways by which a true market valuation can be reached:
>
> > (a) a recent free sale of the property itself where neither the conditions of the property nor the market have since changed;
> >
> > (b) recent free sales of identical properties in the same neighbourhood and market;
> >
> > (c) recent free sales of comparable properties;
> >
> > (d) the price which the revenue producing possibilities of the property will command; and
> >
> > (e) the depreciated replacement cost.
>
> The last three methods are the usual methods employed by appraisers, often referred to, respectively, as the market data approach (or comparative sales method), the income capitalization approach and the cost approach.
>
> **26** In my view, as a general proposition all approaches to valuation are, in principle, appropriate to be resorted to, both as a means of conducting a "reality check" of the results of one approach by comparison with the results of other approaches, and also as a means, in appropriate cases, of providing a composite or correlated value using all applicable data. There will, of course, be special situations, as was argued in this case, where certain of the approaches to valuation will not be appropriate. For example, in the Sun Life case, where the subject of the assessment was an elaborate office tower that was acknowledged to be unique and unmarketable, it was determined that the comparative sales method of valuation had no application; and in *Canso Seafoods Ltd. v. Town of Canso et al* (1980), 13 M.P.L.R. 284 (N.S.S.C.; App. D.), where a relatively new special purpose building was no longer being used for its specialized purpose of production of fish protein concentrate and it was clear that if the owner had to re-erect the building he would not erect one of the same form, it was held that the application of the replacement cost approach to valuation was wrong in principle.

10 In *3163083 Canada Ltd. v. St. John's (City)*, 2005 NLTD 32 (N.L. T.D.), Orsborn, J. (as he then was) analyzed the objectives of property assessment (at para. 31):

> *31* In Re Murphy [6], Green, J., now C.J., provides a comprehensive discussion of the basic legal principles applicable to an assessment appeal. I do not propose to repeat his analysis, but take the liberty of extracting the following:
>
> > (i) The objective of the assessment is to determine the fair market value of the property, that is, the amount the property would realize if sold on the open market by a willing seller to a willing buyer.
> >
> > (ii) An opinion on fair market value may be informed by:
> >
> > > (a) a recent free sale of the property itself where neither the conditions of the property nor the market have since changed;
> > >
> > > (b) recent free sales of identical properties in the same neighbourhood and market;

(c) recent free sales of comparable properties (market data or direct comparison approach);

(d) the price which the revenue producing possibilities of the property will command; (income capitalization approach) and,

(e) the depreciated replacement cost. (cost approach). Professional appraisers customarily resort to one or more of the last three methods.

(iii) As a general proposition, all approaches to valuation may be resorted to, either to provide a fair market value, to provide a "reality check" of the results of one approach against the results of another, or to enable the formulation of a value using a composite of the results.

(iv) In assessing the fair market value of the property, the property is to be assessed in its current condition and as it is currently being used.

(v) The objective is not to determine the value to the owner as a going concern or otherwise; while the owner may indeed be considered as a possible purchaser in the notional and hypothetical market, that fact does not serve to inflate the value beyond what other potential purchasers would pay.

(vi) The direction in subsec. 49(2) of the Act to ensure uniform taxation does not contemplate an assessment that may exceed fair market value. Fair market value is the objective and represents the upper limit of assessed value, but that value may be reduced if assessments of like properties have been set at a lower amount.

(Footnote Omitted)

**Issues**

11 Whether Loblaw's appeal raises questions of law or jurisdiction, as required by the *Act*.

12 Whether the Commissioner erred in law in rejecting Loblaw's comparative sales and income approach evidence and accepting that relating to Mount Pearl's income approach.

13 Whether the Assessors' use of anonymized data supporting their income approach, and the Commissioner's reliance upon it, constituted a breach of procedural fairness.

14 Whether the Commissioner failed to provide adequate reasons.

***The Standard of Review***

15 Subsection 39(3) of the *Act* provides for appeals from the Commissioner's decision on a question of law or jurisdiction. Subsection 39(5) describes the Court's role:

39(5) The court shall either confirm or vacate the decision of the commissioner and where vacated the court shall refer the matter back to the commissioner with the opinion of the court as to the error in law or jurisdiction and the commissioner shall deal with the matter in accordance with that opinion.

16 The Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.), explained the standard of review applicable to administrative tribunals at paragraph 45:

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards - correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

17 At paragraphs 46 and 47, the Supreme Court of Canada explained the reasonableness standard:

> 46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

18 The correctness standard was explained at paragraph 50:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

19 In *Labatt Brewing Co. v. St. John's (City)*, 2011 NLCA 75 (N.L. C.A.) the Newfoundland and Labrador Court of Appeal applied a correctness standard where the interpretation of "key assessment provisions" in the Commissioner's home statute involved consideration of issues of discrimination and uniformity amongst taxpayers (at para. 29). In *St. John's International Airport Authority v. St. John's (City)*, 2015 NLTD(G) 175 (N.L. T.D.) I concluded on the basis of the legal principles involved in the taxation of restricted-use public aeronautics property owned by the Federal Crown that a correctness standard applied.

20 *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) provided that "unless the situation is exceptional", there is a presumption that an administrative tribunal's interpretation of its home statute would attract a standard of reasonableness (at para. 34).

21 *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para. 22 discusses the presumption:

> 22 The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions — even when they involve the interpretation of a home statute — warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.), at para. 16). ...

22 In 2015 the Supreme Court of Canada in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (S.C.C.) considered the appropriate standard of review applicable on an appeal from a decision of the Human Rights Tribunal. Gascon, J. described the tribunal as specialized, with membership including judges of the Court of Québec with experience and expertise in human rights, and having assessors with experience and expertise in the area that provide assistance to the judges. It was noted that tribunal members are appointed for five-year terms (at para. 40).

23 The Supreme Court of Canada explained that the standard of review which will be applicable "depends primarily on the nature of the questions that have been raised" (at para 45). The standard of review on the question at issue in *Saguenay* was the scope of the state's duty of religious neutrality. A correctness standard was applied on this question (at para. 49). Gascon, J. wrote at paragraph 51:

> 51 ... I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable. Moreover, the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be non-exclusive; the Tribunal's jurisdiction is exercised concurrently with that of the ordinary courts. I am therefore of the view that the presumption of deference has been rebutted for this question. This Court confirmed in a recent case (*Tervita*, at paras. 24 and 34-40) that the applicable standards on judicial review of the conclusions of a specialized administrative tribunal can sometimes vary depending on whether the questions being analyzed are of law, of fact, or of mixed fact and law.

24 On other questions arising in *Saguenay*, notably the qualification of the expert witnesses and the weight to be accorded to their evidence, the Supreme Court of Canada applied a standard of reasonableness. Accordingly, in the context of a single appeal there can be different categories of questions, attracting different standards of review. The Court wrote at paragraph 50:

> 50 However, it was not open to the Court of Appeal to apply that standard to the entire appeal and to disregard those of the Tribunal's determinations that require deference and are therefore subject to the reasonableness standard. For example, the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise. The same is true of the qualification of the experts and the assessment of the probative value of their testimony, which concerned the assessment of the evidence that had been submitted (*NGC*, at para. 30; *Khela v. Mission Institution*, 2014 SCC 24, [2014] 1 S.C.R. 502 (S.C.C.), at para. 74; *Khosa*, at paras. 59 and 65-67). The Tribunal is entitled to deference on such matters. The only requirement is that its reasoning be transparent and intelligible. Its decision must be considered reasonable if its conclusions fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

25 In *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (S.C.C.), the Supreme Court of Canada considered the standard of review on an appeal from a decision of the Competition Tribunal. The Court was satisfied that the standard of reasonableness was rebutted, writing at paragraphs 39 and 40:

> 39 The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.
>
> 40 I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

26 The Alberta Court of Appeal in *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85 (Alta. C.A.) (leave to appeal to Supreme Court of Canada granted 3 September 2015 [2015 CarswellAlta 1618 (S.C.C.)]) analyses the standard of review applicable to property assessment appeal tribunals, with reference to the Supreme Court of Canada decisions following *Dunsmuir*. The issue in *Edmonton East* was whether the Assessment Review Board could increase a property assessment when a complaint is brought by a taxpayer seeking a reduction.

27 The applicable municipal assessment statute in *Edmonton East*, the *Municipal Government Act*, R.S.A. 2000, c. M-26, provides that assessments be based on market value. The legislation contains a right of appeal, with leave of the court, from a

decision of the Assessment Review Board on a question of law or jurisdiction. The legislation under consideration here, also provides a right of appeal from decisions of the Commissioner on questions of law or jurisdiction, but does not require leave of the court.

28 Slatter, J.A., writing for the Court, provides a comprehensive analysis of the appropriate standard of review in municipal property assessment appeals, introducing his discussion at paragraph 11, "The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day".

29 The Alberta Court of Appeal in *Edmonton East* concluded that a correctness standard should be applied. At paragraph 17 the Court considered the role of the legislature:

> 17 The "external" model of judicial review is no longer universal. Legislatures are increasingly recognizing the role of the superior courts in balancing the need to maintain the integrity of the administrative law system with: 1) the need to maintain the rule of law, and 2) the legitimate expectations of parties in having their rights protected by proportional but effective error correcting mechanisms. Sometimes statutes specifically state the standard of review. On other occasions, rights of appeal to the superior courts (sometimes only with leave, and sometimes directly to the Court of Appeal) are built right into the administrative structure. This represents a recognition that while the administrative tribunal has "expertise", so do the superior courts. A right of appeal is a signal that the Legislature wishes to take advantage of (and make available to affected citizens) all the expertise available in the system. Where there is a right to appeal, the superior courts are a part of the system of administrative justice, not external to it.

30 Slatter, J.A. at paragraph 22 refers to the four exceptions referred to in *Dunsmuir* as "signposts" as to when the correctness standard would apply: constitutional questions, questions of central importance to the legal system as a whole and that are outside the decision-maker's expertise, questions pertaining to the jurisdictional lines between two or more specialized tribunals and jurisdictional questions. At paragraph 23 he analyzes their dimension:

> 23 These signposts were never intended to be hard and fast categories, and the standard of review analysis remains sensitive to the statutory and factual context: *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para. 22, [2013] 3 S.C.R. 895 (S.C.C.). These categories may bring a measure of predictability and clarity to the analytical framework, but a mechanical and formalistic test for the standard of review is not reflective of the subtlety of the underlying issues. A few overlapping observations can be made about these four "exceptions" to a "presumptive" reasonableness standard of review:
>
> > (a) First of all, they are only presumptions; there is no universal rule that the correctness standard of review never otherwise applies. As was pointed out in *McLean* at para. 22, "The presumption endorsed in *Alberta Teachers*, however, is not carved in stone.... a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute".
> >
> > (b) Secondly, any common law presumption must yield to the express or implied legislative intent, reflected by the precise structure of the administrative law regime in question.
> >
> > (c) Thirdly, the four listed exceptions should not be regarded as a "closed" list; there may well be other general exceptions, or at least variations on the four named examples.
> >
> > (d) Fourthly, the four exceptions should be read in a flexible and open ended manner; they are not statutory provisions.
>
> As noted several times now, administrative law has been evolving continuously since the 1970s. That evolution is not yet over, and if the history of administrative law has taught us anything, it is that the *A.T.A./McLean* formulation of the evolving test is unlikely to be the final word on judicial review.

31 The Alberta Court of Appeal reasoned that appeals to the court from assessment review tribunals on questions of law and jurisdiction, with the statutory direction that the tribunal thereafter decide the matter in accordance with the opinion of the court,

provides "strong signals of a correctness standard of review" (at para. 26). The Court also considered that the relative expertise of the tribunal and the courts in the area of taxation statutes also favoured a correctness standard taking into consideration judicial expertise in the interpretation of tax laws (at para. 28). As appeals from a tribunal's decision require leave of the court thereby imposing a "screening method", the Alberta Court of Appeal noted that they are of interest to the "municipal taxation system as a whole" (at para. 27).

32 Slatter, J.A. wrote that the "general democratic principle that taxpayers are entitled to have their liability to the government determined by the ordinary courts" also supports a correctness standard, citing *Calgary (City) v. Lougheed Tomasson Inc.*, 2000 ABCA 81 (Alta. C.A.), "... a taxpayer is entitled to an assessment that is both equitable and correct." (at para. 29). The Court of Appeal also noted the multiplicity of assessment review tribunals, as opposed to one assessment review board for the province, writing, "... it is undesirable for the *Municipal Government Act* to mean different things in different parts of the province. It is here that the superior courts have a legitimate role to play in ensuring consistency of interpretation and result..." (at para. 30). On this factor as well, a correctness standard was favoured.

33 Likewise, here, the *Act* provides for the appointment of individual commissioners by different municipalities who hold office without tenure:

> **Appointment of commissioner**
>
> **32(1)** A municipality or the city shall, by resolution, prior to January 31 in a year, appoint a commissioner.
>
> **32(2)** A municipality shall, not more than 14 days after the appointment of a commissioner under subsection (1), notify the director of the appointment of the commissioner.
>
> **32(3)** A commissioner holds office until he or she resigns or is dismissed.
>
> **32(4)** A commissioner appointed under subsection (1) shall be compensated under the terms negotiated between the commissioner and the city or municipality that made the commissioner's appointment.
>
> **32(5)** The city or municipality that made the appointment may dismiss a commissioner from office.

34 In contrast, decisions of the Ontario Superior Court, Divisional Court, *Kensington Foundation v. Municipal Property Assessment Corp., Region No. 9*, 2013 ONSC 7694 (Ont. Div. Ct.) and *JUNVIR Investments Ltd. v. Municipal Property Assessment Corp.*, 2015 ONSC 1526 (Ont. Div. Ct.), adopt a reasonableness standard of review on appeals from the municipal assessment appeal board.

35 Counsel for Loblaw submits that an important distinguishing feature in the Ontario case law is the fact that Ontario has a province-wide specialized review board which considers appeals from property assessments.

36 Upon consideration of *Labatt* and the reasoning in *Edmonton East*, I am satisfied that appeals from commissioners in this jurisdiction will not inevitably attract the presumptive reasonableness standard of review in their interpretation of the *Act*. Instead, in appropriate cases, analyzed within the framework of the principles established by Supreme Court of Canada jurisprudence post-*Dunsmuir*, a standard of correctness may be engaged. In the analysis which follows, I will consider the category of question arising here, in my determination of the standard of review which should apply to the review of the Commissioner's decision.

**Analysis**

37 *Dunsmuir* instructs that the first step in determining the applicable standard of review is to ascertain whether jurisprudence has already determined the degree of deference to be applied with respect to the specific category of question raised in the appeal (at para. 62). As noted above, the Newfoundland and Labrador Court of Appeal in *Labatt* adopted a correctness standard on appeals from the *Act* where questions of law related to statutory provisions addressing discrimination and uniformity of taxation. These issues do not arise here.

38 The second step in the analysis involves a consideration of factors set out in *Dunsmuir* at paragraphs 62 to 64:

> 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> 63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> 64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

39 I will now consider the factors. What is essentially at issue here is the Commissioner's rejection of the taxpayer's evidence in favour of that tendered by the Assessors, and her adoption of the income approach to valuation based on that evidence. Loblaw submits that the Commissioner thereby proceeded contrary to generally accepted appraisal principles.

40 Considered within the *Dunsmuir* contextual analysis, I am not satisfied that this category of question, *viz.* the weighing of evidence, is one which attracts the standard of correctness. I accordingly find the correct standard of review on this category of question to be reasonableness.

41 Loblaw further alleges that the Commissioner's acceptance of anonymized data in support of the income approach denied it procedural fairness. Procedural fairness is squarely within the purview of the Court. *Dunsmuir* addresses this issue at paragraph 129:

> 129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

***Whether the appeal raises questions of law or jurisdiction***

42 I am satisfied that Loblaw has advanced a question of law relating to the Commissioner's adoption of the income approach to valuation on the basis of the evidence presented at the hearing, taking into consideration generally accepted appraisal principles.

***Whether the Commissioner erred in law in her adoption of the income approach***

43 Case law confirms that a municipal tax assessment is presumed correct unless an appellant establishes it to be wrong. As such, a municipality is not required to adduce evidence before a commissioner, but may choose to provide the commissioner with evidence in support of its position. *Newterm Ltd., Re* (1988), 74 Nfld. & P.E.I.R. 328, 13 A.C.W.S. (3d) 389 (Nfld. C.A.); and *Joyce Avenue Apartments Ltd. v. New Brunswick (Director of Assessment)* (1993), 38 A.C.W.S. (3d) 630, [1993] N.B.J. No. 68 (N.B. Q.B.) at paras. 17, 21-22.

44 In *Newterm* the Newfoundland and Labrador Court of Appeal explained the onus of proof on an assessment appeal at paragraph 22:

> 22 As to the onus of proof and of leading evidence when the hearing is conducted by way of hearing de novo, that rests upon the appellant, as it did before the Review Court and does on any appeal. At that stage, the record with regard to the assessment itself and of the proceedings before the Review Court will presumably be before the appeal Judge. No onus lies on the city at the outset. The assessment is presumed to be correct unless and until it is demonstrated to be wrong. However, having heard an appellant's evidence, the city may itself wish to adduce its own evidence in support of its position.

45 In *Joyce* the New Brunswick Queens Bench considered the Assessment Appeal Board's responsibility to consider the totality of the evidence, at paragraph 9:

> 9 The Board had an obligation to consider the evidence before it, but it has no obligation to accept it. In this instance the Board considered carefully all the evidence before it including the evidence of both experts; gave all the evidence the weight it felt it deserved; and came to the conclusion that the Applicant had not met the onus upon it of proving that the assessments exceeded the real and true value of the real property.

46 Loblaw states that it provided the Commissioner with the best available sales data documenting comparative sales. The Commissioner rejected Loblaw's evidence because it was dated. Loblaw identified four comparable sales occurring February 2007, November 2007, December 2008 and February 2013. Mount Pearl also presented evidence of sales. It's Assessor testified before the Commissioner:

> ...We have presented some properties but as for my summation, you know, they are small and it's our point that they are not comparable and therefore little or no weight can be put on that. It is our position that we did search... at 43
>
> ...We didn't use them because it couldn't adequately adjust the sale to reflect the subject property...at 56
>
> (Transcript of Hearing)

47 Loblaw claims that the comparative sales approach is the most credible indicator of value for owner-occupied commercial and industrial properties. Mount Pearl counters that this is not borne out by the International Association of Assessing Officers', *Property Assessment Valuation*, 2nd ed., at 105:

> • When no reliable sales data are available for the appraisal of a property, for instance, a commercial property, and the building is old and the cost approach inconclusive or unconvincing, the income approach is the best value indicator.

48 The Assessors also refuted the reliability of Loblaw's comparable sales evidence because generally accepted appraisal principles consider whether a property owner could immediately occupy such a property in order to resume its operations. This involves a determination of the time and cost involved in the modification of the comparable property to meet operational needs. When asked whether Loblaw could move into one of the comparable properties and start operating "tomorrow", its Representative responded "I doubt it" (Transcript of Hearing at 52). With reference to a second comparable property relied upon by Loblaw, the evidence before the Commissioner was simply, "it's a warehouse building. I'm not saying that they can operate there as a grocery." (Transcript of Hearing at 52). The Commissioner was also informed by the Assessor that the comparable properties advanced by Loblaw did not have freezer areas (Transcript of Hearing at 52), and that it could cost within a range of one and two million dollars to renovate the property as comparable to the Loblaw property (Transcript of Hearing at 56).

49 The transcript disclosed that Loblaw also acknowledged that the income approach was meritorious in valuing the property (Transcript of Hearing at 59). Before this Court, Loblaw challenges the Commissioner's adoption of the income approach to valuation as presented by the Assessors on the grounds that the Assessor's data failed to identify warehouse locations or lease information, comprising anonymized data taken from a mass appraisal computer system. This evidence was described by the Assessors as a review of lease rates for warehouses in Mount Pearl provided in response to questionnaires sent to landlords and tenants (Transcript of Hearing at 51). Loblaw claims that it was thereby denied the opportunity to verify the compatibility of these warehouses to the subject property.

50 Loblaw says that because the Assessors failed to reveal the specific location of the rental information, the Commissioner acted without any evidence and in so doing committed an error of law. It further argues that the anonymized data denied it procedural fairness because it did not understand the case it had to meet.

51 Mount Pearl disputes that the Commissioner acted without evidence in her adoption of the income approach to valuation. Mount Pearl states that at no time did Loblaw challenge the Assessors on this point or request further information, respecting the lease information. It submits that Loblaw did not identify the source of the rental information as an issue before the Commissioner or complain to her that the data was anonymized.

52 In her reasons for decision, the Commissioner did not accept the comparison approach as the "most appropriate method" to determine market value because the comparable properties relied upon by Loblaw were dated in terms of the base date. She also found that the size of the properties were not comparable. She considered that the evidence respecting the market rental rate was acceptable given the adjustment of gross rent to reflect the "large size" of the property (at 2). In her reasons for decision she accepted the Assessor's valuations based upon the income approach in the amount of $5,454,500.

53 In *JUNVIR* the municipal taxpayer appealed its assessment on the grounds that the Assessment Review Board failed to consider all of the evidence. The court considered the issue at paragraphs 7, 8 and 9:

> **Did the Board Err in Law in Failing to Properly Determine the Current Value of the Appellant's Property?**
>
> **7** The appellant submits that, while the Board correctly understood its task, which was to determine the current value of the appellant's property based on an income approach, the Board erroneously relied on only two of the comparable properties submitted by the parties for consideration, while ignoring eight other grocery stores whose current values were not challenged.
>
> **8** In our view, this argument does not raise a question of law. The appellant simply disagrees with the Board's findings of fact and the weight it afforded to various pieces of evidence. This is not a case where the Board's conclusion was unsupported by any evidence or where the Board ignored relevant evidence (it considered the other eight grocery store comparables but found that they were not sufficiently comparable to the appellant's independent grocery store) or where the Board misapprehended relevant evidence. Such errors could constitute errors of law. However, what the appellant is arguing before us on the first issue is a simple question of fact from which no appeal lies to this Court.
>
> **Did the Board Err in Law in Failing to have Reference to Similar Properties in the Vicinity?**
>
> **9** The appellant's argument on this issue is very similar to its argument on the previous issue and must be dismissed for the same reason. In essence the appellant is arguing that the Board's decision was wrong because it ended up with an assessment value that it states was double the assessment value of eight other grocery stores in the vicinity. Again the Board made a finding of fact that the best comparables to use were the comparables relating to two independent grocery stores in the vicinity, rather than the eight other grocery stores, which were chain stores. Again, they had an ample evidentiary basis upon which to make this finding.

54 Loblaw has not established that the Commissioner acted without any evidence.

55 The Commissioner was entitled to weigh all of the evidence and determine the evidence which she considered the best. The Commissioner explained that she rejected Loblaw's evidence as being dated. She further explained that she was satisfied that the Assessor's rental rates were applied properly.

56 I am satisfied that the Commissioner's application of this evidence to the income approach to property valuation as explained in case law and based on generally accepted appraisal principles, does not constitute an error of law, measured by a standard of reasonableness.

***Whether Loblaw was denied procedural fairness***

57 Procedural fairness in the context of an assessment appeal under the *Act* was discussed in *Hiscock Estate v. St. John's (City)*, 2014 NLTD(G) 110 (N.L. T.D.), citing jurisprudence from the Supreme Court of Canada on the application of the rules of natural justice and the extent of the duty of procedural fairness, at paragraphs 19 and 20:

> 19 In *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11 (S.C.C.), at paragraph 75, the Supreme Court of Canada addressed the application of the rules of natural justice before administrative bodies. Justice Arbour wrote:
>
> > 75. The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; Baker, supra, at para. 20; Therrien, supra, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the audi alteram partem rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as per L'Heureux-Dubé J. in Baker, supra, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see Knight, supra, at p. 683); there is no appeal from the Council's decision (see D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).
>
> 20 The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) explained at paragraph 21 that the extent of the duty of procedural fairness to be accorded a party to a hearing must be determined with a consideration of the "specific context of each case":
>
> 21. The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: Knight, at pp. 682-83; Cardinal, supra, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

58 The municipal taxpayer in *Hiscock* had received notice of assessment increasing the valuation of the Estate property for which she stood in the role of Executrix, from $243,100 to $5,201,600, significantly affecting the issue at stake in the appeal. A comprehensive development area land-use-zone plan had been released since the property's most recent assessment. Prior to the appeal hearing, the taxpayer had been assured that the proceedings would be informal and that assistance would be provided to her by a senior assessor with the City. Further, the taxpayer had not been given key comparable sales information, denying her the opportunity to properly prepare for her appeal. To compound her difficulty in understanding the case she had to meet, she was not provided copies of the City's comparable sales at the hearing, despite a request to see them. In the result, the Commissioner's decision was vacated and the matter remitted for a new hearing on a finding that she had been denied procedural fairness.

59 The facts here are distinguishable from those in *Hiscock*. Loblaw, a sophisticated taxpayer, was represented at the hearing by two experienced appraisers. There was no evidence that Loblaw requested further information at any time during the appeal

hearing or had been given any assurances of assistance from the Assessors in advance of the hearing. Loblaw prepared its own expert report and was given a copy of the report relied upon by Mount Pearl's Assessors. While the transcript was incomplete in some instances, Counsel for Mount Pearl underscored that the source of the rental rate and information was simply not an issue before the Commissioner. I do not find a denial of procedural fairness in these circumstances.

60 Nothing in these reasons however, precludes the taxpayer from raising concerns with the reliability of anonymized data on future appeals where the issue can be properly argued on the basis of submissions and evidence.

***Adequacy of the Commissioner's Reasons***

61 Loblaw also challenges the Commissioner's decision on the grounds that her reasons were inadequate in failing to explain why she rejected its evidence. The Commissioner's reasons are brief but cannot be said to disclose no consideration of evidence or appropriate property valuation methodology. More fulsome reasons would have assisted Loblaw and other taxpayers in their understanding of the application of municipal tax to their property. However, in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.), the Supreme Court of Canada explains that adequacy of reasons is not a "stand-alone basis" for vacating a tribunal's decision (at para. 14). Instead, the reviewing court must assess the reasons as part of an "organic exercise" which considers the range of outcomes arising from the evidence and the law. Deference in this regard is explained at paragraphs 15 to 18:

> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> 17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
>
> 18 Evans J.A. in *P.S.A.C. v. Canada Post Corp.*, 2010 FCA 56, [2011] 2 F.C.R. 221 (Fed. C.A.), explained in reasons upheld by this Court (2011 SCC 57 (S.C.C.)) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
>> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

62 To the extent that Loblaw raises the adequacy of reasons, I consider that a contextual analysis, including the record of the appeal hearing, two valuation reports, and the range of possible outcomes, supports a finding that the sufficiency of reasons, though not comprehensively analyzing the evidence in relation to the valuation approach, does not support quashing the Commissioner's decision.

**Conclusion**

63 Loblaw's appeal is dismissed with costs to the City of Mount Pearl in accordance with Column 3 of the Scale of Costs contained in Rule 55.

*Appeal dismissed.*

# TAB 7

2020 NLCA 27
Newfoundland and Labrador Court of Appeal

John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's

2020 CarswellNfld 185, 2020 NLCA 27, 327 A.C.W.S. (3d) 296

# JOHN DOE (G.E.B. #25) (APPELLANT / RESPONDENT BY CROSS-APPEAL) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S (RESPONDENT / APPELLANT BY CROSS-APPEAL)

JOHN DOE (G.E.B. #26) (APPELLANT / RESPONDENT BY CROSS-APPEAL) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S (RESPONDENT / APPELLANT BY CROSS-APPEAL)

JOHN DOE (G.E.B. #33) (APPELLANT / RESPONDENT BY CROSS-APPEAL) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S (RESPONDENT / APPELLANT BY CROSS-APPEAL)

JOHN DOE (G.E.B. #50) (APPELLANT / RESPONDENT BY CROSS-APPEAL) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S (RESPONDENT / APPELLANT BY CROSS-APPEAL)

D.E. Fry C.J.N.L., L.R. Hoegg J.A., F.P. O'Brien J.A.

Heard: March 21, 2019; March 22, 2019
Judgment: July 28, 2020
Docket: 201801H0028, 201801H0045

Proceedings: reversing in part *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's* (2018), 2018 CarswellNfld 88, 2018 NLSC 60, Alphonsus E. Faour J. (N.L. S.C.); leave to appeal refused *Roman Catholic Episcopal Corporation of St. John's v. John Doe (G.E.B. #25), et al.* (2021), 2021 CarswellNfld 13, 2021 CarswellNfld 12 (S.C.C.)

Counsel: Eugene Meehan Q.C., Thomas Slade, Geoffrey E. Budden, Paul Kennedy, for Appellants / Respondents by Cross-Appeal
Mark R. Frederick, Susan Adam Metzler, Chris T. Blom, for Respondent / Appellant by Cross-Appeal

**Headnote**
Torts --- Specific forms of liability — Vicarious liability — Miscellaneous
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed on grounds including that judge erred in dismissing their vicarious liability claims — Appeal allowed — Trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs, but did not err in finding no vicarious liability for R's conduct — Trial judge did not apply correct law of vicarious liability to evidence, failed to assess all relevant factors when applying doctrine, and conflated closeness and connection inquiries — These errors were extricable errors of principle subject to correctness standard of review which were so fundamental to finding on ultimate issue that they undermined trial judge's decision not to impose vicarious liability on Archdiocese for brothers' wrongdoing — Total relationship between brothers and Archdiocese showed that brothers were working on basis of Archdiocese's social and religious mandate — Relationship was sufficiently close and connection between brothers' assigned tasks and their wrongdoing was sufficiently close to justify vicarious liability finding against Archdiocese — Judge erred in finding that R did not owe duty of care to plaintiffs, but did not err in finding that evidence did not establish

breach of duty — Trial judge did not err in finding that R's negligence was not established, and on finding that Archdiocese could not be vicariously liable for R's conduct.
Torts --- Negligence — Duty and standard of care — Duty of care
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed — Appeal allowed on basis that trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs — Trial judge did not err in finding no vicarious liability for R's conduct and did not err in deciding that Archdiocese was not directly negligent — Trial judge erred in finding that relationship between R and Archdiocese was not sufficiently proximate to create duty of care and erred in finding concluding that foreseeability requirement was not met — Trial judge did not err in analysis and application of burden of proof — Trial judge made considered assessment of evidence on breach of duty issue — Trial judge was entitled to reach conclusion that breach of duty was not established by evidence.
Torts --- Negligence — Duty and standard of care — Fiduciary duty
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed — Appeal allowed on basis that trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs — Trial judge did not err in finding no vicarious liability for R's conduct and did not err in deciding that Archdiocese was not directly negligent — Plaintiffs had not discharged onus of showing breach of fiduciary duty on per se or ad hoc basis — Assuming per se fiduciary duty arose from relationship between R as priest and plaintiffs as penitents, evidence did not support conclusion that there was breach of fiduciary duty in context of plaintiffs who made no sexual abuse disclosure — With respect to plaintiff who alleged that R failed to act when told of sexual abuse, judge did not err in finding that trial evidence did not establish this — Fact that vulnerable person in fiduciary relationship has been harmed does not automatically amount to breach of fiduciary duty — Evidence of misconduct by fiduciary in abusing or betraying fiduciary relationship was also required — No evidence was provided to show abuse of power, trust or loyalty by R necessary to show breach of ad hoc fiduciary duty by R — R's negligence was not established and Archdiocese could not be held vicariously liable for R's conduct.
Torts --- Negligence — Miscellaneous
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed — Appeal allowed on basis that trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs — Trial judge did not err in finding no vicarious liability for R's conduct and did not err in deciding that Archdiocese was not directly negligent — There was no evidence that Archdiocese had direct knowledge of brothers' abuse — Presuming argument was that Archdiocese had knowledge of abuse because R was told of it, and presuming that R's knowledge could be imputed to Archdiocese, evidence did not show that R failed to take appropriate action in light of disclosures — Plaintiffs did not establish that judge erred in finding that Archdiocese discharged its duty of care by dealing appropriately with report of sexual abuse by civilian employee — Plaintiffs did not show that trial judge erred in finding there was no evidence that Archdiocese had direct knowledge of brothers' abuse of plaintiffs, or in concluding that evidence did not prove that R breached duty of care by failing to act when advised of abuse — There was no basis for finding that Archdiocese was directly negligent.
Remedies --- Damages — Valuation of damages — Miscellaneous

Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed — Defendants cross-appealed judge's provisional assessments of general damages for three of four plaintiffs and cross-appealed provisional awards for economic loss, including pre-judgment interest, for two plaintiffs — Appeal allowed on basis that trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs — Trial judge did not err in finding no vicarious liability for R's conduct and did not err in deciding that Archdiocese was not directly negligent — Cross-appeal allowed only on issue of pre-judgment interest — There was no error in judge's application of "but for" test in assessing general and aggravated damages award — Trial judge carefully balanced evidence, including expert opinions, and came to decision supported by evidence and in line with awards for similar injuries — Trial judge recognized trend toward higher awards for childhood sexual abuse — Trial judge was aware of and considered plaintiffs' potential family history with alcoholism as well as evidence of expert witnesses and Archdiocese did not show that judge erred in consideration of this issue with respect to general and aggravated damages award with respect to specified plaintiffs.
Remedies --- Damages — Special damages [pre-trial pecuniary loss] — Past loss of income — Effect of plaintiff's employment status
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents — Plaintiffs brought action for damages against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial, but trial judge stated that CB Inc. appeared to have acknowledged liability — Action against Archdiocese was dismissed and plaintiffs appealed — Defendants cross-appealed judge's provisional assessments of general damages for three of four plaintiffs and cross-appealed provisional awards for economic loss, including pre-judgment interest, for two plaintiffs — Appeal allowed on basis that trial judge erred in finding that Archdiocese was not vicariously liable for brothers' sexual abuse of plaintiffs — Trial judge did not err in finding no vicarious liability for R's conduct and did not err in deciding that Archdiocese was not directly negligent — Cross-appeal allowed only on issue of pre-judgment interest — Judge did not err in declining to find that plaintiff's alcohol abuse was due to genetics as opposed to sexual abuse he suffered at orphanage — It was not unreasonable to find that plaintiff's understanding and explanation as to why he drank evolved with time — Archdiocese did not demonstrate that trial judge erred in treatment of causation issue and there was no basis in intervening in assessment of this plaintiff's claim for loss of income.
Civil practice and procedure --- Judgments and orders — Interest on judgments — Prejudgment interest — Date from which interest runs
Plaintiffs were victims of abuse by several brothers of lay religious order of teachers (CB Inc.) during their childhood when plaintiffs were orphanage residents in 1950s — Plaintiffs brought action against corporate personality of Catholic Church (Archdiocese) and CB Inc. — Action alleged that Archdiocese was liable vicariously for actions of brothers and for R, resident orphanage priest, and liable directly because it knew but did not act on knowledge that plaintiffs were being sexually abused at orphanage — CB Inc. did not participate in trial — Action against Archdiocese was dismissed and plaintiffs appealed — Defendants cross-appealed provisional awards for economic loss, including pre-judgment interest, for two plaintiffs — Pre-judgment interest award for loss of income was calculated from 1957 for first plaintiff and from 1975 for second plaintiff — Cross-appeal allowed only on issue of pre-judgment interest award on economic loss awards — Pre-judgment interest was to be calculated on economic loss awards for two plaintiffs from date of filing of statement of claim to date of judgment — In this case, given enactment of statutory provisions, there was no basis in common law to award pre-judgment interest on damages for economic loss — According to s. 4(1) in both 1983 and 1990 versions of Judgment Interest Act, court should calculate pre-judgment interest from date that cause of action arose to day of judgment — Trial judge erred in awarding pre-judgment interest from period from 1957 or 1975 to date of hearing without making finding as to when causes of action arose — Trial judge did not apply discoverability principle and made no finding as to when plaintiffs would have had substantial awareness of harm done and its likely cause — Without analysis by judge, who merely noted first time that one of plaintiffs disclosed sexual

abuse to anyone was in 1990s, it was not possible to use discoverability principle to determine when causes of action arose — Amendment to Limitations Act in 1995 revived causes of action — In circumstances, discretion was exercised under s. 3(3) of Judgment Interest Act and pre-judgment interest award was made from December 29, 1999.

**Table of Authorities**

**Cases considered:**

*A. (C.) v. C. (J.W.)* (1998), 1998 CarswellBC 2370, 113 B.C.A.C. 248, 184 W.A.C. 248, 166 D.L.R. (4th) 475, 42 R.F.L. (4th) 427, 43 C.C.L.T. (2d) 223, 60 B.C.L.R. (3d) 92, 13 Admin. L.R. (3d) 157 (B.C. C.A.) — considered

*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 W.L.R. 1024, (sub nom. *Anns v. London Borough of Merton)* [1977] 2 All E.R. 492, 121 S.J. 377, [1977] UKHL 4, [1977] 2 All E.R. 118 (U.K. H.L.) — considered

*B. (E.) v. Order of the Oblates of Mary Immaculate (British Columbia)* (2001), 2001 BCSC 1783, 2001 CarswellBC 2891 (B.C. S.C.) — considered

*B. (E.) v. Order of the Oblates of Mary Immaculate (British Columbia)* (2005), 2005 SCC 60, 2005 CarswellBC 2484, 2005 CarswellBC 2485, (sub nom. *B. (E.) v. Order of the Oblates of Mary Immaculate in the Province of British Columbia)* 258 D.L.R. (4th) 385, 35 C.C.L.T. (3d) 1, 340 N.R. 202, [2006] 3 W.W.R. 1, 48 B.C.L.R. (4th) 37, 217 B.C.A.C. 1, 358 W.A.C. 1, [2005] R.R.A. 1024, [2005] 3 S.C.R. 45 (S.C.C.) — referred to

*B. (J.) v. Jacob* (1998), 1998 CarswellNB 308, 166 D.L.R. (4th) 125, 204 N.B.R. (2d) 254, 520 A.P.R. 254 (N.B. C.A.) — referred to

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

*Baldwin v. Chalker* (1984), 34 R.P.R. 167, 48 Nfld. & P.E.I.R. 86, 142 A.P.R. 86, 1984 CarswellNfld 26 (Nfld. C.A.) — considered

*Bank of America Canada v. Mutual Trust Co.* (2002), 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 287 N.R. 171, 159 O.A.C. 1, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — considered

*Bazley v. Curry* (1999), 1999 CarswellBC 1264, 1999 CarswellBC 1265, (sub nom. *B. v. Curry)* 99 C.L.L.C. 210-033, 43 C.C.E.L. (2d) 1, 62 B.C.L.R. (3d) 173, (sub nom. *P.A.B. v. Children's Foundation)* 124 B.C.A.C. 119, (sub nom. *P.A.B. v. Children's Foundation)* 203 W.A.C. 119, (sub nom. *P.A.B. v. Children's Foundation)* 241 N.R. 266, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197, [1999] L.V.I. 3046-1, 46 C.C.L.T. (2d) 1, [1999] 2 S.C.R. 534 (S.C.C.) — considered

*Benedict v. Sealand Helicopters Ltd.* (1993), 111 Nfld. & P.E.I.R. 66, 348 A.P.R. 66, 1993 CarswellNfld 182 (Nfld. T.D.) — considered

*Blackwater v. Plint* (2001), 2001 BCSC 997, 2001 CarswellBC 1468, 93 B.C.L.R. (3d) 228, [2001] B.C.T.C. 997 (B.C. S.C.) — considered

*Blackwater v. Plint* (2005), 2005 SCC 58, 2005 CarswellBC 2358, 2005 CarswellBC 2359, 258 D.L.R. (4th) 275, 46 C.C.E.L. (3d) 165, 339 N.R. 355, 35 C.C.L.T. (3d) 161, 48 B.C.L.R. (4th) 1, 216 B.C.A.C. 24, 356 W.A.C. 24, [2006] 3 W.W.R. 401, [2005] R.R.A. 1021, [2005] 3 S.C.R. 3 (S.C.C.) — considered

*Broome v. Prince Edward Island* (2010), 2010 SCC 11, 2010 CarswellPEI 20, 2010 CarswellPEI 21, 73 C.C.L.T. (3d) 1, 317 D.L.R. (4th) 218, 400 N.R. 148, 297 Nfld. & P.E.I.R. 24, 918 A.P.R. 24, [2010] 1 S.C.R. 360, 294 Nfld. & P.E.I.R. 24 (S.C.C.) — considered

*Bussey v. White* (2001), 2001 NFCA 7, 2001 CarswellNfld 23 (Nfld. C.A.) — referred to

*Central & Eastern Trust Co. v. Rafuse* (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only) (S.C.C.) — considered

*Chiasson v. Duguay Holdings Inc.* (2015), 2015 NBCA 8, 2015 CarswellNB 35, 2015 CarswellNB 36 (N.B. C.A.) — considered

*Childs v. Desormeaux* (2006), 2006 SCC 18, 2006 CarswellOnt 2710, 2006 CarswellOnt 2711, 30 M.V.R. (5th) 1, 266 D.L.R. (4th) 257, 39 C.C.L.T. (3d) 163, 347 N.R. 328, 210 O.A.C. 315, 80 O.R. (3d) 558 (note), [2006] 1 S.C.R. 643, [2006] R.R.A. 245 (S.C.C.) — considered

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

*Courtney v. Cleary* (2010), 2010 NLCA 46, 2010 CarswellNfld 219, 322 D.L.R. (4th) 10, 299 Nfld. & P.E.I.R. 85, 926 A.P.R. 85 (N.L. C.A.) — considered

*Cowper-Smith v. Morgan* (2017), 2017 SCC 61, 2017 CSC 61, 2017 CarswellBC 3482, 2017 CarswellBC 3483, 32 E.T.R. (4th) 1, [2018] 1 W.W.R. 209, 416 D.L.R. (4th) 1, 4 B.C.L.R. (6th) 1, [2017] 2 S.C.R. 754 (S.C.C.) — referred to

*Deloitte & Touche v. Livent Inc. (Receiver of)* (2017), 2017 SCC 63, 2017 CSC 63, 2017 CarswellOnt 20138, 2017 CarswellOnt 20139, 416 D.L.R. (4th) 32, 55 C.B.R. (6th) 1, 71 B.L.R. (5th) 175, 43 C.C.L.T. (4th) 1, [2017] 2 S.C.R. 855 (S.C.C.) — considered

*F.H. v. McDougall* (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, 260 B.C.A.C. 74, 380 N.R. 82, [2008] 3 S.C.R. 41, 439 W.A.C. 74 (S.C.C.) — considered

*Fontaine v. British Columbia (Official Administrator)* (1997), 1997 CarswellBC 2930, 1997 CarswellBC 2931, (sub nom. *Fontaine v. Loewen Estate)* 156 D.L.R. (4th) 577, (sub nom. *Fontaine v. Loewen Estate)* 103 B.C.A.C. 118, (sub nom. *Fontaine v. Loewen Estate)* 169 W.A.C. 118, (sub nom. *Fontaine v. Loewen Estate)* 223 N.R. 161, 46 B.C.L.R. (3d) 1, [1998] 1 S.C.R. 424, [1998] 7 W.W.R. 25, 34 M.V.R. (3d) 165, 41 C.C.L.T. (2d) 36 (S.C.C.) — considered

*Fontaine v. Canada (Attorney General)* (2017), 2017 MBQB 21, 2017 CarswellMan 48, 97 C.P.C. (7th) 334, [2017] 7 W.W.R. 761 (Man. Q.B.) — distinguished

*G. (J.) c. Nadeau* (2016), 2016 QCCA 167, 2016 CarswellQue 927 (C.A. Que.) — considered

*Galaske v. O'Donnell* (1994), [1994] 5 W.W.R. 1, [1994] 1 S.C.R. 670, 112 D.L.R. (4th) 109, 43 B.C.A.C. 37, 69 W.A.C. 37, 166 N.R. 5, 89 B.C.L.R. (2d) 273, 21 C.C.L.T. (2d) 1, 2 M.V.R. (3d) 1, 1994 CarswellBC 152, 1994 CarswellBC 1238 (S.C.C.) — referred to

*Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56, 1971 CarswellNfld 19 (Nfld. T.D.) — considered

*H. (H.) Estate v. Newfoundland & Labrador* (2010), 2010 NLTD 47, 2010 CarswellNfld 69, 298 Nfld. & P.E.I.R. 74, 921 A.P.R. 74 (N.L. T.D.) — considered

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

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — considered

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

*Jacobi v. Griffiths* (1999), 1999 CarswellBC 1262, 1999 CarswellBC 1263, (sub nom. *J. v. Griffiths)* 99 C.L.L.C. 210-034, (sub nom. *G.T.-J. v. Griffiths)* 241 N.R. 201, 174 D.L.R. (4th) 71, 124 B.C.A.C. 161, 203 W.A.C. 161, 63 B.C.L.R. (3d) 1, [1999] L.V.I. 3046-2, [1999] 9 W.W.R. 1, 46 C.C.L.T. (2d) 49, 44 C.C.E.L. (2d) 169, [1999] 2 S.C.R. 570 (S.C.C.) — considered

*John Doe v. Bennett* (2004), 2004 SCC 17, 2004 CarswellNfld 75, 2004 CarswellNfld 76, 236 D.L.R. (4th) 577, 32 C.C.E.L. (3d) 1, 318 N.R. 146, 236 Nfld. & P.E.I.R. 215, 700 A.P.R. 215, (sub nom. *Untell c. Bennett)* [2004] R.R.A. 311, [2004] 1 S.C.R. 436, 2004 CSC 17 (S.C.C.) — considered

*Johnstone v. Sealand Helicopters Ltd.* (1981), 35 Nfld. & P.E.I.R. 76, 99 A.P.R. 76, 1981 CarswellNfld 43 (Nfld. C.A.) — considered

*L. (H.) v. Canada (Attorney General)* (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 1 S.C.R. 401, 29 C.C.L.T. (3d) 1, 2005 CSC 25 (S.C.C.) — considered

*Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57, 1989 CarswellOnt 126, 1989 CarswellOnt 965, 69 O.R. (2d) 287 (note), 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574 (S.C.C.) — considered

*M. (D.) v. W. (W.)* (2013), 2013 ONSC 4176, 2013 CarswellOnt 8448 (Ont. S.C.J.) — considered

*M. (F.W.) v. Mombourquette* (1996), 152 N.S.R. (2d) 109, 442 A.P.R. 109, 1996 CarswellNS 294, 1996 NSCA 125 (N.S. C.A.) — referred to

*M. (K.) v. M. (H.)* (1992), 142 N.R. 321, (sub nom. *M. c. M.)* [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, 1992 CarswellOnt 841, 1992 CarswellOnt 998 (S.C.C.) — considered

*Matchim v. BGI Atlantic Inc.* (2010), 2010 NLCA 9, 2010 CarswellNfld 32, 294 Nfld. & P.E.I.R. 46, 908 A.P.R. 46 (N.L. C.A.) — considered

*McAlister (Donoghue) v. Stevenson* (1932), [1932] A.C. 562, [1932] All E.R. Rep. 1, 101 L.J.P.C. 119, 147 L.T. 281, 37 Com. Cas. 850, [1932] UKHL 100 (U.K. H.L.) — considered

*McInerney v. MacDonald* (1992), 137 N.R. 35, 126 N.B.R. (2d) 271, 317 A.P.R. 271, 93 D.L.R. (4th) 415, 7 C.P.C. (3d) 269, 12 C.C.L.T. (2d) 225, [1992] 2 S.C.R. 138, 1992 CarswellNB 63, 1992 CarswellNB 247 (S.C.C.) — referred to

*Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec* (2019), 2019 SCC 28, 2019 CSC 28, 2019 CarswellQue 2950, 2019 CarswellQue 2951, 2019 C.L.L.C. 210-037, 55 C.C.E.L. (4th) 171, 434 D.L.R. (4th) 313, [2019] 2 S.C.R. 406 (S.C.C.) — referred to

*Nelson (City) v. Mowatt* (2017), 2017 SCC 8, 2017 CSC 8, 2017 CarswellBC 400, 2017 CarswellBC 401, [2017] 3 W.W.R. 1, 74 R.P.R. (5th) 1, 58 M.P.L.R. (5th) 1, 406 D.L.R. (4th) 1, 93 B.C.L.R. (5th) 36, [2017] 1 S.C.R. 138 (S.C.C.) — considered

*Norberg v. Wynrib* (1992), [1992] 4 W.W.R. 577, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, 12 C.C.L.T. (2d) 1, 9 B.C.A.C. 1, 19 W.A.C. 1, 138 N.R. 81, 68 B.C.L.R. (2d) 29, 1992 CarswellBC 155, [1992] R.R.A. 668, 1992 CarswellBC 907 (S.C.C.) — referred to

*P. (J.) v. Sinclair* (1997), 148 D.L.R. (4th) 472, 93 B.C.A.C. 175, 151 W.A.C. 175, 1997 CarswellBC 1212, 37 B.C.L.R. (3d) 366, 11 C.P.C. (4th) 386, 37 C.C.L.T. (2d) 290 (B.C. C.A.) — considered

*PIPSC v. Canada (Attorney General)* (2012), 2012 SCC 71, 2012 CarswellOnt 15718, 2012 CarswellOnt 15719, D.T.E. 2012T-892, 352 D.L.R. (4th) 491, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 438 N.R. 1, (sub nom. *Prof. Inst. of the Public Service of Canada v. Canada (Attorney General))* 2012 C.E.B. & P.G.R. 8017 (headnote only), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 300 O.A.C. 202, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 274 C.R.R. (2d) 30, (sub nom. *Professional Institute of the Public Service Alliance of Canada v. Canada (Attorney General))* [2012] 3 S.C.R. 660, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 119 O.R. (3d) 80 (note), 1 C.C.P.B. (2nd) 1 (S.C.C.) — considered

*Perez v. Galambos* (2009), 2009 SCC 48, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 276 B.C.A.C. 272, 468 W.A.C. 272, 312 D.L.R. (4th) 220, (sub nom. *Galambos v. Perez)* [2009] 3 S.C.R. 247 (S.C.C.) — referred to

*Q. v. Minto Management Ltd.* (1985), 31 C.C.L.T. 158, 49 O.R. (2d) 531, 15 D.L.R. (4th) 581, 36 R.P.R. 75, 1985 CarswellOnt 718 (Ont. H.C.) — considered

*Q. v. Minto Management Ltd.* (1986), 57 O.R. (2d) 781, 34 D.L.R. (4th) 767, 1986 CarswellOnt 2187 (Ont. C.A.) — referred to

*R. (G.B.) v. Hollett* (1996), 30 C.C.L.T. (2d) 215, 139 D.L.R. (4th) 260, 154 N.S.R. (2d) 161, 452 A.P.R. 161, [1996] G.S.T.C. 71, 1996 CarswellNS 321, 1996 NSCA 121 (N.S. C.A.) — considered

*R. (G.B.) v. Hollett* (1997), 160 N.S.R. (2d) 80 (note), 473 A.P.R. 80 (note), 223 N.R. 221 (note) (S.C.C.) — referred to

*R. v. Clark* (2005), 2005 SCC 2, 2005 CarswellBC 137, 2005 CarswellBC 138, 25 C.R. (6th) 197, 329 N.R. 10, 193 C.C.C. (3d) 289, 249 D.L.R. (4th) 257, 208 B.C.A.C. 6, 344 W.A.C. 6, 8 M.P.L.R. (4th) 289, [2005] 1 S.C.R. 6 (S.C.C.) — considered

*R. v. Mohan* (1994), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), 1994 CarswellOnt 66, 1994 CarswellOnt 1155, 1994 SCC 80 (S.C.C.) — referred to

*Rankin (Rankin's Garage & Sales) v. J.J.* (2018), 2018 SCC 19, 2018 CSC 19, 2018 CarswellOnt 7370, 2018 CarswellOnt 7371, 25 M.V.R. (7th) 1, 422 D.L.R. (4th) 317, 47 C.C.L.T. (4th) 1, [2018] 1 S.C.R. 587 (S.C.C.) — considered

*Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre* (2013), 2013 SCC 53, 2013 CarswellOnt 14113, 2013 CarswellOnt 14114, (sub nom. *Rasouli v. Sunnybrook Health Sciences Centre)* 310 O.A.C. 19, (sub nom. *Rasouli v. Sunnybrook Health Sciences Centre)* 449 N.R. 313, 364 D.L.R. (4th) 195, (sub nom. *Cuthbertson v. Rasouli)* [2013] 3 S.C.R. 341, 5 C.C.L.T. (4th) 1, 123 O.R. (3d) 560 (note) (S.C.C.) — referred to

*Rich v. Bromley Estate* (2013), 2013 NLCA 24, 2013 CarswellNfld 149, 360 D.L.R. (4th) 51, 1043 A.P.R. 107, 336 Nfld. & P.E.I.R. 107, 1 C.C.L.T. (4th) 79 (N.L. C.A.) — considered

*Rich v. Bromley Estate* (2013), 2013 CarswellNfld 383, 2013 CarswellNfld 384, 463 N.R. 391 (note), 1106 A.P.R. 81 (note), 355 Nfld. & P.E.I.R. 81 (note) (S.C.C.) — referred to

*Salomon v. Matte-Thompson* (2019), 2019 SCC 14, 2019 CSC 14, 2019 CarswellQue 764, 2019 CarswellQue 765, 52 C.C.L.T. (4th) 175, 432 D.L.R. (4th) 1, [2019] 1 S.C.R. 729 (S.C.C.) — considered

*Saylor v. Madsen Estate* (2007), 2007 SCC 18, 2007 CarswellOnt 2754, 2007 CarswellOnt 2755, (sub nom. *Saylor v. Brooks)* 360 N.R. 327, 32 E.T.R. (3d) 61, 279 D.L.R. (4th) 547, (sub nom. *Saylor v. Brooks)* 224 O.A.C. 382, 42 C.P.C. (6th) 1, (sub nom. *Madsen Estate v. Saylor)* [2007] 1 S.C.R. 838 (S.C.C.) — considered

*Slaney v. Ellis* (1993), 108 Nfld. & P.E.I.R. 181, 339 A.P.R. 181, 1993 CarswellNfld 298 (Nfld. T.D.) — considered

*T. (G.) v. Griffiths* (1995), 1995 CarswellBC 2764 (B.C. S.C.) — considered

*White Burgess Langille Inman v. Abbott and Haliburton Co.* (2015), 2015 SCC 23, 2015 CSC 23, 2015 CarswellNS 313, 2015 CarswellNS 314, 383 D.L.R. (4th) 429, 18 C.R. (7th) 308, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 470 N.R. 324, 67 C.P.C. (7th) 73, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 1135 A.P.R. 1, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 360 N.S.R. (2d) 1, [2015] 2 S.C.R. 182 (S.C.C.) — considered

*Whiteway v. Newfoundland* (1897), [1897-1903] Nfld. L.R. 482 (Nfld. C.A.) — referred to

*Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), [1986] 2 C.T.C. 200, 46 Alta. L.R. (2d) 83, [1986] 5 W.W.R. 450, 1986 C.E.B. & P.G.R. 8023 (headnote only), 86 C.L.L.C. 14,062, 87 D.T.C. 5025, [1986] 3 F.C. 553, 70 N.R. 214, 1986 CarswellNat 366, 1986 CarswellNat 699 (Fed. C.A.) — considered

*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 2001 SCC 59, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 150 O.A.C. 12, 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, (sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.)* 2002 C.L.L.C. 210-013, 55 O.R. (3d) 782, 2001 CSC 59 (S.C.C.) — considered

**Statutes considered:**

*Court Order Interest Act*, R.S.B.C. 1996, c. 79

Generally — referred to

*Indian Act*, S.C. 1951, c. 29

Generally — referred to

*Judgment Interest Act*, R.S.N. 1990, c. J-2

Generally — referred to

s. 4 — considered

s. 4(1) — considered

*Judgment Interest Act*, S.N. 1983, c. 81

Generally — referred to

s. 3(3) — considered

s. 4(1) — considered

s. 10 — considered

*Judicature Act*, R.S.O. 1970, c. 228

Generally — referred to

*Judicature Act*, R.S.O. 1980, c. 223

s. 36 — considered

s. 36(7) — considered

*Limitation of Personal Actions Act*, R.S.N. 1990, c. L-15

Generally — referred to

*Limitations Act*, S.N. 1995, c. L-16.1

Generally — referred to

s. 5 — referred to

s. 5(a) — considered

s. 6 — referred to

s. 8 — considered

s. 8(2) — considered

s. 8(3) — considered

s. 17 — considered

s. 17(2) — considered

s. 24(1) — considered

s. 24(2) — considered

*Revised Statutes, 1990 Act*, S.N. 1991, c. 41

Generally — referred to

s. 9 — considered

s. 9(3) — considered

*Young Persons Offences Act*, R.S.N. 1990, c. Y-1

Generally — referred to

*Young Persons Offences Act*, S.N. 1984, c. 2

Generally — referred to

**Rules considered:**

*Court of Appeal Rules*, Nfld. Reg. 38/16

R. 58(1) — considered

R. 58(2) — considered

**Tariffs considered:**

*Court of Appeal Rules*, Nfld. Reg. 38/16

App., Items of Costs, column 3 — referred to

**Per curiam:**

**INTRODUCTION**

1 In a suit filed in December 1999, four plaintiffs, G.E.B. #25, G.E.B. #26, G.E.B. #33 and G.E.B. #50 (the plaintiffs or the appellants), claimed against the Roman Catholic Episcopal Corporation of St. John's (the Diocese or Archdiocese) and the Christian Brothers Institute Inc. for damages resulting from the sexual abuse they suffered while they were boys living at Mount Cashel orphanage in St. John's during the 1950s.

2 The judge accepted and it is not contested on this appeal that the plaintiffs received partial payment of their claims against the Christian Brothers after bankruptcy proceedings resulted in liquidation of their assets. The record does not disclose a Notice of Discontinuance or Satisfaction Piece in this regard, although counsel for the plaintiffs stated at a discovery proceeding that the action was discontinued. That said, the Christian Brothers Institute Inc. remained as a defendant on the Statement of Claim although they did not participate in the trial.

3 The plaintiffs' suit was tried over approximately 35 days during 2016. The plaintiffs alleged that the Archdiocese was vicariously liable for the Brothers' sexual abuse of them, arguing that the Archdiocese had a sufficiently close relationship with the Brothers to justify it being found vicariously liable for their actions. As well, the plaintiffs alleged that the Archdiocese was vicariously liable for the negligence of one of its priests, Monsignor Ryan, who lived at the orphanage. The plaintiffs also alleged that Monsignor Ryan breached his fiduciary duty to them. Finally, the plaintiffs alleged that the Archdiocese was directly liable in negligence because it knew that the plaintiffs were being sexually abused at the orphanage but failed to act on that knowledge.

4 The evidence in this case implicated five Brothers at Mount Cashel who were there during the 1950s when the plaintiffs were residents. The Archdiocese did not dispute that the Brothers had abused the plaintiffs, and the judge accepted the Archdiocese's acknowledgement in this regard. However, the Archdiocese did dispute that it was negligent or that it was vicariously liable for the Brothers' or Monsignor Ryan's actions or inaction. The Archdiocese also disputed the degree of causal connection between the sexual assaults and the damages claimed by the plaintiffs.

5 In a written judgment filed March 16, 2018, the judge dismissed the plaintiffs' claims against the Archdiocese. Despite finding that the Archdiocese was not liable, the judge provisionally assessed damages respecting each of the four plaintiffs.

6 The judge made several comments respecting the plaintiffs' claim against the Christian Brothers. At paragraph 2 of his decision, the judge stated that "the Christian Brothers appear to have acknowledged liability" and at paragraph 49 of his decision, he said that he had "no doubt about the Plaintiffs' description of the events [the sexual abuse] that happened to them personally". Also, at paragraph 189 he stated that "there would be little doubt about the imposition of liability on the Christian Brothers organization", and noted at paragraph 199 that "[t]he Christian Brothers organization, which would have been found vicariously liable, has liquidated its assets through bankruptcy proceedings...".

**THE APPEAL AND CROSS-APPEAL**

7 The appellants appeal the judge's dismissal of their claims, saying that the judge made several errors in coming to his conclusions. They argue that the judge erred in dismissing their vicarious liability claims against the Archdiocese, and maintain that vicarious liability ought to have been imposed on the Archdiocese by two routes.

8 First, they argue that the Archdiocese was so closely related to the Brothers at Mount Cashel that the imposition of vicarious liability on the Archdiocese is appropriate. In this regard they say that the judge failed to consider the relationship between the Archdiocese and the Brothers in light of the policy rationales for the doctrine of vicarious liability, and that the judge assessed the evidence in a piecemeal fashion. The appellants also argue that the judge failed to consider key pieces of evidence, and that he focused unduly on the Archdiocese's lack of involvement in the day-to-day operations of the orphanage while minimizing or discounting evidence respecting the Archdiocese's involvement and influence in other operational matters.

9 Second, the appellants argue that the judge erred in failing to find the Archdiocese vicariously liable for the negligence of its priest, Monsignor Ryan, whom the Archdiocese assigned to live on the property to be the spiritual advisor to the appellants. The appellants say that Monsignor Ryan had been told about the Brothers' sexual abuse of the residents and that he failed to take action to have it addressed. The appellants also argue that Monsignor Ryan breached his fiduciary duty to them.

10 Finally, the appellants also argue that the judge erred in dismissing their claim that the Archdiocese was directly negligent. They submit that the evidence showed the Archdiocese knew of sexual abuse at the orphanage by a civilian employee and by the Brothers, and that it was negligent in failing to address the situation.

11 The Archdiocese says that the judge correctly dismissed the vicarious liability claims. The Archdiocese accepts that the Brothers sexually abused G.E.B. #25, G.E.B. #26, G.E.B. #33 and G.E.B. #50 while they were resident at Mount Cashel, but it denies that it is vicariously liable for the Brothers' wrongdoings. The basis for its denial is that the Brothers at Mount Cashel were separate from the Archdiocese, and that they acted independently from the Archdiocese in all respects involving the appellants and other residents of the orphanage. The Archdiocese also denies vicarious liability for the conduct of Monsignor Ryan, saying that he had no duty of care to the appellants, as the judge found, and that Monsignor Ryan cannot be shown to have breached such a duty of care in any event. The Archdiocese also rejects the appellants' claim that Monsignor Ryan breached a fiduciary duty to them. Finally, the Archdiocese maintains the judge correctly dismissed the appellants' direct negligence claim against it.

12 On the cross-appeal, the Archdiocese appeals the judge's provisional assessment of general damages for three of the four appellants. They also appeal the provisional awards for economic loss, including pre-judgment interest, for two of the appellants.

13 The Archdiocese argues that the judge made errors in his calculation of provisional general damages by failing to apply the proper tests and failing to account for other factors in the appellants' lives that may have contributed to their losses. The Archdiocese also argues that the judge erred in his causation analysis in determining the provisional awards for economic loss. Finally, the Archdiocese argues that the judge erred in his provisional awards of pre-judgment interest.

14 The appellants argue that damage awards attract a high degree of judicial deference and that the judge's provisional award of damages was appropriate. They also argue that the judge made no errors in his analysis and assessment of the economic loss claims and pre-judgment interest associated with those claims.

**ISSUES**

15 The issues on appeal are as follows:

(1) Did the judge err in dismissing the appellants' vicarious liability claim respecting the Brothers' sexual abuse of the appellants? This issue involves determining:

(a) whether the judge set out the correct legal standard of vicarious liability to be applied to the evidence;

(b) whether the judge erred in his application of the legal standard to the evidence; and

(c) whether the judge made other errors in the course of his analysis.

(2) Did the judge err in dismissing the appellants' vicarious liability claim respecting the conduct of Monsignor Ryan? This issue involves determining:

(a) whether the judge erred in finding that Monsignor Ryan had no duty of care to the appellants;

(b) whether the judge erred in finding that, if Monsignor Ryan had a duty of care to the appellants, he did not breach it; and

(c) whether Monsignor Ryan had a fiduciary duty to the appellants, and if so, whether he breached the duty.

(3) Did the judge err in dismissing the appellants' negligence claim against the Archdiocese?

16 The issue on the cross-appeal is whether the judge erred in his provisional assessment of damages. This issue involves determining:

(a) whether the judge erred in calculating the provisional damages awards by applying the wrong tests and failing to take account of other factors in the appellants' lives which may have contributed to their losses;

(b) whether the judge erred in assessing the provisional awards for economic loss; and

(c) whether the judge erred in the manner in which he awarded pre-judgment interest on the provisional loss of income awards.

**CONCLUSION ON GROUNDS OF APPEAL AND CROSS-APPEAL**

17 On Issue 1 of the appeal on liability, we allow the appeal. We conclude the judge erred in deciding that the Archdiocese was not vicariously liable for the Brothers' sexual abuse of the appellants. The judge made errors of law by inappropriately characterizing the requirements to be met for vicarious liability, by failing to globally assess the evidence, and by conflating the "closeness" and "connection" inquiries. He also made palpable and overriding errors by failing to consider relevant evidence in his analysis. Accordingly, we have set aside the judge's conclusion and determined that the Archdiocese is vicariously liable for the Brothers' abuse of the appellants.

18 On Issue 2, we uphold the judge's finding that the Archdiocese is not vicariously liable for Monsignor Ryan's conduct. While we find the judge erred in deciding Monsignor Ryan owed no duty of care to the appellants, we conclude the judge did not err in finding there was no breach of duty. As a result, Monsignor Ryan was not negligent and the Archdiocese is not vicariously liable. We also find that the judge made no error in concluding that there was no breach of fiduciary duty by Monsignor Ryan.

19 On Issue 3, we conclude the judge made no error in concluding the Archdiocese was not directly negligent.

20 As the appellants were successful on Issue 1, in the result the appeal on liability is allowed.

21 On the cross-appeal, with respect to the provisional awards for general damages, we conclude the judge applied the correct tests and properly took into account factors that contributed to the appellants' losses. Further, we find the judge properly assessed the provisional awards for economic loss. However, we find the judge erred in the manner in which he awarded pre-judgment interest on the provisional awards for loss of income.

22 In the result, the cross-appeal is allowed on the issue of pre-judgment interest on the loss of income awards.

**BACKGROUND**

23 The Roman Catholic community began establishing itself within the eastern part of Newfoundland during the late 18th century. The first chapel was built in the city of St. John's around this time and in 1784 the Pope officially recognized the territory of Newfoundland as a distinct region of the Church to be overseen by the Church in Quebec. In 1829 the first Roman Catholic Bishop of Newfoundland, Bishop Michael Fleming, was appointed to the Diocese of Newfoundland. (In 1856 the official name became the Diocese of St. John's, Newfoundland and in 1904 it became the Archdiocese of St. John's, Newfoundland.)

24 During the 18th and 19th centuries, it was common for religious denominations to provide social services, especially services related to health and education, to the community. Dr. John Fitzgerald, an expert witness tendered by the Archdiocese, testified to this practice at trial. See also *H. (H.) Estate v. Newfoundland & Labrador*, 2010 NLTD 47, 298 Nfld. & P.E.I.R. 74 (N.L. T.D.) at paras. 4, 12 and 19.

25 In the 1870s, a private non-sectarian organization called the Benevolent Irish Society (the "BIS") was interested in providing education to children through respective religious denominations and encouraged the Bishop to invite the Irish Christian Brothers to come to Newfoundland to teach in Roman Catholic schools. The Brothers had been established in Ireland early in the 19th century to educate poor and orphaned Roman Catholic boys. The Brothers were lay men who agreed to live together in a community under a set of rules established and enforced by Superiors of the organization. The Brothers were an Order of Pontifical Rite, meaning that they were generally answerable to the Vatican. The chain of command respecting the

Brothers in this province went from the Brother Superior in Newfoundland and continued to the Brothers Superior in New Rochelle, New York and the province of Canada (as described in the Brothers' structure), and ultimately to the Vatican. This chain of command was qualified by the requirement that the Bishop, or later the Archbishop, as the authority for the Diocese of Newfoundland, would be required to approve the establishment of any religious order in the Diocese and that Canon Law would ultimately govern the order and its members.

26 In 1875, the BIS asked the then Roman Catholic Bishop, Bishop Power, to approach the Christian Brothers in Ireland to come to Newfoundland for the purpose of educating Roman Catholic boys. Bishop Power wrote to a contact he had in Ireland and invited the Brothers to come and teach in Newfoundland.

27 In accordance with Canon Law, the Bishop granted these Christian Brothers permission to come to the Diocese of Newfoundland to establish an educational institute. An agreement dated September 8, 1875 between Bishop Power and the Assistant to the Superior of the Christian Brothers in Ireland was signed. The Agreement stated:

> 8$^{th}$ September 1875
>
> Draft of agreement between the Right Rev Dr. Power of St. John's Newfoundland, and the Superior General of the Christian Brothers Institute in Ireland.
>
> > 1. That an annual collection for the support of the Institute be taken up on the last Sunday in January in the Cathedral and other churches in St. John's.
> >
> > 2. That the Ecclesiastical Authorities on the Second last Sunday in January announce the collection and give it all reasonable sanction.
> >
> > 3. The Christian Brothers will be free to receive such other subscriptions and donations as the generosity of the public may suggest for the extension of the Institute in St. John's and Newfoundland.
> >
> > 4. The Brothers will not be obliged to receive or accept any government grant, or to place their schools under government inspection.
> >
> > 5. That the lease of land — little over four acres — selected by the Rev. Br. McDonnell, be transferred to the Institute, or should the Christian Brothers prefer it, a sufficient portion of the field at the rear of the Palace held in Fee will be given them.
> >
> > 6. That on the land so selected, a suitable dwelling house for the Institute be erected by the Bishop. The Bishop trusting to the well known generosity of the people for the necessary funds.
> >
> > 7. That as speedily as possible, a temporary dwelling house be secured by the Bishop for the Brothers, all necessary accommodations provided for them including an oratory; the Bishop being responsible for all rents and taxes in connection with such dwelling.
> >
> > 8. The Bishop will supply funds to render existing schools suitable for the reception of children according to the system of the Brothers in Ireland and will also undertake to supply all other necessary requisites
> >
> > 9. The Bishop will pay the expenses of each Brother from Ireland and supply them to the number of five at the rate of fifty pounds per annum for the support of each Br. until such time as the annual collection takes place.
> >
> > 9. [sic] The Brothers will be allowed the free exercise of the Rules and Religious observances in the same manner as in Ireland.
> >
> > 10. That in all things appertaining to such rules and observances they will be subject to their own Superior and to no other person.

11. That the schools under the management of the Christian Brothers be conducted by them with due efficiency both with regard to secular education and the Religious Instruction of the children.

12. That as soon as circumstances permit a community of not less than five Brothers will represent the Institute in St. John's.

[sgd.] Rt. Rev. T.J. Power, Bishop of St. John's

[sgd.] D.M. McDonnell, Assistant to Superior of Christian Brothers

9th Sept. 1875

28 As a result of the agreement, the Brothers began teaching at St. Patrick's Hall School, one of the Roman Catholic schools funded by the BIS. By the 1890s, the Brothers were also teaching at St. Bonaventure's College and Holy Cross School.

29 According to a brochure entered into evidence, written by J.B. Ashley and published at St. John's by Guardian Press Limited to commemorate the 75th anniversary of Christian Brothers coming to Newfoundland, Bishop Power had begun negotiations with the Superior General of the Christian Brothers in Dublin in 1892 respecting the feasibility of Brothers coming here to take charge of an orphanage. After Bishop Power passed away, Bishop Howley took over the effort. In the late 1890s, the Government of Newfoundland proposed financial assistance to religious denominations for the care of vagrant and otherwise disadvantaged children. At that time there was no orphanage for Roman Catholic boys. There had previously been a small Roman Catholic orphanage operated by a priest in the Topsail area, but it closed when the priest died. On September 14, 1897, Sir Robert Bond, Colonial Secretary, on behalf of the Government of Newfoundland, wrote to the then Roman Catholic Bishop Michael Howley, asking if the Diocese would be prepared to take charge of such Roman Catholic boys. On September 17, 1897, Bishop Howley responded to the Government via letter. Relevant sections of his reply are:

> In reply, I have to say that ever since I assumed the Episcopal Government of the Diocese of St. John's the subject of opening such an institution for our children has been a constant matter of consideration with me, and notwithstanding the pressure of the times, I had fully determined, before the receipt of your very welcome letter, to open such an institution this fall. I had already made preliminary arrangements, having ordered bedsteads and other furniture, I had also entered into a correspondence with the Superior of Christian Brothers in Dublin with a view to securing a staff of Brothers, who are experts in the management of such work, from the far-famed Institution of Artane.
>
> . . .
>
> I guarantee to have the establishment carried out in such a manner as shall amply satisfy all the demands required by any Act of Parliament which may be enacted, to erect suitable buildings, and make the enterprise in every sense a complete success. Special attention shall be paid to the instruction of the boys in useful trades and technical and practical training in agriculture and farming shall be an object of primary consideration, with a view to settling the boys on the fertile tracts of the interior of the country.

30 As Bishop Howley indicated, the Diocese had already begun preparations to open an "institution" for Roman Catholic boys in need and to have it staffed by Christian Brothers from Ireland. Also as indicated, Bishop Howley gave the Government his guarantee that suitable buildings would be erected and that the establishment would be carried out in such a manner as to make it in every sense a complete success. Government funding for denominational orphanages did not materialize at that time due to a change in government. Regardless, Bishop Howley continued with his plan and Christian Brothers arrived in St. John's between 1897 and 1898 to staff the institution. The institution was situated on property formerly owned by the family of Bishop Howley. Bishop Howley had announced at an organizational meeting in 1897 that the property would be used for the institution. The property consisted of Howley Cottage, a chapel dedicated to St. Raphael the Archangel which had been added to the cottage, and surrounding land. The institution was named Mount Cashel and it opened in the fall of 1898 with much fanfare, including a mass at St. Raphael's celebrated by Bishop Howley.

31 In 1903, Bishop Howley arranged for the property, which had previously been conveyed to the Diocese, to be conveyed in trust to the Brothers for the express purpose of establishing "an Industrial Home and Orphanage". The conveyance contained a clause providing for ownership of the property to revert to the Diocese should the Brothers cease to operate the orphanage.

32 Over time Mount Cashel expanded. New buildings were added, financed by parishioners through the Archdiocese and prominent business families. A residence for the Brothers was erected on site by 1907. St. Raphael's chapel was extended and a priest's residence was attached in 1915. In 1925, St. Raphael's parish was formally established. Father Thomas Bride was appointed pastor of St. Raphael's and chaplain of Mount Cashel, and assigned to live on-site. In 1926, Mount Cashel was destroyed by fire. Insurance proceeds fell short of covering the loss, so the Archbishop called on Catholic Societies and generous parishioners to provide the funds to rebuild.

33 In addition to the residents and later the Brothers, parishioners who lived in the area attended services at St. Raphael's. In 1952, Archbishop Skinner assigned Monsignor Ryan to minister to the spiritual and religious needs of the residents as well as to the parishioners of St. Raphael's. Monsignor Ryan lived in the priest's dwelling attached to the other orphanage buildings when the appellants lived at Mount Cashel.

34 The exact nature of the relationship between the Archdiocese and the Brothers during the early half of the 20th century was in dispute at trial. Documentary evidence illuminating the issue was scanty; it is unclear whether helpful documentation was not found or whether it simply did not exist. Correspondence between the Archbishop and the Newfoundland Government which spoke to the relationship between the Archdiocese and the Brothers at Mount Cashel was introduced at trial, and there was evidence showing that operational funding for the orphanage came from several sources including the Archdiocese. At some point around 1952 the Government of Newfoundland, by then a provincial government within the Canadian confederation, began to provide grants to Mount Cashel based on the number of boys in residence.

35 The appellants were residents of Mount Cashel for varying periods of time between the late 1940s and the late 1950s. Their claims relate to sexual abuse they suffered between 1951 and 1958 at the hands of five Brothers at Mount Cashel: Brothers Lasik, J.E. Murphy, Spollen, Collins, and Ford.

36 In the 1980s, serious sexual abuse at Mount Cashel orphanage became known to the public. Allegations of cover ups and failure to take earlier complaints seriously were widespread, not only against the Archdiocese and the Brothers but also against the provincial Departments of Justice and Social Services. Eventually the Government of Newfoundland called a public inquiry into the abuse and cover-ups by the government departments. The *Royal Commission of Inquiry into the Response of the Criminal Justice System to Complaints*, commonly known as the Hughes Inquiry, was held in St. John's during 1989-1990, and the Commissioner, The Honorable S.H.S. Hughes Q.C., a retired Ontario Supreme Court judge, filed his report in 1991.

37 Both criminal and civil proceedings followed the release of the Hughes Inquiry report, and several of the Brothers from Mount Cashel who had been identified as abusers during the 1970s and 1980s were prosecuted and convicted. Civil claims based on sexual abuse were filed by former residents of the orphanage. The civil claims that related to time periods which implicated the Government of Newfoundland's Departments of Justice and Social Services were settled against the Government of Newfoundland and Labrador in 1996. The plaintiffs in those cases assigned their claims against the Christian Brothers to the Government of Newfoundland and Labrador as part of the settlement. The civil claims made by the four appellants in this case arose before the Government of Newfoundland was implicated, and accordingly were not part of the 1996 settlement.

38 Due in large part to the abuse revelations, Mount Cashel closed in 1989. Ownership of the orphanage and the property on which it was situated reverted to the Archdiocese in accordance with the original agreement. The orphanage was subsequently torn down and the property was sold to a commercial developer.

**STANDARD OF REVIEW**

39 Simply put, questions of law are reviewed on the standard of correctness, and questions of fact are reviewed on the standard of palpable and overriding error. Questions of mixed fact and law are also reviewable on the standard of palpable and

overriding error, although if such questions are based on an incorrect characterization of a legal standard or an extricable legal principle relating to the legal standard, the standard of review is correctness.

40 This was explained in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 36:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, [[1981] 2 S.C.R. 2 (S.C.C.)] is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

41 In *Housen*, the review standard of palpable and overriding error was explained as an error "clear to the mind to see" and one that had to have discredited the result. In *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 (S.C.C.), the Supreme Court of Canada explained palpable and overriding error in further detail:

> [9] ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm...

42 A failure to consider relevant evidence can also constitute palpable and overriding error (*Rich v. Bromley Estate*, 2013 NLCA 24, 336 Nfld. & P.E.I.R. 107 (N.L. C.A.) at para. 17, leave to appeal to S.C.C. refused, (2013), 355 Nfld. & P.E.I.R. 81 (note) (S.C.C.), and *Bussey v. White*, 2001 NFCA 7 (Nfld. C.A.) at para. 7. See also *Saylor v. Madsen Estate*, 2007 SCC 18, [2007] 1 S.C.R. 838 (S.C.C.)).

43 The doctrines of negligence and vicarious liability are legal standards which must be correctly applied to a set of facts in order to determine whether liability ensues. In this case, if the legal standard the judge applied to the evidence is not correct, a question of law arises, and the review standard of correctness applies. If the judge erred in his application of the legal standard to the evidence, questions of mixed fact and law arise, for which the review standard of palpable and overriding error applies (*B. (E.) v. Order of the Oblates of Mary Immaculate (British Columbia)*, 2005 SCC 60, [2005] 3 S.C.R. 45 (S.C.C.) at para. 23) unless the error is an extricable error of principle, in which case the review standard is correctness. If the judge failed to consider relevant evidence or made factual findings or drew inferences which are plainly wrong or unsupported by the evidence, he will have committed palpable and overriding error.

44 If the judge is found to have made errors, the issue becomes whether the proper application of the correct legal standard to all of the evidence would warrant this Court imposing liability on the Archdiocese.

**ANALYSIS: THE APPEAL**

***Issue 1: Did the judge err in concluding that the Archdiocese is not vicariously liable for the Brothers' sexual assaults of the appellants?***

*The Law*

45 The doctrine of vicarious liability developed primarily during the nineteenth century as a means to compensate those who suffered losses at the hands of individuals whose actions caused the losses but whose ability to compensate their victims was minimal or non-existent. It has been described as a strict liability doctrine, for it is imposed on parties who have not committed

tortious conduct, and accordingly is counter-intuitive to the well-entrenched principles of tort law that usually hold a person liable for loss only when he or she causes it and then only if he or she is at fault.

46 In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.), Major J. explained the theory this way at paragraph 25:

> Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. ...

47 In *Sagaz*, the Court referred to vicarious liability as having its basis in policy. Major J., writing for a unanimous Court, described the policy considerations as (1) a just and practical remedy for people who suffer harm as a consequence of wrongs perpetrated by an employee and (2) deterrence of future harm. With respect to a just and practical remedy for victims, he explained the policy incorporated the ability of an employer to bear the loss of compensating a victim, and also fairness, because fairness dictates that an employer who introduces an enterprise that carries risks into the community should bear the loss when those risks materialize. In other words, when "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise" (*Sagaz*, at para. 31). With respect to the policy of deterrence of future harm, Major J. said that "employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision" (*Sagaz*, at para. 32). He related the policy of deterrence to the policy of fair compensation, saying "the introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it" (*Sagaz*, at para. 32).

48 The common thread in vicarious liability cases is that it is relationship based, in that fairness dictates that liability ensues only if the relationship between an enterprise or entity and the wrongdoer is close enough to warrant it. The closeness of the relationship between the entity and the wrongdoer imports legal principle into the appropriateness of imposing vicarious liability, and provides a check on careless application of the doctrine. The doctrine of vicarious liability has been part of our common law for centuries. While resort to it is relatively rare, it can produce results that resonate intuitively with fairness and justice.

49 As Major J. explained in *Sagaz*, use of the doctrine is relationship based. It was initially applied in the context of a master/servant, or employer/employee relationship. Over time, it has been extended to apply to many other relationships, like vehicle owner/driver, entity/volunteer, and so on. This Court specifically addressed the status of a wrongdoer within an entity in *Bromley*. This Court explained that the label attached to the wrongdoer, or the status of the wrongdoer *vis à vis* the entity, is not a determining factor in a vicarious liability consideration. Rather, what is determinative is whether the relationship between the entity and the wrongdoer is sufficiently close to justify the imposition of liability on the entity (*Bromley*, at paras. 117-120, *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436 (S.C.C.) at para. 17, and *B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.) at para. 19). In *B. (K.L.)*, the Court described the relationship issue as the first hurdle a plaintiff must overcome to establish vicarious liability.

50 A few years prior to *B. (K.L.)* the doctrine of vicarious liability was developed in order to properly address compensation for wrongs perpetrated on children in institutional care. In *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.), the Supreme Court of Canada considered vicarious liability as a means of redress for the sexual assaults of residents in a home for emotionally troubled children. The assaults were committed by an employee of the home, which was operated by an entity called the Children's Foundation (the "Foundation").

51 In *Bazley*, the plaintiff sued the employee as well as the home. There was no question that the employee had sexually abused the plaintiff (he had been criminally convicted for sexually abusing the plaintiff as well as several other victims). The question was whether the Foundation was vicariously liable for the employee's actions.

52 The Foundation denied liability for the employee's actions, but was found vicariously liable at trial. A five-person panel of the British Columbia Court of Appeal unanimously affirmed the trial judge's decision, although the affirmation was delivered in four different sets of reasons. The Foundation applied for leave to appeal to the Supreme Court of Canada. The Supreme Court granted leave, describing the four different appellate court decisions as "divergent in emphasis and detail" and having

presented a "sophisticated and nuanced review of this difficult issue and the considerations which properly bear on it" (*Bazley*, at paras. 7-8).

53 Ultimately the Supreme Court of Canada dismissed the Foundation's appeal, affirming the lower courts' rulings that the Foundation was vicariously liable for the employee's actions. In so doing, McLachlin J., writing for a unanimous Court, set out an analytical framework for determining vicarious liability in cases involving the sexual assault of children in institutional care.

54 McLachlin J. stated the broad issue:

> [9] ... May employers be held vicariously liable for their employees' sexual assaults on clients or persons within their care? ...

and then looked for guidance to the traditional common law "*Salmond* test", found in the well-known text, J.W. Salmond, *Salmond's Law of Torts*, 10th ed. (London: Sweet & Maxwell, 1945). She described:

> [10] ...employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. ...

She took issue with the description of the second basis for vicarious liability in the *Salmond* test, saying its focus was on semantics, so she reformulated the analytical approach.

55 McLachlin J. began by saying that courts grappling with vicarious liability claims respecting child abuse in institutional care should first look to whether there are precedents that would "unambiguously determine" whether vicarious liability exists in a given factual situation. If there are such precedents, courts need go no further than to apply those precedents to an instant case. But if prior cases are of no assistance, courts must go on to determine whether vicarious liability should be imposed in light of the broad policy rationales (*Bazley*, at para. 15).

56 McLachlin J. described the policy rationales at paragraph 29 of *Bazley* as (1) the provision of a just and practical remedy for the harm and (2) deterrence of future harm, and elaborated on them as follows:

> [34] The policy grounds supporting the imposition of vicarious liability fair compensation and deterrence are related. The policy consideration of deterrence is linked to the policy consideration of fair compensation based on the employer's introduction or enhancement of a risk. The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.

In explaining why deterrence is a valid policy to ground liability, she quoted the trial judge in *T. (G.) v. Griffiths*, [1995] B.C.W.L.D. 3081 (B.C. S.C.) [1995 CarswellBC 2764 (B.C. S.C.)] at para. 69:

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. ...

57 McLachlin J. went on to say that the two policy rationales can only be served where the wrongdoing is sufficiently close to the entity such that it can be said that the entity has introduced the risk of the wrong into the community and is thereby fairly and usefully charged with its management and minimization, and where there is a significant connection between the introduction of the risk and the wrong that accrues from it (*Bazley*, at paras. 37 and 41). She was careful to explain that the degree of connection between the entity's introduction of the risk of wrong and the wrong itself must be more than just opportunity, emphasizing that it is the strength of the causal link between the opportunity to perform the wrongful act and the wrongful act itself that matters:

> [40] ... When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role — for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse — the opportunity provided by the employment situation becomes much more salient.

58 At paragraph 41, McLachlin J. summarized the principles to guide courts in determining whether the wrongful act is sufficiently related to the conduct authorized by the employer, which *B. (K.L.)* later characterized as the second step in a vicarious liability analysis:

> . . .
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
>
> (2) The fundamental question is whether the wrongful act is <u>sufficiently related</u> to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the <u>creation or enhancement of a risk</u> and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> (3) In determining the sufficiency of the connection between <u>the employer's creation or enhancement of the risk</u> and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> > (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
> >
> > (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
> >
> > (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
> >
> > (d) the extent of power conferred on the employee in relation to the victim;
> >
> > (e) the vulnerability of potential victims to wrongful exercise of the employee's power.
>
> (Emphasis in original.)

59 McLachlin J. elaborated on the subsidiary considerations listed in item (3) above. She gave examples of factors that could enhance the risk of a wrongdoer sexually abusing a child in institutional care, such as the wrongdoer being permitted to be alone with the child for extended periods of time, the wrongdoer being expected to bathe or toilet the child (*Bazley*, at paras. 43-44), or the wrongdoer being placed in a positon of intimacy or power over the child. She noted that when and where wrongs occur could also influence the assessment. She then summarized the test:

> [46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

60 In the result, a unanimous Supreme Court imposed vicarious liability on the Foundation for its employee's tortious conduct.

61 In *Bazley*, the wrongdoer was an employee of the entity. As a result, the principles set out in the decision are couched in employer/employee language. However, as noted in *Bromley* (at paragraph 46 above), it is not necessary that a wrongdoer be an employee in the traditional sense of drawing a pay cheque or following direct orders for liability to ensue. Similarly, in *Sagaz*, the Court explained that the issue was not whether the tortfeasor was an independent contractor but whether the tortfeasor was working on his own account or working on the account of *Sagaz*. The Court stated that "the total relationship of the parties" determined the issue (*Sagaz*, at para. 46). The result in *Sagaz* did not rest on the tortfeasor's classification as an independent contractor. Rather, *Sagaz* was not held vicariously liable because the independent contractor was truly working on his own account, and not that of *Sagaz*. Accordingly, wrongdoers who are authorized to carry out activities which benefit an entity, or who work on the account of an entity, whatever their titles or formal status, can attract liability to that entity.

62 *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.), was a companion case to *Bazley*. It involved vicarious liability claims by a brother and sister against a Boys and Girls Club for sexual abuse committed by an employee of the club. The employee had isolated the victims from the Club's group activities by inviting the children to personal get-togethers away from the Club, and these personal get-togethers gave the employee opportunity, time and place to sexually assault the children. In a split decision, the Supreme Court of Canada ruled that the ultimate misconduct was too remote from the employer's enterprise to justify imposing vicarious liability.

63 A few years later the Supreme Court of Canada had occasion to revisit vicarious liability for the sexual abuse of children, this time for children in the care of foster parents. In *B. (K.L.)* the Court ruled that vicarious liability was not established because the relationship between the Government and the foster parents was not sufficiently close and the policy of deterrence was not sufficiently engaged to justify its imposition. In so ruling, McLachlin C.J.C. stated this summary of the test:

> [19] To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. <u>First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate.</u> This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. <u>Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.</u> This was the issue in *Bazley*, *supra*, which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.
>
> (Emphasis added.)

64 In *Bennett*, the Supreme Court of Canada upheld this Court's decision that a diocese was vicariously liable for sexual assaults perpetrated by one of its priests on young boys in his parish. McLachlin C.J.C. explained that vicarious liability can be imputed to a principal, in that case a diocese, which was not an employer in the traditional sense:

> [17] ... The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.

She reiterated the policy rationales of the doctrine:

> [20] ... Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. ...

McLachlin C.J.C. also reiterated that the relationship between the tortfeasor and the entity must be sufficiently close, and the wrongful act sufficiently connected to the conduct authorized by the "employer or principal", to ensure that the twin policy goals are met.

65 *Bromley* also concerned vicarious liability for sexual abuse. In *Bromley* the question was whether the Government of Newfoundland and Labrador, as the operator of a provincial detention home for boys, was vicariously liable for sexual assaults perpetrated by a volunteer priest on a boy while he was resident in the home. The priest had been authorized by the home to take the boy on overnight excursions where he had sexually abused him.

66 The trial judge dismissed the boy's claim, saying that the priest was acting outside of the Government's mandate to run the home, and that the province could not be held liable for the priest's criminal acts. On appeal, this Court applied the law of vicarious liability set out by the Supreme Court of Canada in *B. (K.L.)* and *Bazley*, and ruled that the trial judge had erred in restricting his analysis to the narrow confines of the priest's status as a volunteer at the home, and more importantly, that the trial judge had erred by failing to appreciate that the priest was authorized by the home to take the boy on overnight outings and was thereby exercising delegated authority over him and specifically furthering the home's "reward for good behaviour" program. In the result, this Court determined that the close relationship between the priest and the Government detention home, evidenced by the priest exercising the Government's custodial powers in furtherance of its custodial policies, was sufficient to justify the imposition of vicarious liability on the province for the priest's sexual abuse of the boy.

67 The Supreme Court of Canada addressed the doctrine of vicarious liability respecting abuse of children in institutional care in *Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360 (S.C.C.). In a reference to the Prince Edward Island Court of Appeal, the parties sought determination of whether the province of Prince Edward Island had legal duties to children who were resident in a privately-operated home. One of the questions posed was whether the province was vicariously liable for the acts or omissions of the Board of Trustees and staff of the home.

68 The Prince Edward Island Court of Appeal ruled that the province was not vicariously liable. The Supreme Court of Canada agreed, saying that the appellants had not established a sufficiently close relationship between the province and the home to warrant a finding of vicarious liability. The Court stated that having legislative authority over children and placing them in the home did not give rise to vicarious liability. The Court highlighted the fact that the evidentiary record before them was quite limited and that as a consequence, the scope of the reference was limited.

69 A precedent that bears on the issue of whether two or more entities are in a sufficiently close relationship with the wrongdoer that could justify the imposition of vicarious liability on both entities is *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.). The plaintiff in *Blackwater* was resident in a home for aboriginal children when he was sexually assaulted by a worker employed there. The plaintiff sued the employee as well as the United Church of Canada, which operated the home, and the Government of Canada, which had the statutory mandate to care for aboriginal children pursuant to the *Indian Act*, S.C. 1951, c. 29. The trial judge held that both Canada and the United Church were vicariously liable for the sexual abuse of the plaintiff by the employee on the basis that both entities operated the home as partners, and apportioned liability 75% to Canada and 25% to the United Church.

70 The Supreme Court of Canada upheld the trial judge's decision, ruling that there is no principled reason why two entities cannot both be held vicariously liable for the same wrong. Further, the Court upheld the unequal apportionment imposed by the trial judge, ruling that defendants may be more or less vicariously liable for a wrong, depending on their respective levels of supervision, direct contact, and control.

71 A trial court decision from this jurisdiction also touches on the issues raised in this case. In *H. (H.) Estate* the question was whether vicarious liability ought to be imposed on the Government of Newfoundland and Labrador for a Christian Brother's sexual assault of residents of Mount Cashel which took place between the 1940s and the early 1960s, before the Government's Departments of Justice and Social Services were implicated in the abuse at Mount Cashel.

72 In *H. (H.) Estate*, the trial judge found that the relationship between the Government and the Brothers was not close enough to justify imposing liability on the Government. In his decision, the judge referred to orphanages operating in the province, and in so doing, specifically commented on the relationship between the Archdiocese and Mount Cashel orphanage. At paragraph 15 he noted the Archbishop's references to Mount Cashel as "our institution" in correspondence between the Archdiocese and the Government. At paragraph 32 the judge stated, "Mount Cashel was privately operated and controlled by a non-governmental entity, namely the Christian Brothers organization and ultimately the Roman Catholic Church", and at paragraph 69 he stated, "[m]anagement at Mount Cashel was entirely within the mandate of the Christian Brothers and the Roman Catholic Church".

73 This decision respecting vicarious liability of Newfoundland and Labrador for sexual abuse of boys by the Brothers at Mount Cashel is not authority for finding liability against the Archdiocese in this case. However, the court's statements that the Christian Brothers and the Roman Catholic Church were responsible for Mount Cashel orphanage and its operations during the same time period of time as the time period involved in this case are of some interest.

*The Judge's Characterization of Vicarious Liability*

74 In this case, determining whether vicarious liability ought to be imposed on the Archdiocese required considering the closeness of its relationship with the Brothers at Mount Cashel, and the connection between the Brothers' assigned tasks and their sexual assaults of the appellants. The policies of fair compensation and deterrence will only be served if the close relationship and connection inquiries are positively determined.

75 On review of the judge's decision, we conclude that he erred in his characterization of the doctrine of vicarious liability. His focus on the doctrine of vicarious liability as generally involving an employment relationship, his failure to identify the fundamental question to be answered, his focus on control of day-to-day operations at the orphanage, and his comparison of the Archdiocese's conduct with the Brothers' conduct characterized the doctrine in a limiting way. His limiting characterization effectively caused him to apply the wrong law to the evidence.

76 The first step in determining whether vicarious liability ought to be imposed on an entity is setting out the legal standard for vicarious liability. The judge described vicarious liability as liability without fault, found "where there is, generally, an employment relationship, or other relationship involving supervision and control over the tortfeasor" (para. 69). He noted the twin policies of compensation and deterrence that underlie the doctrine, and stated at paragraph 198:

> If one examines the policy reasons for imposing liability, the Supreme Court of Canada in the *Bazley* and *Jacobi* cases set out clear direction. It involves elements of control and direction of the enterprise, and the ability to pay damages. The first, involving control, raises the question of **who had most control** over the perpetrators, and therefore **had the most opportunity** to curb tortious behavior. ...
>
> (Emphasis added.)

77 The judge stated that the legal basis for vicarious liability had evolved from the *Salmond* test to the *Bazley* test and quoted *Bazley* respecting the principles to guide application of the doctrine to the evidence. He also discussed a number of cases where vicarious liability had been considered.

78 The judge's description of vicarious liability is concerning. He referred to vicarious liability pertaining "generally" to employment relationships, although he acknowledged it could be imposed in other contexts. However, he emphasized the employment relationship and included the fact that the Archdiocese did not employ the Brothers or any orphanage staff in his reasons for dismissing the plaintiffs' claim. His comments in this regard suggest that he apparently considered an employment relationship to be fundamental to a finding of vicarious liability. An employment relationship is not fundamental to vicarious liability, as *Bromley* and *Bennett* tell us.

79 The judge's reference to "relationships involving supervision and control over the tortfeasor" is also concerning. It is a limiting description. While it is so that an entity can be found vicariously liable for a wrongdoer's actions when an entity

had *actually* exercised supervision and control over the wrongdoer, liability can also ensue when the entity is shown to have authority over the wrongdoer such that is had the *responsibility* to exercise supervision and control over the wrongdoer. This is how the policy of deterrence assists in determining whether vicarious liability ought to be imposed. Ascribing responsibility to the Archdiocese for the Brothers' wrongful conduct could give effect to the policy of deterrence, if the Archdiocese was in a position to reduce the wrongs by efficient organization and supervision (*Bazley*, at para. 32), and could have taken steps to reduce the risk of harm to the appellants (*Bennett*, at para. 20). The judge's description of vicarious liability failed to take account of this policy and as will be seen, this failure caused him to focus on whether the Archdiocese was actually supervising and controlling the day-to-day activities of the Brothers at Mount Cashel, which in turn led him to conclude that the Archdiocese was not liable for the Brothers' wrongful conduct.

80 As well, the judge did not identify the salient questions to be answered when applying the doctrine to the evidence. The first is whether the Archdiocese and the Brothers enjoyed a sufficiently close relationship as to make a claim for vicarious liability appropriate. The second is whether the Brothers' sexual assaults of the appellants were sufficiently related to the conduct authorized by the Archdiocese. The answers to these questions depended on whether the Archdiocese, through the establishment of Mount Cashel and delegating the care of the boys to the Brothers, had authority over how the Brothers cared for the boys and whether it maintained that authority throughout the course of its relationship with the Brothers during the time the appellants were resident there; and whether there was a significant connection between the Archdiocese's creation or enhancement of the risk of harm associated with the Brothers' care of the boys at the orphanage and its materialization.

81 The judge's statements which compared levels of responsibility between an entity and a wrongdoer in a vicarious liability analysis are not correct. Determining closeness and connection in the context of the policies of compensation and deterrence does not require that an entity be found to be more or less at fault than a wrongdoer. In other words, it is not an "either/or" determination. In this case it was not a question of whether the Archdiocese had more control over the Brothers at Mount Cashel than the Brothers at Mount Cashel did over themselves. The issue was whether the relationship between the Archdiocese and the Brothers at Mount Cashel who committed the wrongs, as well as the connection between the Brothers' assigned tasks and the sexual assaults they committed, were sufficient to justify the imposition of vicarious liability.

82 That said, there is support in the jurisprudence for comparing degrees of liability between two entities which may both be vicariously liable. However, this comparison goes to apportionment between entities who have each been found vicariously liable. Such a comparison does not go to imposition of vicarious liability. Apportionment of vicarious liability as between Canada and the United Church is what occurred in *Blackwater*, and could have occurred in this case if the judge had found both the Christian Brothers Institute Inc. and the Archdiocese vicariously liable.

*The Judge's Analysis of the Evidence*

83 The judge did not find a precedent in Canadian law "for the imposition of liability on a diocese in similar circumstances". To the extent that the judge's comment could be interpreted as meaning that such a precedent must involve a diocese in order to be applicable, that is not the case. A diocese is the same as any other entity for the purposes of applying the doctrine of vicarious liability. It is the closeness of the relationship between the entity — whether a diocese or not, and in this case the Archdiocese — and the wrongdoer — whether an employee or not, and in this case the Brothers at Mount Cashel — that determines whether it is appropriate to impose vicarious liability on the entity.

84 We agree that there is no precedent that would conclusively decide this case. Precedents are almost always fact-based, and especially so when they involve human relationships and the behavior that informs them. It would therefore be rare to find a case with facts similar enough to this one that would qualify as a conclusive precedent providing an answer to the issues raised in this case. But that does not mean that there are no precedents which set out legal principles that are directly applicable to this case.

85 The judge went on to consider the plaintiffs' arguments respecting the closeness of the relationship between the Archdiocese and the Brothers, first focusing on the argument that Mount Cashel orphanage was a joint venture. At paragraph 90, he acknowledged the relationship between the Archdiocese and the Brothers at Mount Cashel, saying: "There does not appear to be any doubt that the support of the diocese was critical to the establishment of Mount Cashel". However, he rejected

the argument that Mount Cashel was a joint venture of the Archdiocese and the Brothers. He distinguished *Blackwater*, noting that in that case, Canada had a statutory duty to care for the resident aboriginal children and the United Church had significant operational control over the residential home. He said at paragraph 103:

> To apply the reasoning in *Blackwater* I would have to find there was close collaboration between the Archdiocese and the Brothers which would have been sufficient to create the relationship where a joint venture could be determined. In my view, the evidence presented did not disclose that kind of relationship.

He concluded at paragraph 106 that "... apart from involvement in the launching of the orphanage in the 1890's, the role of the Archdiocese was limited to a supportive one".

86 The judge's characterization of the Archdiocese's role in the launching of Mount Cashel as "involvement" and thereafter as "supportive" seriously minimizes the relationship between the Archdiocese and the Brothers at Mount Cashel. There was ample evidence that the Archdiocese (formerly the Diocese) not only established Mount Cashel, but that it played an ongoing role in administering, servicing, operating, and financially supporting it.

87 The role of the Diocese in launching Mount Cashel orphanage was central to its establishment. The Diocese took the initiative to establish an institution for disadvantaged boys of the Roman Catholic denomination, and Bishop Howley invited Christian Brothers to come from Ireland for the purpose of staffing it. The Brothers did not invite themselves to St. John's — they came to staff a denominational orphanage for these boys to fulfill the Diocese's social and religious objectives.

88 Much was made by the Archdiocese of the BIS involvement in the Brothers coming to Mount Cashel. The evidence, composed of newspaper reports of meetings, suggests that the BIS, through the Bishop, was involved in encouraging Christian Brothers to come to Newfoundland to teach earlier in the 19th century. There was a newspaper article which referred to the BIS having invited the Bishop to chair the 1897 organizational meeting of Bishops, clergy, and prominent citizens at which Bishop Howley announced he would give over the Howley home and estate for the purpose of establishing an orphanage. However, there was no evidence of BIS involvement in the Brothers coming to Newfoundland to staff Mount Cashel or in the establishment of the orphanage. Neither does the evidence suggest that the Christian Brothers themselves, individually or through their Institute in Ireland, had the initiative, or the wherewithal, to come to St. John's to open an orphanage. In this regard, the Brothers who staffed Mount Cashel were no different in status than persons who staffed other denominational orphanages. The fact that the Archdiocese sought to staff its orphanage by inviting a group of Brothers from Ireland to do so does not permit the Archdiocese to divest itself of responsibility for the Brothers who once arrived, were furthering the Archdiocese's religious and social objectives. In short, the Archdiocese established Mount Cashel and assigned the task of caring for the resident boys to the Brothers who agreed to come here for that purpose.

89 The Archdiocese argued that Canon Law fettered the authority of the Archdiocese over the Brothers at Mount Cashel, because the Christian Brothers were an Order of Pontifical Rite, which meant that they reported directly to the Vatican rather than to the Archdiocese, and that the Archbishop had no right of visitation at the orphanage and no authority to get involved in its operations. The judge found that while Canon Law does not determine civil law responsibility, it can define relationships within the Church. While he was satisfied that the Archbishop would have an obligation to intervene respecting an allegation of abuse, he accepted that because the Order of Christian Brothers was an Order of Pontifical Rite, the Archdiocese had no authority to get involved in Mount Cashel's operations.

90 While the Brothers, as members of an Order of Pontifical Rite, reported through their chain of command to their Provinces and the Vatican, and not the Archdiocese, that does not mean that the Archdiocese had no authority over how the Brothers at Mount Cashel were carrying out the work the Archdiocese assigned to them to do at the orphanage. The Brothers' Provinces or the Vatican were not exercising authority over the work the Brothers were doing at Mount Cashel. Rather, the Superiors of their Order exercised authority over them with respect to matters involving their internal governance, routines, vows and general well-being. The visitation reports and the evidence of Father Morrissey, a Canon Law expert tendered by the Archdiocese, explain this. In any event, the internal structure of the Brothers' Order does not immunize the Archdiocese from responsibility for the Brothers' misconduct while they are carrying out work for the Archdiocese at the orphanage. The Archdiocese cannot

simply install the Brothers and assign them work and then walk away, especially because the Archdiocese continued to exercise authority over the Brothers and take responsibility for the orphanage.

**Piecemeal Assessment of the Evidence**

91 The appellants argue that the judge approached the evidence supporting their arguments respecting the closeness of the relationship between the Archdiocese and the Brothers as though each argument were the sole determinant of vicarious liability. They maintain this piecemeal approach to the evidence was in error.

92 We agree that the judge erred by failing to assess the evidence as a whole when determining whether the legal standard of vicarious liability had been met. While it may be that any one of the factors the judge considered would not, on its own, establish vicarious liability, that was not the question. The question was whether all of the evidence taken together, considered in light of the twin policies, established whether the Brothers' sexual assaults of the appellants were sufficiently related to their conduct authorized by the Archdiocese to justify the imposition of vicarious liability.

93 The judge considered much of the evidence the plaintiffs argued to support their position that the ongoing relationship between the Archdiocese and the Brothers at Mount Cashel was sufficiently close to support a finding of vicarious liability. The plaintiffs maintained that the Archbishop was the ultimate Roman Catholic authority in the province and thereby had authority over the Brothers and the orphanage, that the public perceived that the Archdiocese controlled Mount Cashel, that the Archdiocese exercised authority over Mount Cashel by virtue of exercising significant control over its finances and fundraising and by acting on behalf of Mount Cashel in dealings with the government, that the Archdiocese was closely tied to Mount Cashel by virtue of its reversionary interest in the property on which it stood, and that internal church governance supported a close relationship between the Archdiocese and the Brothers at Mount Cashel.

94 The judge discussed these relationship arguments and determined that none was a basis for the imposition of vicarious liability on the Archdiocese. Curiously, we note that the judge did not say that most of the factors he considered had no weight or no relevance. He simply said that each one on its own was not determinative of vicarious liability.

95 The Supreme Court of Canada recently considered the piecemeal approach to evidence in *Salomon v. Matte-Thompson*, 2019 SCC 14 (S.C.C.). *Salomon* concerned a statement made by the Court of Appeal of Quebec in reversing the trial judge for assessing the trial evidence "through a distorting lens". At the Supreme Court of Canada, the appellant argued that the Quebec Court of Appeal had erred by employing the notion of a distorting lens as an analytical tool. In rejecting that argument, the Supreme Court explained that the appellate court had used the term as a metaphor to show why the trial judge's approach to assessing the evidence caused her to make errors. The metaphor was that the lens through which the trial judge had viewed the evidence was distorted in that it was narrow and had isolated the evidence into individual silos, which denied her the insight provided by a global assessment.

96 The judge in this case similarly viewed the evidence through a narrow lens focusing on individual factors as though each one was determinative of the main issue which led to identifiable errors. For example, he characterized the "public profile" evidence the plaintiffs submitted as highlighting the public persona of the Bishop, and said that "profile by itself is no indicator of liability" (para. 127). With respect to the evidence respecting the Archdiocese's control over finances and fundraising, he said "control of one aspect of its operation, by itself, is not one of the indicators of vicarious liability" (para. 144) and with respect to the Archdiocese's relations with government respecting the orphanage he said "involvement in negotiations on policy matters, by itself, is not evidence of exertion of control over operations by the Archdiocese" (para. 155). As well, the judge found that the Archdiocese's reversionary interest in the property "could not in any way have been an indicator of involvement or control over operations. By itself, property ownership would be irrelevant" (para. 158).

97 Determining whether a legal standard, in this case vicarious liability, is met, involves consideration of all of the evidence taken together. When individual factors are assessed individually and determined on their own not to justify the imposition of vicarious liability, that will surely result in a finding of no liability, as the appellants argued in their factum.

98 The requirement that the whole of the evidence must be considered when determining whether a legal standard is met is so fundamental to our legal system that it hardly needs mention. Nevertheless, brief reference to some authorities makes the point.

99 In *Housen*, the Supreme Court stated at paragraph 36 that determining whether legal standards are met, in that case the legal standard of negligence, involves interpretation of the evidence as a whole. Likewise, determining whether the legal standard of vicarious liability is met involves interpretation of the evidence as a whole.

100 The decision of the Supreme Court of Canada in *Sagaz* also pertains, and is especially pertinent because it concerned an independent contractor's status in the context of vicarious liability. In *Sagaz*, the Court quoted with approval McGuigan J.A. in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, 70 N.R. 214 (Fed. C.A.), saying that "*what must always occur is a search for the total relationship of the parties*" and that all of the factors weighing on the issue were to be considered together [emphasis added]:

> [46] In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. ... Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563 ... that what must always occur is a search for the total relationship of the parties:
>
> > .... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> . . .
>
> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

101 The New Brunswick Court of Appeal's decision in *Chiasson v. Duguay Holdings Inc.*, 2015 NBCA 8 (N.B. C.A.), also referred to the principle that all of the evidence must be considered together when reaching a liability determination. *Chiasson* concerned whether the legal standard of negligence in a claim of personal injury was established. In upholding the trial judge's decision, the appellate court stated:

> [4] In determining a liability-related issue, the trial judge has to decide which version of the events is most plausible <u>having regard to the totality of the evidence</u>.
>
> (Emphasis added.)

102 Likewise, in this case, the judge had to examine and weigh all of the factors bearing on the relationship between the Archdiocese and the Brothers, taken together, in reaching a determination. His failure to do so is an extricable error of principle.

**Control of Day-to-Day Operations at Mount Cashel**

103 The judge then focused on day-to-day operations at the orphanage, calling it the key issue. He concluded that such operations were not the responsibility of the Archdiocese, saying:

> [192] ... there was no pattern of involvement or control by the Archdiocese over the day-to-day operations of the orphanage. ...
>
> [193] In the absence of evidence of control over operational matters, or the assumption of responsibility for the day-to-day affairs of the orphanage, there was nothing in the evidence which would give rise to the kind of relationship which would form the basis for vicarious liability. ...

104 In this case, the judge erred by focusing on who had control over the day-to-day activities at Mount Cashel to the exclusion of other relationship factors respecting the authority of the Archdiocese over the Brothers, and to the exclusion of the other responsibilities of running an orphanage.

105 In *Sagaz*, the Supreme Court of Canada addressed how control impacts a finding of vicarious liability. The Court stated that the level of control will always be a factor, but it is only one of several factors. The Supreme Court in *B. (K.L.)* also commented on the control factor in the context of an entity's ability to directly supervise work being carried out on its behalf:

> [22] ... Many skilled professionals ... perform specialized work that is far beyond the abilities of their employers to supervise, and yet they may reasonably be perceived as acting "on account of" these employers. Control is simply one indication of whether a worker is acting on behalf of his or her employer...

106 The judge's focus on whether the Archdiocese controlled the day-to-day operations of Mount Cashel raises two issues. One relates to whether the Archdiocese actually controlled the day-to-day operations at Mount Cashel. The other is the significance of control respecting only one aspect of running the orphanage — that being day-to-day activities. There is little doubt that only the Brothers controlled the day-to-day operations at Mount Cashel. But that is not determinative. Also very important is whether the Archdiocese was in a position to manage the risk posed by the conduct of the Brothers at Mount Cashel in relation to the care of their charges which was the mandate given to the Brothers by the Archdiocese when they came to Newfoundland. This inquiry goes to the heart of deterrence as one of the policy rationales underlying the doctrine, as McLachlan J. explained in *Bazley*:

> [33] ... Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm. A related consideration raised by Fleming is that by holding the employer liable, "the law furnishes an incentive to discipline servants guilty of wrongdoing" (p. 410).
>
> [34] The policy grounds supporting the imposition of vicarious liability fair compensation and deterrence are related. The policy consideration of deterrence is linked to the policy consideration of fair compensation based on the employer's introduction or enhancement of a risk. <u>The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.</u>
>
> (Emphasis added.)

107 If the whole relationship is not to be considered, an entity could easily escape a determination of vicarious liability by walking away from or delegating the day-to-day operations and pleading "we were not there" or "we don't know anything about caring for children". Such a position would not accord with the law as set out in *Sagaz*, nor would it support the policy rationales of the doctrine.

108 The second issue illustrates that the judge's focus on day-to-day operations at Mount Cashel ignores the other ways in which an entity exercises authority over those who are carrying out its objectives. Day-to-day operations at Mount Cashel were only a part of the overall operation of the orphanage. One would not expect the Archdiocese to have been involved in the day-to-day operations of Mount Cashel. The Archdiocese had many different responsibilities. It was not involved in the day-to-day operations of its individual parishes either, yet it could have been fixed with vicarious liability for wrongful deeds of its parish priests. Authority over the Brothers and the operation of Mount Cashel involved many different responsibilities carried out at many different levels, times and places. Control over day-to-day care of the residents, setting the curriculum, ordering food, and other activities the judge identified in paragraph 190, are only a part. Simply put, the Archdiocese's lack of involvement in the direct supervision of the care of the appellants at Mount Cashel and control of the day-to-day operations at the orphanage does not enable it to escape responsibility. Determining vicarious liability in a case such as this one involves a much broader analysis of the relationship between the Archdiocese and the Brothers than consideration of who was supervising day-to-day operations.

109 Additionally, day-to-day operations and the day-to-day activities of the Brothers in caring for the appellants is more related to whether their sexual assaults of the appellants were connected with their legitimate tasks than to the closeness of their relationship with the Archdiocese. The judge never did consider the connection between the Brothers' assigned tasks and their sexual assaults of the appellants, although it was not necessary for him to go to this second stage of analysis after effectively finding that the relationship could not support the imposition of vicarious liability on the Archdiocese. Nevertheless, his references to day-to-day activities could be said to touch on this secondary inquiry, thereby conflating the inquiry respecting the closeness of the relationship between the Archdiocese and the Brothers with the inquiry respecting whether the Brothers' sexual assaults of the boys were so connected to their assigned tasks that they could be regarded as a materialization of the risk that the Archdiocese had introduced to, and maintained, in the community. While there is overlap between the closeness and connection inquiries, the analyses are distinctly different (see *Bromley*, at paras. 113-114).

110 The judge also failed to consider other evidence bearing on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel in his analysis. The first is the guarantee Bishop Howley provided in his correspondence to Sir Robert Bond in 1897. Bishop Howley stated:

> I guarantee to have the establishment carried out in such a manner as shall amply satisfy all the demands required by any Act of Parliament which may be enacted, to erect suitable buildings, and make the enterprise in every sense a complete success.

Bishop Howley gave this guarantee to Sir Robert Bond in the context of discussions respecting proposed government funding for orphanages. The Archdiocese argues that Bishop Howley's guarantee was given on a promise of government funding, and because the funding did not materialize, the guarantee argument has no merit. It is clear from Bishop Howley's letter of reply that he had plans in place to establish, furnish and staff a denominational orphanage before Sir Robert Bond wrote him in September 1897. While it is so that the proposed funding did not materialize, that does not diminish the appellants' argument. The Bishop, as the ultimate authority in the Diocese, professed to Sir Robert Bond that he was in the process of establishing an orphanage (following the lead of his predecessor, Bishop Power) and that he had the authority and ability to ensure that it would be successfully operated into the future. His guarantee shows not only the Diocese's interest in establishing an orphanage, but also that Christian Brothers in Ireland had been approached to staff it and were regarded as fit to do so. Omitting consideration of Bishop Howley's guarantee as a relevant factor bearing on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel is a palpable error in the judge's application of the doctrine of vicarious liability to the evidence.

111 Secondly the judge failed to consider section 3 of Canon 1381, which governed school and religious teachings. Roman Catholic schooling and religious teaching were important objectives of the Archdiocese when Mount Cashel was established in 1898, and they continued to be important to the Archdiocese throughout the period leading up to Newfoundland's entry into Confederation and well beyond, as Dr. Fitzgerald testified. Schooling and religion figured prominently in life at Mount Cashel, an institution that the Archdiocese introduced into the community to realize their objective of caring for poor and orphaned boys within the Roman Catholic faith.

112 The judge quoted the first two sections of Canon 1381 in his decision, but omitted mention of the third section. The third section stated that the Bishop "for the sake of religion or morals [could] require that either teachers or books be removed from the school". This third section specifically empowered the Archdiocese to require that a Brother be removed from Mount Cashel, which comprised a school and a church, for moral misconduct. Accordingly, while the Archdiocese may not have actually fired any Brothers, it had the specific authority through Canon Law to require the removal of a Brother for the type of moral misconduct at issue in this case. The judge made a palpable error in failing to consider the Archbishop's specific power to expel Brothers in his analysis.

113 Thirdly, the judge also failed to consider evidence respecting the Archdiocese's placement of one of its priests on site, which the plaintiffs argued showed a close relationship between the Archdiocese and the Brothers. The Archdiocese argues that St. Raphael's parish was a separate entity from the Brothers and the orphanage. We do not agree. St. Raphael's chapel was part of Mount Cashel from the beginning, and was established as a formal Roman Catholic parish in 1925. A priest, charged with responsibility for the religious and moral education of the resident boys, had been assigned to live on site since Father Bride was

installed in 1925. St. Raphael's remained a parish throughout the time the appellants were resident at the orphanage, and until 1962 when the parish was relocated and became Mary Queen of Peace. We note that even after St. Raphael's parish relocated, a priest remained as chaplain in residence at Mount Cashel.

114 The resident priest was part of life at Mount Cashel, although his residence, while joined to the orphanage buildings, had a separate entrance from the entrance to the orphanage. According to the evidence, he conducted daily masses and regular confessions for the residents. The appellants testified that their interactions on site with Monsignor Ryan, who was the resident priest when the appellants were at Mount Cashel, were limited. However, one of the appellants reached out to Monsignor Ryan for help, and another witness gave evidence that he reported his sexual abuse to Monsignor Ryan both inside and outside the confessional. There was also evidence of kindly interactions between Monsignor Ryan and the boys. The evidence also disclosed that the Brothers were directly involved with St. Raphael's. In particular, Brothers were charged with taking care of the sacristy, the oratory, and the priests' house, and helping with the preparations for the priest to say mass.

115 The fact that the Archdiocese placed Monsignor Ryan at Mount Cashel to provide spiritual direction to the residents within their denominational faith, and the fact that some of them looked to him for help, suggest that Monsignor Ryan, like Father Bride before him, was part of the orphanage community. To the extent that St. Raphael's parish could be considered separate from Mount Cashel, its presence on site, attached to the orphanage, the regular interaction between the priest and the appellants, and the interrelationship between the Brothers and the Church itself, is, at a minimum, suggestive of the orphanage being a joint venture between the Archdiocese and the Brothers.

116 Accordingly, in our view the judge erred in failing to recognize that the Archdiocese's establishment of a parish and placement of a priest on site was relevant evidence in determining the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel.

117 The judge also stated that the Archdiocese and the Brothers were separate corporate entities. The Brothers at Mount Cashel during the 1950s were neither incorporated nor part of an incorporated entity. The Christian Brothers were not incorporated in Canada until 1962, beyond the time period relevant to this case. In any event, even if the Brothers at Mount Cashel had been part of an incorporated entity during the 1950s, that would not necessarily permit the Archdiocese to escape the imposition of vicarious liability. It is the Archdiocese's relationship with the Brothers at Mount Cashel who sexually assaulted the appellants which is at issue, not whether the Archdiocese and the Brothers at Mount Cashel could be regarded as separate corporate entities.

**Summary**

118 In summary, the judge erred in law in failing to apply the correct law of vicarious liability to the evidence. He also erred in failing to globally assess the evidence when applying the doctrine to the evidence and by conflating the closeness and connection inquiries. The latter errors are extricable errors of principle. The errors, being subject to the correctness standard of review, are so fundamental to the determination of the ultimate issue that they undermine the judge's decision not to impose vicarious liability on the Archdiocese for the Brothers' wrongdoing. As well, the judge's failure to consider Bishop Howley's guarantee, section 3 of Canon 1381, and the placement of a parish and a priest on site as factors important to the analysis are palpable errors and overriding in the sense that they could well make a difference to the outcome of an analysis. Accordingly, the judge's decision not to impose vicarious liability on the Archdiocese for the Brothers' sexual abuse of the appellants must be set aside.

*Should a New Trial be Ordered?*

119 The question that now arises is whether a new trial should be ordered or whether this Court can properly determine whether the Archdiocese is vicariously liable for the Brothers' wrongdoing.

120 The question of whether an appellate court can finally decide a civil case after finding error was considered by the Supreme Court of Canada in *Madsen Estate*. In that case, the issue was whether a trial judge had failed to consider evidence respecting whether a daughter was beneficially entitled to assets in bank accounts she held jointly with her father when he died. The Supreme Court of Canada determined that the trial judge had failed to consider evidence relevant to the issue, so the question then became whether to order a new trial so that the evidence that had not been considered could be considered, or

whether the Supreme Court ought to finally decide the case. The Supreme Court determined that it was both practical and fair to consider the import of the unconsidered evidence and finally decide the case, and provided its rationale for doing so:

> [24] It is well established that where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33; *Prudential Trust Co. v. Forseth*, [1960] S.C.R. 210, at pp. 216-17. Having regard to the circumstances of the present appeal, I think it is both feasible on a practical level and within the interests of justice for this Court to consider the evidence not considered by the trial judge and make a final determination rather than sending the case back to trial.

121 This Court came to the same conclusion in *Matchim v. BGI Atlantic Inc.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46 (N.L. C.A.), after finding that the trial judge had erred in his treatment of the evidence. Green C.J.N.L. identified the factors for consideration:

> [99] The two basic considerations, therefore, that an appellate court must address when deciding whether to decide a case on the existing record rather than sending it back for retrial are: practicality and justice, or fairness, to the parties.

122 In this case, we are of the view that the appropriate course of action is for this Court to decide whether the Archdiocese is vicariously liable for the Brothers' sexual assaults of the appellants. Deciding the matter does not require this Court to assess the credibility of witnesses or make findings of fact on the basis of conflicting evidence. The evidentiary record in the case is solid, and it is not controversial. The controversy in this case relates to how the evidence should be interpreted, and whether it supports or does not support the imposition of vicarious liability on the Archdiocese. This Court is well positioned to apply the correct legal standard for vicarious liability to the evidence and arguments made by the parties.

123 As a practical consideration, this litigation was commenced over 20 years ago. Insofar as a decision from this Court could expedite a conclusion to this ongoing litigation, we believe it would benefit all parties, namely, the Archdiocese and the appellants who are advanced in age.

124 Accordingly, in our view, it is fair and just for this Court to conduct its own assessment of the evidence in light of the twin policies and determine whether vicarious liability ought to be imposed on the Archdiocese.

***Is the Archdiocese Vicariously Liable for the Brothers' Sexual Assaults of the Appellants?***

125 This fundamental question is answered by two inquiries undertaken in consideration of the totality of the evidence in light of the twin policies. The first is whether the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficient to justify imposing vicarious liability on the Archdiocese. Consideration of this inquiry is informed by determining whether the Archdiocese created and maintained an ongoing relationship of authority over the Brothers. The second inquiry is whether the Brothers' sexual assaults of the appellants were sufficiently connected to the Brothers' assigned task of caring for the appellants such that the assaults can be regarded as a materialization of the risks created by the Archdiocese (*Bazley*, at para. 41, and *B. (K.L.)*, at para. 19). If these two inquiries are answered positively, vicarious liability can and should be imposed on the Archdiocese. If not, vicarious liability should not result.

*The Relationship Between the Archdiocese and the Brothers at Mount Cashel*

126 For the reasons that follow, we conclude that the relationship between the Archdiocese and the Brothers at Mount Cashel was sufficiently close to justify imposing vicarious liability on the Archdiocese for the Brothers' sexual assaults of the appellants.

127 We restate that the Diocese invited Christian Brothers from Ireland to come to St. John's to staff its denominational orphanage for poor and orphaned boys. The Brothers did not invite themselves here, nor is there any evidence supporting the notion that they had an independent idea to come to St. John's to open an orphanage. In this regard, the Diocese (through Bishop Power, Bishop Howley's predecessor) had been communicating with the Brother Superior of the Christian Brothers in Dublin on and off since 1892, and by 1897, Bishop Howley had a plan in place for Brothers to come to staff an orphanage. The evidence suggests that Brother Slatterly came in 1897, and Brothers Ennis, Murray and Brennan arrived the following year.

**The 1875 Agreement**

128 The Archdiocese says the 1875 agreement applied to the Brothers who came to staff Mount Cashel, and contends that it shows the Brothers were independent of the Archdiocese.

129 The 1875 agreement was executed for the purpose of setting out the terms on which Christian Brothers would come to Newfoundland from Ireland to teach in Roman Catholic schools. The agreement stipulates that the Diocese would pay for the Brothers' passage, provide accommodation and a stipend for them on their arrival, and provide suitable buildings for the educational institution.

130 The 1875 agreement does shed light on the relationship between the Archdiocese and the Brothers at Mount Cashel. It sets out the responsibilities of the Archdiocese respecting the Brothers, which included payment of their travel expenses, provision for their lodging, and compensation for them until the annual collection from parishes materialized. These provisions alone show a close relationship between the Archdiocese and the Brothers, if not a relationship akin to that of master/servant.

131 Clauses 9 and 10 of the 1875 agreement provide that the Brothers were free to exercise the "Rules and Religious observances [of their Order] in the same manner as in Ireland", and that in all things appertaining thereto, they are "subject only to their own Superior and no other person". The Archdiocese argues that this agreement shows that the Brothers were independent of the Archdiocese.

132 Dr. Fitzgerald testified that these rules and observances pertained to the Brothers' modes of dress, their fraternization within and outside the Order, their obedience to their Superiors, their internal structure, and matters of daily routine within the brotherhood. We agree with this interpretation, and observe that these brotherhood matters do not touch on how the Brothers carried out their work at the orphanage. Neither does the 1875 agreement say anything about how the Brothers who came to staff Mount Cashel were to relate to or interact with the Archdiocese respecting caring for the resident boys which was the task the Archdiocese assigned to the Brothers in furtherance of its objectives. Instead of showing the Brothers' independence from the Archdiocese, we see the 1875 agreement as an acknowledgement of responsibility by the Archdiocese for the Brothers, who had come to a far-away land to further the Archdiocese's objective of caring for poor and orphaned boys. In our view, the 1875 agreement is supportive of a close, if not protective, relationship between the Archdiocese and the Brothers at Mount Cashel, and lends weight to the imposition of vicarious liability.

133 The Archdiocese made much of the fact that Superiors within the Order of Christian Brothers governed the Brothers, not the Archdiocese. According to Brother A.E. Murphy's evidence, the Christian Brothers Institute Inc. did not operate in Newfoundland and did not have any governing role respecting Mount Cashel and there was no other corporate body governing the Brothers at Mount Cashel orphanage during the time when the appellants lived at the orphanage. Archbishop Currie agreed with this evidence. Mount Cashel was not privately owned or operated at that time by any corporation, or governed by any board of directors or trustees like the orphanage in *Broome*.

134 Brother A.E. Murphy and Dr. Fitzgerald explained the internal governance of Christian Brothers by their provinces which undertook requisite visitations and filed reports in this regard. Visitations concerned issues the Brothers might have with their vows, their financial well-being, and other matters internal to the Order. We agree that these issues would have been beyond Archdiocesan control. But that does not matter, because these internal matters are not relevant to the vicarious liability analysis; they do not touch on the relationship between the Archdiocese and the Brothers respecting the Archdiocese's establishment of and an ongoing relationship with Mount Cashel, or how the care of orphanage residents which the Archdiocese entrusted to the Brothers was to be carried out.

135 The report of Father Morrissey dated January 23, 2016 distinguishes between a work belonging to an institute of Christian Brothers and a work belonging to a diocese. In respect of the latter, he says:

> ... When a diocesan work is entrusted to a religious institute, the diocesan bishop and the competent superior of the institute are to draw up a written agreement which, among other things, is to define expressly and accurately those things which pertain to the work to be accomplished, the members to be devoted to it, and financial matters.

While the evidence does not disclose a contract between the Brothers at Mount Cashel and the Archdiocese respecting the "work to be accomplished" in caring for the boys at Mount Cashel, that does not mean that the Brothers were not carrying out the Archdiocesan work. We also note that in this respect the Archdiocese was no different than the dioceses or superior authorities of other religious denominations which entrusted employees, volunteers, or other individuals to take care of the residents in their denominational orphanages. The Archdiocese cannot divest itself of civil responsibility for an institution it established, staffed with Brothers to whom it entrusted the care of its residents, and continued to be involved with, on the basis that it did not set the internal governance rules respecting the Order of Christian Brothers.

136 In short, the small group of individual Brothers at Mount Cashel, installed there initially and added to and subtracted from over time, was introduced into the community by the Archdiocese and entrusted with caring for the resident boys, and operated under the auspices of the Archdiocese to further the Archdiocese's social and religious objectives.

137 Several other factors have been argued to bear directly on the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel and thereby go to whether it is appropriate to impose vicarious liability on the Archdiocese.

**Authority of the Archdiocese**

138 The appellants contend that the Brothers and Mount Cashel were always subject to the authority of the Archdiocese. The Archdiocese argues this was not the case because the Brothers ran their own operation independently of the Archdiocese. The judge characterized the Archdiocese's ongoing relationship with the Brothers at Mount Cashel as involvement, and said its "involvement with matters internal to [Mount Cashel's] operation was limited to aspects of the curriculum relating to religious instruction, and the delivery of certain religious ritual services to the residents and the Brothers" (para. 122), and that Canon Law supported nothing more.

139 It was not in dispute that the Archbishop was the ultimate authority in the Archdiocese. This authority emanated from Archdiocesan authority over all parishes and institutions that could reasonably be regarded as part of the Archdiocese and from Canon Law. As well, Father Doyle (an expert witness called by the appellants) was of the view that the Archdiocese could exercise authority over the Brothers with respect to major issues presenting in the Archdiocese, which would include the Brothers' sexual abuse of the appellants at Mount Cashel. Monsignor Puddester, Vicar General of the Archdiocese at the time of the trial, seemed to agree. Father O'Keefe's evidence was that while the Archbishop had some authority over the Brothers at Mount Cashel, it was limited. Father Morrissey's and Archbishop Currie's evidence on this point was qualified; while they agreed that the Archdiocese would have to act on knowledge of abuse at Mount Cashel, they said that this duty would be discharged by reporting the abuse to the Brother Superior.

140 The Archdiocese argues that the dismissal of a civilian employee by Brother Carroll, who was the Superior at Mount Cashel during the time the appellants were resident there, shows that the Brothers did the hiring and firing at Mount Cashel and therefore operated the orphanage independently of the Archdiocese.

141 The dismissal of the civilian employee related to a report that the employee at Mount Cashel was sexually abusing one of the appellants. The report was made by a former civilian employee of Mount Cashel to Father O'Keefe, the Archbishop's secretary, at the Palace, the Archbishop's residence and the offices of the Archdiocese. The former employee also reported to Father O'Keefe that the Brothers had been told of the matter and that it had been reported to the police. Father O'Keefe documented the report, and shortly thereafter Monsignor Murphy, the administrator of the Archdiocese acting in the stead of Archbishop who was away at the time, sent for Brother Carroll. The three men met and discussed the matter. Brother Carroll denied the allegation of abuse but did promise to further investigate. Three days later Brother Carroll advised Father O'Keefe by telephone that the boy involved had recanted his story, but that he (Brother Carroll) had dismissed the civilian employee

anyway on the ground that his character was so low that it could cause Mount Cashel harm. The record shows that the dismissed employee was subsequently convicted of sexual charges respecting two of the appellants.

142 While the evidence shows that Brother Carroll did fire the civilian employee, it also shows that the Archdiocese did not decline to act when the abuse was reported. On the contrary, the Archdiocese did act by summoning Brother Carroll to the Palace and directing him to further investigate the matter. The Archdiocese's actions show that it had authority over the Brothers, and that it exercised that authority. While Brother Carroll did the actual firing of the civilian employee, it was the intervention of the Archdiocese that caused him to do so.

143 In our view the evidence shows that the Archdiocese was the ultimate authority of the Catholic Church and that it exercised a degree of authority over the Brothers at Mount Cashel.

**Public Perception**

144 The appellants argue that the public perceived that the Archdiocese controlled Mount Cashel and that this perception showed that the relationship between the Archdiocese and the Brothers at Mount Cashel was close if not interconnected. The appellants refer to Bishop Howley's public role in the establishment of Mount Cashel and other evidence which they contend shows that the Archdiocese was regarded by the public and government officials as having authority over Mount Cashel.

145 We agree that public perception can be a legitimate consideration in an analysis respecting whether vicarious liability ought to be imposed. Evidence of entities or wrongdoers holding themselves out to the public as being closely related to other persons or entities can indicate a close relationship between the two, and thereby could contribute weight to an ultimate determination of vicarious liability. Whether it does depends on how the entity and wrongdoers represent themselves to the public and how the public reasonably regards those representations. Reasonable regard involves both subjective and objective evaluation. Such evaluation must take account of the fact that members of the public do not usually have the ability to look behind the public profile of wrongdoers or entities to ascertain their formal relationship. Evaluation must also take care to differentiate between loose associations and the nature and degree of closeness which could reasonably support a finding of vicarious liability.

146 In this case, the appellants perceived that the Archdiocese was closely involved with Mount Cashel. One of the appellants testified that he did not see a distinction between a Brother and a priest when he was a boy living at Mount Cashel. As far as he was concerned, both were authoritarian religious figures to him. Another appellant testified that he saw Monsignor Ryan as the "head priest" of Mount Cashel. Another witness testified that he viewed the orphanage as a Catholic institution, and saw the church and Mount Cashel "as one unit".

147 The civilian abuse incident also bears on the public's perception of a close relationship between the Brothers and the Archdiocese. The former employee who reported the matter to the Palace did so because he perceived that the Archdiocese had the authority to do something about it. As it turned out, he was correct. In our view, the incident shows that members of the public correctly perceived the Archdiocese as having authority over the Brothers.

148 The judge acknowledged some of the documentary evidence respecting orphanage events showed that the Archdiocese was happy and proud that the Brothers were part of its church history and apostolates for Catholic education. The Archdiocese and the Brothers publicly showed they were proud affiliates of each other — until the abuse scandal broke.

149 It is also clear, as will be discussed below, that the provincial government perceived Mount Cashel as being under the auspices of the Archdiocese. On matters involving Mount Cashel orphanage, and Roman Catholic orphanages generally, government officials were not communicating with the Brother Superior — they were communicating with the Archbishop.

150 We also note the obiter comments of the judge in *H. (H.) Estate* respecting his view that the evidence in that case showed that Mount Cashel was the responsibility of the Roman Catholic Church and the Christian Brothers.

151 We conclude that the public perceived a close relationship between the Archdiocese and the Brothers of Mount Cashel, and that this public perception lends inferential support to the imposition of vicarious liability on the Archdiocese.

**Requests for Permission and Fundraising**

152 The appellants argue that the Archdiocese controlled the Brothers' ability to fundraise at Mount Cashel, and that this control shows Archdiocesan authority over the orphanage. They identify eight different requests from the Brothers to the Archdiocese, made between 1951 and 1957, for permission to raise funds for Mount Cashel by holding raffles, fairs, and concerts. Of particular note is the request from Brother Warren dated November 11, 1951 for approval to hold the annual Christmas raffle. Other evidence indicates this request was made annually. The Archdiocese granted some of these requests, and denied others.

153 The Archdiocese argues that these requests were effectively courteous information provided to the Archdiocese to facilitate the co-ordination of fundraising within the Roman Catholic community so as not to overload it with demands for money.

154 We agree that the Archdiocese was likely legitimately concerned about overloading its people with requests for money. However, a request for permission is not a courteous notice. A request for permission clearly connotes granting authority, and is counter to the notion of courteous information. The Brothers' requests for permission to fundraise show that the Archdiocese had the authority to grant or deny permission. If the Brothers were operating Mount Cashel completely on their own, they would not have needed to seek permission for the fundraising, especially for fundraising like the Christmas raffle which generated one-fifth of the orphanage's annual revenue. The necessity for permission shows that the Archdiocese exercised financial and administrative authority over Mount Cashel as an institution operating under its auspices.

155 The Brothers also sought permission from the Archdiocese to establish a Sea Cadets corps at Mount Cashel. Again, the requirement for permission to do so shows the Archdiocese's authority over orphanage programming and activity, and supports a close and controlling relationship between the Archdiocese and the Brothers. If the Brothers were truly operating Mount Cashel independently of the Archdiocese, they would not have needed to seek permission to establish the Cadet corps.

156 The various requests for permission support the fact that the Archdiocese had financial authority and control over the Brothers at Mount Cashel. They show a close relationship between the two, and support a finding of vicarious liability.

**Government Relations**

157 Shortly after Newfoundland's entry into confederation with Canada in 1949, the Government of Newfoundland began to contribute to the costs of caring for wards of the province who resided in denominational orphanages. Documentary evidence in this case includes various pieces of correspondence between government officials and Archbishop Skinner in the 1950s pertaining to whether and how much government would pay for the care of wards who were resident in Roman Catholic orphanages. It shows that government's communications in this regard during the early and mid-1950s were almost exclusively with the Archdiocese, although later in the decade the Brother Superior at Mount Cashel communicated occasionally with government officials respecting government funding.

158 The correspondence, especially the several letters between Archbishop Skinner and Dr. H.L. Pottle, Minister of Public Welfare and/or Mr. H. Cramm, Director of Child Welfare on behalf of the Government of Newfoundland, written between 1952 and 1954, shows that government officials communicated with Archbishop Skinner about admission policies. The government officials were concerned about supporting poor and orphaned Roman Catholic children in the province and keeping orphaned children from large Roman Catholic families together insofar as possible. In regard to these admissions and child welfare policies, government officials communicated with the Archbishop. The correspondence clearly indicates that it was the Archdiocese that was directly involved in these child welfare matters and that Archbishop Skinner was the conduit of this policy information to the parish priests in his Archdiocese so that they could disseminate it among parishioners and thereby facilitate admissions in accordance with the policies. There is no suggestion in the evidence that the Brothers at Mount Cashel

were setting child welfare policies. Neither is there any suggestion that the Brothers were determining who and on what basis boys would be admitted to Mount Cashel. The fact that the Archdiocese's authority in regard to admissions and other child welfare policies may have also applied to another Roman Catholic orphanage does not detract from its direct application to the Brothers at Mount Cashel.

159 The documentary evidence referenced above supports the fact that the Archdiocese had authority over government funding and child welfare policies for Mount Cashel orphanage.

160 In sum, the Archdiocese was the interface between the Brothers at Mount Cashel and the Government in regard to any and all matters which concerned admissions and child welfare policies. Accordingly, this interface shows a close and controlling relationship between the Archdiocese and the Brothers at Mount Cashel, and thereby supports the imposition of vicarious liability on the Archdiocese.

**Reversionary Property Interest**

161 In 1903, approximately five years after Mount Cashel was established, the Diocese conveyed the Howley estate property in trust to the Brothers for use as an industrial home and orphanage for poor boys. The conveyance provided that the property would revert to the Diocese should it cease to be used for that purpose. The judge rejected the plaintiffs' argument that this arrangement was relevant to the relationship between the Archdiocese and the Brothers at Mount Cashel and indicative of Archdiocesan control over Mount Cashel.

162 We are of the view that this property arrangement is far from irrelevant to the relationship between the Archdiocese and the Brothers at Mount Cashel. At a minimum, it is evidence of a direct contractual relationship between the two in furtherance of the Archdiocese's objective to care for and educate poor and orphaned Roman Catholic boys. While we agree with the judge that not every property interest would indicate a close relationship justifying the imposition of vicarious liability, this particular property interest was tied to a specific objective of the Archdiocese, which the Brothers agreed to further by caring for the orphanage residents. The reversionary interest controlled the Brothers' use of the property, for if they ceased to carry out the Archdiocese's objective, the Brothers would no longer have claim to the property. We see this arrangement as showing a close and controlling relationship between the Archdiocese and the Brothers at Mount Cashel. It is therefore a factor supporting the imposition of vicarious liability.

**The School Conflict**

163 Dr. Fitzgerald and Brother A.E. Murphy testified to a conflict which erupted in the early 1960s between the Archdiocese and the Christian Brothers who were teaching within the St. John's Roman Catholic School Board. The Archdiocese argues that the outcome of this conflict supports its position that the Brothers at Mount Cashel were independent of the Archdiocese.

164 The conflict concerned whether Christian Brothers or Jesuit priests would teach in a new school planned for St. John's by the Board. The Christian Brothers took umbrage with the Archdiocese's stated preference for Jesuit priests to teach at the new school. The Brothers maintained that they had provided stellar education for Roman Catholic boys in St. John's for many decades and they ought to be able to continue to do so by teaching at the new school. In the end, it was decided that the Brothers would teach at the new school, which was named after Brother Rice, the founder of the Christian Brothers from Waterford, Ireland, and that the Jesuit priests would teach at another new school, Gonzaga High School.

165 We do not see this situation as showing that the Brothers at Mount Cashel operated Mount Cashel independently of the Archdiocese. First, we observe that the teaching Brothers involved in the school conflict were not the Brothers at Mount Cashel orphanage who sexually assaulted the appellants, and observe that Mount Cashel orphanage was very different from the schools where the teaching Brothers worked.

166 Secondly, the school conflict says nothing about how the Brothers at Mount Cashel would carry out the Archdiocese's objectives of caring for the boys at the orphanage or the Archdiocese's ability to exercise authority over the Brothers in that regard. The school conflict was simply a power struggle over which religious Order would teach in the new school.

167 In any event, the resolution of the school conflict involved the Vatican, and it appears, according to Brother A.E. Murphy, that the Vatican resolved it. While we agree with the Archdiocese that this conflict and its resolution shows strength and willfulness on the part of the teaching Brothers, and supports the fact that their status as members of a Pontifical Rite affected their relationship with the Archdiocese, we do not see it as supportive of the argument that the Archdiocese did not have authority over how the Brothers at Mount Cashel were to care for the boys or that Mount Cashel was not administered, controlled, or otherwise the responsibility of the Archdiocese. Neither do we see this argument as supportive of the notion that the Archdiocese had no ability to supervise or oversee the Brothers' work caring for the appellants.

**Admissions to Mount Cashel**

168 The appellants contend that the Archdiocese through its parish priests facilitated admission of boys to the orphanage, and that this arrangement shows a close relationship between the Archdiocese and the Brothers. One of the appellants testified that his admission to Mount Cashel was facilitated by his parish priest, and another witness also testified to this practice. Correspondence between government officials and the Archbishop (as referenced above) shows the involvement of the Archdiocese in setting admissions policy and that the Archdiocese communicated this information to parish priests to enable them to facilitate admissions to the orphanage. Moreover, minutes of a meeting among the Archbishop, Dr. Pottle, and Mr. Clancy, the Deputy Director of Child Welfare, on April 28, 1952 make clear that arrangements for admissions to orphanages were made between parish priests and family. Dr. Fitzgerald's evidence also touched on this practice.

169 The judge referenced only the appellants' evidence in regard to this issue, saying "only one [of the four] testified that a priest was instrumental in his admission to Mount Cashel" (para. 163). Such reasoning is hardly determinative, given that the appellants were of tender years when admitted to Mount Cashel and that their evidence respecting how they came to be there was far from conclusive.

170 In any event, because all of the appellants did not say they were admitted to Mount Cashel through their parish priests does not mean that the Archdiocese did not have influence or involvement in admissions. Other evidence clearly suggests that it did. There was no evidence that the Brothers were soliciting applications for admission to Mount Cashel. Neither were the Brothers at Mount Cashel interacting with parishioners in the community like parish priests were.

171 All told, the involvement of the Archdiocese and its parish priests in admissions to Mount Cashel is well supported in the evidence and is a factor showing a close relationship between the Archdiocese and the Brothers at Mount Cashel.

**St. Raphael's Parish on Site**

172 The building of St. Raphael's chapel on site in 1898 and Bishop Howley's direct involvement and celebratory mass at the official opening show a close relationship between the Brothers and the Archdiocese from the beginning. The formal establishment of St. Raphael's as a parish in 1925 and the installation of a parish priest on site, who was assigned as the spiritual director for the orphanage, demonstrates a close relationship between the Archdiocese and the Brothers at Mount Cashel. St. Raphael's chapel continued as a place of worship for the residents and the Brothers, in keeping with the denominational objective that Roman Catholicism be practiced as a faith and inform the culture of the orphanage.

173 The evidence did not disclose that the Archdiocese sought permission from the Brothers to establish the parish on site, or that the Brothers tolerated the parish on sufferance. The Archdiocese put St. Raphael's on site, and Brothers were assigned duties in the chapel. In particular, they maintained the priest's residence and the oratory, and prepared the sacristy for the priest to say mass. The evidence was also that the Sunday collections were split between the Archdiocese, to help pay the priest's stipend, and the orphanage. This arrangement worked to the benefit of both the orphanage and the Archdiocese, and shows regular Archdiocesan financial support for Mount Cashel from the Sunday collections, which were doubtless the contributions of local parishioners as opposed to the orphanage residents. The arrangement between the parish and the Brothers shows not just a close, but an integrated, relationship between the Archdiocese and the Brothers at Mount Cashel.

**Canon 1381(3)**

174 Canon 1381(3) gave specific authority to the Archdiocese over education and morals and specifically empowered the Archdiocese to require a Brother from Mount Cashel to be removed for moral misconduct. As discussed above in connection with the judge's failure to consider it, Canon 1381(3) shows that the Archdiocese had specific authority over the conduct of the Brothers at Mount Cashel and support a finding of vicarious liability.

**Bishop Howley's Guarantee**

175 Also as discussed above, Bishop Howley's guarantee to Sir Robert Bond shows that the Archdiocese had authority over the Brothers by introducing them into the community and by professing assurance for the future success of the orphanage. The guarantee supports the kind of close relationship between the Archdiocese and the Brothers at Mount Cashel that gives weight to the imposition of vicarious liability.

**Acknowledgement that Mount Cashel was one of the Archdiocese's Institutions**

176 On April 27, 1953 Bishop O'Neil, the Bishop of Harbour Grace, in consultation with the Archbishop Skinner, the Archbishop of St. John's, had occasion to write government officials in connection with the child welfare policy of keeping families together. In his letter, he wrote "[h]owever, while we are most anxious to cooperate with your department in the matter of orphan care, we would not consider it advisable for Government officials to have the entrée to our institutions whenever they feel like it."

177 A further example of the Archdiocese's acknowledgement that Mount Cashel was one of its institutions is found in Archbishop Skinner's correspondence of June 15, 1953 to the Minister, Dr. H.L. Pottle, where he states "... it is the present practice in our orphanages ...".

178 On December 24, 1956, Brother Carroll wrote to the Archbishop enclosing a donation for the Archdiocese's Social Welfare and Education Fund. In his letter he referred to himself as "Superior of one of Your Grace's Institutions".

179 We also note the judge's comment in *H. (H.) Estate* to the Archbishop's reference to Mount Cashel as "our institution".

180 These incidental expressions support the fact that Mount Cashel was acknowledged by both the Brothers and clergy to be under the authority and control of the Archdiocese.

*Conclusion on the Relationship Between the Archdiocese and the Brothers at Mount Cashel*

181 In summary, the Archdiocese established Mount Cashel orphanage to provide care for boys within its religion and culture, and staffed it with Brothers to whom it assigned the task of caring for the resident boys, including the appellants. The evidence shows that this close relationship continued up to and including the 1950s when the appellants were resident. Through these years the Archdiocese had authority over the Brothers with respect to their care of the boys in accordance with the Archdiocese's mandate, had a significant hand in the overall administration and operation of Mount Cashel, exercised authority and control over fundraising, set admissions and child welfare policy, facilitated admissions, and ensured that the Roman Catholic faith informed the education and religious training of the residents.

182 The Archdiocese operated a parish on site and installed a priest there for which both it and the orphanage shared in its maintenance and benefitted, financially and otherwise. The Archdiocese spoke for the Brothers at Mount Cashel to government, and presented the orphanage to the wider community as one of its institutions. It took public credit for the successes of Mount Cashel, and shared in its glories. As well, the Brothers themselves acknowledged the Archdiocese's authority over fundraising and extra-curricular programming, and regarded the orphanage as one of the Archbishop's institutions.

183 Something more must be said about the relationship between the Archdiocese and the Brothers at Mount Cashel. It is not only that the Archdiocese exercised a measure of authority and control over the Brothers, but it had the authority and responsibility to exercise much more oversight over how the Brothers were caring for the appellants. This point is not a new

concept. It is well made in the jurisprudence, and as already noted, goes directly to the policy of deterrence which underlies the doctrine.

184 The Archdiocese was in a position to reduce risk to the appellants but did not do so. It had the ability, through a Diocesan contract or otherwise to set up oversight systems to provide a check on how the Brothers were caring for the appellants. The Brothers were engaged by the Archdiocese to perform services in an orphanage it established and continued to administer and financially support for the benefit of the Archdiocese's objectives. The Archdiocese cannot divest itself of responsibility for the Brothers' wrongdoing by setting up a situation involving risk, perpetuating that risk, and then saying that Church structure denied them authority over how the Brothers carried out their work at the orphanage. This is especially so because the internal governance of the Brothers did not determine how the Brothers were to carry out the Archdiocese's objectives, and also because the Archdiocese continued to exercise much supervision and control over several aspects of running the orphanage and controlling the Brothers. In this regard, the words of Wilkinson J. in *Jacobi*, to the effect that oversight by entities responsible for the institutional care of vulnerable children is required if abuse of these children is ever to be curtailed, are appropriate.

185 In summary, and considering the whole of the evidence, we conclude that the Brothers at Mount Cashel were working on the account of the Archdiocese when they were caring for the appellants, and that the relationship between the Brothers and the Archdiocese was sufficiently close to make the imposition of vicarious liability on the Archdiocese appropriate.

*Connection Between the Brothers' Assigned Tasks and their Wrongdoings*

186 While the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficiently close to justify imposition of vicarious liability on the Archdiocese, before liability can be imposed it must be determined if the tasks assigned to the Brothers were sufficiently connected to their sexual assaults of the appellants to justify doing so. Put another way, were the Brothers' sexual assaults of the appellants a materialization of the risk the Archdiocese placed in the community? (See *Bazley*, at para. 31, and *B. (K.L.)*, at paras. 18-20.)

187 The factors going to this line of inquiry were identified in *Bazley* at paragraph 41:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

**Opportunity**

188 If the Archdiocese had not invited the Brothers to St. John's to staff Mount Cashel, there would have been no opportunity for them to sexually abuse the appellants. However, opportunity is not to be evaluated on this simple "but for" basis because not all opportunities present the same degree of risk. That said, the opportunity for sexual abuse of children being cared for in a residential environment 24 hours a day is significant, for advantage can be taken while the children are showering or sleeping, where caregivers have the ability to isolate a child from others within the institution, and where activities take place away from the watchful eyes of any supervising authority. Such was the situation at Mount Cashel when the appellants lived there.

189 Risk of harm to orphanage residents was recognized by the Archdiocese in the early 1950s. In correspondence between Archbishop Skinner and Dr. Pottle dated July 15, 1953, the Archbishop inquired of Dr. Pottle whether parents could legally sue the orphanage if their child, who was passed over to the orphanage for care, were injured while there. Dr. Pottle's curt reply

of July 24, 1953 and Mr. Cramm's additional reply in November of that year made it clear that the government would not be providing the Archdiocese with the requested legal advice.

**The Extent to Which the Wrongs May have Furthered the Archdiocese's Aims**

190 The Archdiocese's aims were to provide care and education for poor and orphaned Roman Catholic boys within the Roman Catholic faith and culture. These laudable objectives of the Archdiocese cannot be said to have been endorsed or encouraged in any way by the wrongful conduct of the Brothers. There is no support in the record for such a finding and the appellants do not suggest it. Accordingly, the extent to which the sexual abuse could be said to have furthered the Archdiocese's aims weighs against a finding of vicarious liability.

**The Association Between the Sexual Assaults and Friction, Confrontation and Intimacy**

191 In *Bazley*, McLachlin J. explained that when an employer's enterprise or objectives incidentally create a situation of friction and confrontation, such friction and confrontation may increase the chance of intentional misconduct and thereby give rise to the imposition of vicarious liability. It can also bring out the worst in people and thereby result in an increased risk of wrongful conduct. Support for the imposition of vicarious liability on this basis builds on the logic of risk and accident rather than implied authority. Orphanage rules, their enforcement, and potential resulting discipline easily give rise to friction and confrontation, and the evidence shows that this occurred at Mount Cashel. This is not to say that rules and discipline were unnecessary. However, the evidence discloses that physical discipline sometimes escalated into sexual abuse.

192 The association between intimacy and the sexual assaults is much stronger. Intimate activities inherent in a 24-hour day institutional environment, like sleeping, bathing, and showering, are closely related to physical contact, and can provide opportunity for sexual abuse, as the evidence showed. As well, this environment naturally engaged the need for physical and social contact, and sometimes counseling and solace, which puts emotional intimacy in play.

193 In short, living conditions at Mount Cashel exposed the intimate aspects of the appellants' physical and emotional lives, thereby giving opportunity and advantage to those Brothers who wished to abuse the boys in their care.

**Power of the Brothers in Relation to the Appellants**

194 The Brothers exercised virtually full authority over the appellants. While the public may have appreciated the Archdiocese's authority over the Brothers and the orphanage, the appellants were hardly aware of an authority outside of the orphanage from whom they could seek help. Two of the appellants had no parents, and the other two had no family who could support them outside of the orphanage. When the appellants were at Mount Cashel, they left the site only with permission from the Brothers, and the evidence showed that such permission could be easily or arbitrarily withheld. The boys were dependent on the Brothers for their every need and want.

195 The evidence shows that the Brothers regulated and controlled all aspects of the appellants' daily lives. The ability of the appellants to partake in special activities like movie night as well as regular daily activities was entirely at the pleasure of the Brothers. As well, Father Doyle's report explains that the religious teachings of the Roman Catholic faith supported a culture of no complaint against religious officials.

196 The Archdiocese vested the Brothers with power over the appellants within a structure requiring obedience to and respect for the Brothers. This set-up was ripe for the Brothers to exercise their unchecked power and authority over the appellants.

**Vulnerability**

197 The extent of the Brothers' power over the appellants overlaps with their vulnerability. As minors, they were vulnerable; as boys with no viable alternative living arrangements and no effective means to complain, they were vulnerable; and as residents isolated from the broader community, they were vulnerable. Archbishop Currie, the Archdiocese's witness, acknowledged that they were vulnerable. Furthermore, the Archdiocese states in its factum at paragraph 24(e) that at least one of the appellants confirmed that "there was no one to turn to if a boy felt hard done by".

198 Contrasting the appellants' circumstances with school boys who lived outside the orphanage is illustrative. School boys living at home were under the disciplinary code of teachers only during school hours. When school was over for the day, they went home to parents or caregivers who could take care of their needs. The family circumstances of the appellants did not provide refuge — that's why they were at Mount Cashel in the first place. Those who may have had a parent had little to no way to reach out to him or her. And, even if they could, parents could also have been reluctant to complain given both their dependency on Mount Cashel to shelter their children and the teachings of their faith, as Father Doyle's report explains. There is no doubt that the circumstances of the appellants enabled certain Brothers to take advantage of the appellants' vulnerability.

199 The Archdiocese's delegation to the Brothers of unfettered power over the vulnerable child appellants warrants special attention in considering a power and dependency relationship in the context of vicarious liability (*Bazley*, at para. 46). This circumstance weighs heavily in favor of ascribing responsibility for the sexual abuse of the appellants to the Archdiocese.

*Conclusion on the Connection Between the Brothers' Assigned Tasks and their Wrongdoings*

200 Consideration of the secondary factors leads to the conclusion that there was a strong connection between the risk of harm the Archdiocese introduced in the community and the materialization of that risk. The Archdiocese exercised its authority over the Brothers and the orphanage in many ways, but it also provided the Brothers staffing Mount Cashel with the power, environment and tools to carry out their wrongdoing virtually undetected, while they were supposed to be carrying out the Archdiocese's legitimate objectives of caring for and educating the appellants. The link between the Archdiocese's introduction and perpetuation of the risk of harm and its manifestation is strong. The Brothers' sexual assaults of the appellants at Mount Cashel can fairly be regarded as sufficiently connected with the Brothers' assigned tasks in caring for the appellants and running Mount Cashel orphanage to justify the imposition of vicarious liability.

**Disposition on Vicarious Liability for the Brothers' Wrongdoings**

201 In our view, the total relationship between the Brothers at Mount Cashel and the Archdiocese shows that the Brothers were working on the account of the Archdiocese's social and religious mandate. Their relationship was sufficiently close, and the connection between the Brothers' assigned tasks and their wrongdoing was sufficiently close, to justify the imposition of vicarious liability on the Archdiocese. Doing so in the circumstances of this case upholds the policy objectives of the doctrine.

202 In the result, we allow the appeal respecting the Archdiocese's vicarious liability for the conduct of the five Mount Cashel Brothers who sexually assaulted the appellants, and accordingly impose vicarious liability on the Archdiocese for the wrongful conduct of the Brothers.

***Issue 2: Is the Archdiocese liable for Monsignor Ryan's conduct?***

203 The Archdiocese assigned Monsignor Ryan to be the chaplain at Mount Cashel and he lived there, working in that capacity, from 1952 to 1964. His title was Spiritual Director of Mount Cashel Orphanage.

204 The evidence at trial was that boys living at Mount Cashel told Monsignor Ryan that they had been sexually abused by Brothers and by a civilian employee. Most of these sexual abuse disclosures were made to Monsignor Ryan in confession. One witness testified that he told Monsignor Ryan about the abuse outside of confession.

205 There were no allegations that Monsignor Ryan had ever sexually abused or otherwise mistreated the appellants, or any boys at Mount Cashel. The evidence at trial was clear that he did not.

206 At trial, the appellants made two arguments relating to Monsignor Ryan's conduct. First they alleged he was negligent because he failed to act after he was told about the sexual abuse, and that the Archdiocese was vicariously liable for his negligence. Second, the appellants argued there was a fiduciary relationship between them and Monsignor Ryan and that he breached his fiduciary duty by failing to act when he was advised of the sexual abuse.

207 The judge rejected these arguments.

208 He concluded Monsignor Ryan was not negligent and, consequently, the Archdiocese was not vicariously liable. The judge reached this conclusion after considering the requirements for negligence, noting the appellants had to prove there was a duty of care owed by Monsignor Ryan to them and that this duty of care was breached. The judge concluded there was no duty of care in this circumstance. He further held that if a duty of care did exist, the appellants did not prove there was a breach of the duty.

209 In light of these findings, the judge did not go on to consider the requirement of causation. That is, he did not assess whether Monsignor Ryan's alleged negligence caused the appellants' damages.

210 Regarding vicarious liability, the judge decided the Archdiocese would have been vicariously liable if Monsignor Ryan had been negligent. However, as he found the appellants had not proved that Monsignor Ryan was negligent, the judge concluded there was no vicarious liability.

211 The judge also rejected the argument that Monsignor Ryan had breached a fiduciary duty by failing to act when he was told of the sexual abuse. He found no fiduciary relationship existed between the appellants and Monsignor Ryan and, as a result, there was no breach of fiduciary duty.

212 The appellants appeal the judge's conclusions that Monsignor Ryan was not negligent and that the Archdiocese was, consequently, not vicariously liable. Specifically, they appeal the judge's determinations that there was no duty of care and no breach of duty in negligence. They also appeal his determination that there was no breach of fiduciary duty.

213 For this ground of appeal, the issues are:

> (a) Did the judge err in deciding Monsignor Ryan was not negligent and, as a result, that the Archdiocese was not vicariously liable? Specifically:
>
> > (i) Did the judge err in finding Monsignor Ryan had no duty of care to the appellants in negligence?
> >
> > (ii) Did the judge err in finding that, if a duty of care existed, Monsignor Ryan did not breach this duty?
>
> (b) Did the judge err in finding there was no fiduciary relationship between the appellants and Monsignor Ryan, and therefore no breach of a fiduciary duty?

214 For the reasons that follow, we conclude that the judge erred in finding that Monsignor Ryan owed no duty of care to the appellants. However, while a duty of care existed, the judge made no error in finding that the evidence did not establish a breach of duty. As a result, the judge did not err in concluding that Monsignor Ryan was not negligent.

215 We also conclude that the judge made no error in finding there was no breach of fiduciary duty by Monsignor Ryan.

216 Accordingly, we dismiss this ground of appeal. As Monsignor Ryan was not negligent and did not breach a fiduciary duty, there is no basis upon which the Archdiocese could be liable for his conduct.

*Negligence and Vicarious Liability*

217 The appellants must establish that the judge erred in finding that Monsignor Ryan was not negligent. The judge outlined three requirements the appellants had to meet in order to successfully establish Monsignor Ryan's negligence and the Archdiocese's resulting vicarious liability.

218 The first and second of these related to whether the Archdiocese would be vicariously liable for Monsignor Ryan's negligence. The third involved the requirements to be met to prove his negligence. The judge stated:

> [201] The Plaintiffs submit that an alternate source of liability on the part of the Archdiocese is grounded in the knowledge of Msgr. F. Ryan, the priest assigned to be the Chaplain at Mount Cashel from 1952 until 1964. That encompasses the period

within which the Plaintiffs were abused by the Brothers. It is submitted that he was negligent in his failure to intervene to prevent the abuses when he received knowledge. There is no suggestion that he was complicit in the abuse itself. However, it is alleged that his knowledge led to a duty to act, and a failure to do so amounted to negligence.

> [202] If Msgr. Ryan is a source of liability for the Archdiocese, it would be on the basis of the principles of vicarious liability, discussed above. In order to find that the Archdiocese is vicariously liable, the Plaintiffs must prove three elements:
>
> 1. First, that the relationship between Msgr. Ryan and the Defendant is sufficiently close as to make a claim for vicarious liability appropriate;
>
> 2. Second, it must be demonstrated that any tort committed is sufficiently connected to the tasks assigned that it can be regarded as a materialization of the risks created by the Defendant's activities; (*K.L.B.* at para.19), and,
>
> 3. Third, that Msgr. Ryan was negligent, and his negligence was the cause of the damages suffered by the Plaintiffs. To find negligence on his part I must be satisfied:
>
> a) That he owed a duty of care to the Plaintiffs;
>
> b) That he breached that duty of care; and,
>
> c) That [the] breach was the cause of the damages suffered by the Plaintiffs.

219 The judge found that the appellants met the first and second requirements set out above, relating to vicarious liability.

220 First, he was satisfied the relationship between Monsignor Ryan and the Archdiocese was sufficiently close such that the Archdiocese could be vicariously liable if Monsignor Ryan was negligent in failing to act.

221 Second, the judge found that if Monsignor Ryan had acted negligently, his actions were sufficiently connected to his role and duties as a priest such that vicarious liability could be imposed on the Archdiocese.

222 The judge stated in this regard:

> [203] As for the first element, it has already been decided that a priest is an employee of a diocese for the purposes of considering vicarious liability. See *Bennett* at paragraph 32 of the Supreme Court decision, where a diocese and bishop were found vicariously liable for the sexual assaults of a priest assigned to a parish. Without detailed analysis, I am satisfied that the relationship between Msgr. Ryan and the Archdiocese is sufficiently close that vicarious liability may be imposed. As a priest of the Archdiocese, he was subject to direction and assignment by the Archbishop and carried out the mission of the Archdiocese at the parish housed at Mount Cashel. On this basis, I find that Msgr. Ryan was effectively an employee, and if he was negligent in a manner that caused the Plaintiffs harm, the first element of vicarious liability is made out.
>
> [204] As for the second element, I am also satisfied that if a tort was committed by Msgr. Ryan, it would have been in his role as a chaplain or parish priest, as assigned by the Archbishop. All the allegations relate to information received by him in his role as a priest/confessor. If negligence arose from these circumstances, then the second element of vicarious liability is made out.

223 There was no appeal of the judge's conclusion that the Archdiocese would be vicariously liable for Monsignor's Ryan's negligence, if negligence was established. Therefore, this finding need not be further considered. The appeal proceeded on the basis that, if Monsignor Ryan was negligent, the Archdiocese would be responsible to the appellants by operation of the principle of vicarious liability.

**Was Monsignor Ryan Negligent?**

224 The main focus, at trial and on appeal, was on the third requirement the judge outlined above, relating to whether Monsignor Ryan was negligent in failing to act when told of the sexual abuse. The judge noted this as the key issue.

> [205] The third element in this case is the most important and will be controversial. Msgr. Ryan is not accused of committing a tortious act of sexual abuse. The Plaintiffs say he was negligent in not stopping it once he became aware of it, and therefore contributed to the damages suffered [*sic*] by the Brothers who committed the tortious acts. ...

225 The judge reviewed the evidence presented at trial, and assessed whether Monsignor Ryan owed a duty of care to the appellants and whether he had breached any duty owed. He concluded that there was no duty of care and no breach of duty in these circumstances.

***Determining Whether a Duty of Care Exists: the Anns/Cooper Test***

226 In *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587 (S.C.C.), the Supreme Court of Canada summarized the test to establish a duty of care in negligence.

227 The Court traced the development of the duty of care requirement from its beginnings in *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), to the test set out in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.). This test, affirmed and clarified by the Supreme Court in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), and other cases, has become known as the *Anns*/*Cooper* test. The Court in *Rankin's Garage* stated:

> [16] ... *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), revolutionized tort law by defining a principled approach to the development of the tort of negligence. Lord Atkin's famous achievement in this regard was his articulation of the "neighbour principle", under which parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act: *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 25.
>
> [17] The modern law of negligence remains based on the foundations set out in *Donoghue*. It is still the case today that "[t]he law takes no cognizance of carelessness in the abstract": *Donoghue*, at p. 618, per Lord Macmillan. Unless a duty of care is found, no liability will follow. Similarly, the neighbour principle continues to animate the *Anns*/*Cooper* test that Canadian courts use to determine whether a duty of care exists.

228 The *Anns*/*Cooper* test has two stages. In the first stage, issues of foreseeability of harm and the proximity of the relationship in question are considered to determine whether a duty of care exists.

229 In *Rankin's Garage* the Court observed at paragraph 19 that, to prove the existence of a duty of care, a plaintiff must "establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship". If this is established by the plaintiff, a *prima facie* duty of care is said to exist. If not, there is no duty of care:

> [18] ... If it is necessary to determine whether a novel duty exists, the first stage of the *Anns*/*Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 39; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 12; *Cooper*, at para. 30. Once foreseeability and proximity are made out, a *prima facie* duty of care is established.
>
> [19] Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a *prima facie* duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.

230 The second stage of the *Anns*/*Cooper* test is considered when a *prima facie* duty of care has been found to exist. In the second stage, a court can consider whether, for policy reasons, a *prima facie* duty of care should be negated, and therefore should not be recognized.

231 The Supreme Court in *Rankin's Garage* indicated that in this second stage the defendant has the burden to show that there are "residual policy reasons" why a *prima facie* duty of care should not be recognized or acknowledged.

> [20] Once the plaintiff has demonstrated that a *prima facie* duty of care exists, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized: *Childs*, at para. 13; *Imperial Tobacco*, at para. 39.

232 In *Broome*, Cromwell J. succinctly summarized the two part analytical approach in the *Anns*/*Cooper* test (referred to in that decision as the *Anns/Kamloops* test) in the following terms:

> [14] The first step under the *Anns/Kamloops* test is to ask whether the relationship between the appellants and the respondents discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care. If it does, the analysis moves to the second step which is concerned with whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty.

***Duty of Care Relating to a Failure to Act (Nonfeasance)***

233 Before further considering the *Anns*/*Cooper* test in the context of the facts of this case, we note that the claim against Monsignor Ryan in negligence is based on an allegation that he failed to act when advised of incidents of sexual abuse.

234 As such, the alleged negligence is premised on Monsignor Ryan's nonfeasance, his failure to take action. This differs from an allegation of negligence based on misfeasance, where a defendant's overt act causes foreseeable harm (for example, when a driver's inattentiveness causes a motor vehicle accident or an electrician's careless work results in a fire).

235 In *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), the Supreme Court discussed factors to be considered when a duty of care is alleged to arise from a defendant's nonfeasance. The Court identified circumstances where there is a positive duty to act.

236 Regarding the possible imposition of a duty of care arising from nonfeasance, the Court stated that, in such cases "[i]n the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties" (*Childs*, at para. 31).

237 The Court in *Childs* identified situations where, in a claim based on nonfeasance, a positive duty is said to flow from the presence of a "special link or proximity". The Court noted that these situations "function not as strict legal categories, but rather to elucidate factors that can lead to positive duties to act" and "bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist" (*Childs*, at para. 34).

238 One of the situations identified by the Court, where there is a positive duty to act, involves "paternalistic relationships of supervision and control, such as those of parent-child or teacher-student", including circumstances where there is "special vulnerability of the plaintiffs and the formal position of power of the defendants" (*Childs*, at para. 36).

**The Judge's Duty of Care Analysis**

239 In *Rankin's Garage* at paragraph 18, the Court indicated that the *Anns/Cooper* test is used when "it is necessary to determine whether a novel duty exists". Therefore, a preliminary point is whether the present case involves the determination of a "novel duty", thereby necessitating an *Anns/Cooper* analysis.

240 At trial, the judge and parties proceeded on the basis that it was appropriate, and necessary, to use the *Anns/Cooper* test to decide whether Monsignor Ryan owed a duty of care to the appellants.

241 It was not argued in this appeal that the judge erred in using the *Anns/Cooper* test to determine whether a duty of care existed. There was no suggestion that a duty of care had already been recognized in a prior, similar case, thereby making it

unnecessary to conduct an *Anns/Cooper* analysis in this case. The appellants submitted that the judge, in using *Anns/Cooper*, "correctly sets out the test for identifying a duty of care". The appellants' argument was that the judge erred in his *application* of the test, particularly regarding proximity and foreseeability. Accordingly, the appeal's focus was on reviewing the judge's application of the test to the facts of this case.

242 The judge noted the requirements of the *Anns*/*Cooper* test, and stated that to "define a duty of care, two concepts must be addressed: proximity and foreseeability, and the existence of any mitigating circumstances" (para. 226).

243 In the first stage of the *Anns*/*Cooper* analysis, the judge found the requirements of proximity and foreseeability were not met, and he concluded as a result that no *prima facie* duty of care existed.

244 As for the second stage of *Anns*/*Cooper*, regarding the possible negation of a *prima facie* duty of care for policy reasons, the judge noted that this was not argued and was not applicable to this case. Therefore no policy analysis was undertaken. The duty of care analysis was limited to considering proximity and foreseeability under the first stage of *Anns*/*Cooper*.

245 The appellants assert that the judge erred in his analysis of proximity and foreseeability, and in his conclusion that there was no duty of care.

***Did the Judge Err in Concluding There was No Duty of Care?***

246 Whether or not a duty of care exists is a question of law (*Rankin's Garage*, at para. 19). As such, any finding that a duty of care did or did not exist is reviewable on a correctness standard. The judge determined that no duty of care existed in this case because he found the requirements of proximity and foreseeability were not met. The judge's determination will be reviewed, on a correctness standard, beginning with his analysis of proximity.

*Proximity*

247 In *Broome*, Cromwell J. considered the requirement that a sufficiently proximate relationship must exist to establish a duty of care. He noted that factors, including "physical closeness, expectations, representations, reliance ...", may be relevant in determining legal proximity.

> [16] The question of whether there is sufficient proximity is concerned with whether the relationship between the plaintiff and defendant is sufficiently close and direct to give rise to a legal duty of care, considering such factors as physical closeness, expectations, representations, reliance and the property or other interests involved: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paras. 23-24 and 29.

These factors had also been previously identified by the Supreme Court in *Cooper v. Hobart*, at paragraph 34.

248 The judge applied these factors in his proximity analysis. With regard to the factor of "physical closeness", the judge determined that Monsignor Ryan was proximate in the physical sense, because he lived at Mount Cashel as chaplain. However he found this was insufficient, and that Monsignor Ryan's relationship with the appellants was not sufficiently proximate to satisfy the legal requirements to create a duty of care in negligence.

> [230] Msgr. Ryan was proximate in one sense. He was the chaplain at Mount Cashel. He was not, however, in the same position of trust and care-giving as the Brothers. His only contact with the boys was during religious services. He had no responsibility for their care. His living quarters were physically separate from the orphanage, and neither he nor the boys had access to each other's living area.

249 Regarding the factor of "expectations", noted in *Broome*, the judge noted that the boys at Mount Cashel saw Monsignor Ryan as someone who they expected, or at least hoped, might be able to help them.

> [232] On the issue of expectations of the boys, they clearly saw him as someone who might have been able to help them. It is understandable that they would have related their experiences of abuse in the confessional. ...

250 With respect to the factors of "representations" and "reliance", discussed in *Broome*, the judge noted that there was evidence from one witness that he had informed Monsignor Ryan about having been sexually abused and that the witness "indicated Msgr. Ryan promised to follow up with the Superior" (para. 218).

251 Despite the presence of some of the factors set out in *Broome* which might be considered to be possible indicia of proximity, the judge ultimately concluded that the relationship between Monsignor Ryan was not sufficiently proximate to create a duty of care.

252 The judge's conclusion on proximity was based on his assessment that Monsignor Ryan was not "in the same position of trust and care-giving as the Brothers" (para. 230), and that Monsignor Ryan's role was limited to religious duties and he "would not have had any role in any aspect of governance of the orphanage" (para. 231). He stated:

> [231] He was not given any authority over the boys, nor did he have any responsibility for their education, care or discipline. He had no formal relationship with the Superior of the orphanage. He undoubtedly collaborated with the Superior on matters of religious services but would not have had any role in any aspect of governance of the orphanage.

253 We conclude that the judge erred in his analysis and conclusion on proximity. It is certainly true that the Brothers were in a more direct role in terms of the boys' care-giving, and had greater authority over their day-to-day lives. However this does not mean Monsignor Ryan did not also have a duty of care. The issue of whether Monsignor Ryan's relationship with the boys was sufficiently proximate is not determined by comparing his role with that of the Brothers. Further, there is no requirement that Monsignor Ryan have responsibility for governance of the orphanage for a duty of care to arise.

254 To determine whether a relationship of legal proximity existed that was sufficient to support a duty of care in negligence, it is necessary to assess the circumstances of Monsignor Ryan's relationship with the boys and his responsibilities to them.

255 As chaplain at Mount Cashel, Monsignor Ryan had specific responsibilities and duties with respect to the boys. His official duties included attending to the boys' religious and spiritual development, for example through their participation in mass and confession. The appellants testified that they attended mass each morning and confession each week, on Saturday. Monsignor Ryan was the regular officiant on these daily and weekly occasions.

256 The judge characterized Monsignor Ryan's function as being restricted to religious activities, but this ignores the context of his role and responsibilities as chaplain in residence at Mount Cashel. It is clear from the evidence that his role went well beyond saying mass and hearing confessions. Mount Cashel was not a secular institution. It was a place where religion was the central organizing principle. The appellants testified that religion was omnipresent. For this reason, Monsignor Ryan was assigned by the Archbishop to live and work at Mount Cashel and be present in the boys' lives. His role was adjunct to and directly associated with the Archdiocese's objectives relating to the orphanage's operations. As the judge noted at paragraph 203 of the judgment, Monsignor Ryan "carried out the mission of the Archdiocese at the parish housed at Mount Cashel".

257 Monsignor Ryan played an important role as resident priest and Spiritual Director of Mount Cashel Orphanage. His connection to Mount Cashel was not fleeting or casual. He was a constant presence there from 1952 to 1964. While he did not live directly among the boys, his residence was on site at the orphanage. Throughout his 12 years in residence there, he would have been familiar with the boys' daily routines and would have come to have known many of them, and many of the Brothers. His responsibilities went beyond formal religious instruction and extended to promoting the boys' overall well-being.

258 The judge compared the Brothers' relationship with the boys with Monsignor Ryan's relationship with them, and concluded no duty of care arose because the Brothers had more significant interaction with and more control and authority over the boys. In this regard, the judge noted that the Brothers were responsible for many parts of the boys' everyday lives, including providing their meals, their education, addressing health concerns, and so on. Monsignor Ryan was not engaged in these quotidian aspects of the boys' lives and he did not participate in the boys' daily routine to the same extent as the Brothers.

259 However this does not mean that Monsignor Ryan's relationship with the boys was not sufficiently proximate to create a duty of care. It does not mean that Monsignor Ryan would not be expected to act when told by boys that they were being sexually abused. Whether Monsignor Ryan had a duty of care cannot be determined by comparing his interactions with the boys, and his responsibilities, to those of the Brothers. Proximity is not purely a mathematical calculation where only one entity, the one with greater control or authority, can have a duty of care. The Brothers undoubtedly had a duty of care in this context and so did Monsignor Ryan, having been directly told, in his official capacity as resident chaplain at Mount Cashel, of sexual abuse allegations.

260 The judge found that "Msgr. Ryan had no duties *vis à vis* the care of the boys and the management of the orphanage" (para. 235). However, as resident priest in a religious institution, he did have global responsibilities for the boys' spiritual and religious care, and their general well-being. As well, there is no need to establish that he was involved in the management of the orphanage for a duty of care to exist.

261 It also does not follow, as the judge posits at paragraph 235 of the judgment, that, "[a]s an agent of the Archdiocese, Msgr. Ryan would have had to be placed in a position of authority over the children, and perhaps the Brothers, for any knowledge to have triggered a duty of care". This, in our view, takes too narrow a view of proximity. Both the Brothers and Monsignor Ryan had their respective responsibilities to the boys. Both played different, significant and complementary roles in their lives. There was no evidence that, in his role as spiritual leader, Monsignor Ryan would have been prohibited from taking action when apprised of sexual abuse allegations.

262 Further the context of Mount Cashel orphanage in the 1950s, where Monsignor Ryan and the boys lived, is relevant. The appellants testified that, while at Mount Cashel, contact with their respective families or anyone else outside the orphanage was limited. They testified that their days were spent mainly at Mount Cashel. Mount Cashel was their home and life was generally restricted to its confines. Until they were in senior grades, residents would have attended school exclusively within the orphanage. The evidence was that there was little opportunity to leave or interact with the outside world, and few reasons to do so.

263 The particular, isolated nature of the everyday life at Mount Cashel in the 1950s is a contextual factor to be considered when determining whether the relationship between the appellants and Monsignor Ryan was sufficiently proximate such that a duty of care existed at the time disclosures of sexual abuse were made to him. Physical isolation meant limited access to those who the boys might otherwise seek out to disclose their circumstances or request assistance.

264 The evidence was that the boys did not have unfettered access to Monsignor Ryan. Some appellants testified that they were not encouraged to contact him or approach him at will. However, the evidence was also clear that the residents understood who Monsignor Ryan was, that they were aware of his role as the resident priest at Mount Cashel, and that they knew he was not one of the Brothers who were perpetrating the abuse. They also understood that they would normally see him at daily mass and weekly confession, where most of the disclosures of sexual abuse were made.

265 We conclude that the judge erred in requiring that Monsignor Ryan needed to be "placed in a position of authority over the children, and perhaps the Brothers, for any knowledge to have triggered a duty of care" (para. 235). As chaplain and Spiritual Director of Mount Cashel Orphanage, Monsignor Ryan would have had, in his own right, responsibilities for the boys' well-being. We cannot agree with the proposition that, in this context, his duties would be strictly limited to saying mass and hearing confession, or that his responsibilities would be so restrictive as to permit him to ignore allegations of sexual abuse.

266 Such a result would be tantamount to concluding that these allegations of sexual abuse were not Monsignor Ryan's concern because they did not fall within the limited category of formal religious instruction. It would be to conclude that these allegations were none of his business as the long-serving, resident priest at Mount Cashel in the period the abuse occurred. In our view, the factual context of this case provides a sufficiently proximate relationship between Monsignor Ryan and the appellants that these disclosures would certainly have been Monsignor Ryan's business and concern.

267 Monsignor Ryan's lesser authority over the boys in comparison with the Brothers, or his lack of direct authority over the Brothers or over the management of Mount Cashel, does not mean that he had no duty of care to act in light of sexual abuse disclosures. Authority alone does not create the duty of care in this context. Although he was not involved in the day-to-day governance of Mount Cashel, he did have responsibilities for the boys' overall well-being and it cannot be said that Monsignor Ryan's role was so minor, irrelevant or fleeting that a proximate relationship with the appellants was precluded.

268 Based on the unique factual circumstances in this case and Monsignor Ryan's specific role as chaplain at Mount Cashel, we find the relationship between Monsignor Ryan and the appellants was, in the language of *Broome*, "sufficiently close and direct to give rise to a legal duty of care, considering such factors as physical closeness, expectations, representations, reliance ..." (*Broome*, at para. 16).

269 Further, and mindful of the considerations set out by the Supreme Court in *Childs*, we conclude that the nature of the relationship between Monsignor Ryan and the appellants created the necessary "nexus between the parties", to create the "special link or proximity" required to impose a positive duty to act (*Childs*, at paras. 31 and 34).

270 The nature of Monsignor Ryan's relationship with the appellants in the context of Mount Cashel in the 1950s, his pastoral and religious role, his responsibilities arising from his position as resident chaplain at Mount Cashel, and, significantly, the specific context of the interactions with the boys and the sexual abuse disclosures made to him, created a relationship of sufficient proximity to ground a duty of care in negligence.

271 However, proximity alone does not create a duty of care. Foreseeability must also be considered.

*Foreseeability*

272 In *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), the Supreme Court stated that the question to be determined when assessing foreseeability is "whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim". The Court also noted, at paragraph 22, Lord Atkin's statement on foreseeability in *McAlister (Donoghue) v. Stevenson*, that one "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".

273 The judge found that, mainly due to the positive reputation of the Brothers at the time the abuse occurred, it "would not have been foreseeable that these acts could have taken place". He concluded that foreseeability was not established:

> [241] The second part of finding a duty is whether there was foreseeability. In the context of Mount Cashel in the 1950's it must be considered that no allegations of sexual abuse had ever come forward. ...
>
> . . .
>
> [244] ... Foreseeability by definition is the subjective view of the observer. Sexual abuse involving religious individuals had never come to light before. Dr. Fitzgerald testified that the Christian Brothers during the first half of the 20$^{th}$ century were considered stellar educators. Their reputation was unblemished. The first publicly disclosed incident of sexual abuse did not come to light until the 1960's, and that could have been considered an isolated incident at that time.
>
> . . .
>
> [246] Even if proximity was evident, on the issue of foreseeability the evidence falls short. Even the Plaintiffs, in their testimony, were of the view that no one would believe them if they disclosed because of the stellar reputation of the Brothers.

274 The judge summarized his conclusion on foreseeability at paragraph 265 of the judgment, holding that it "would have been unthinkable" that the Brothers could have been sexually abusing boys at Mount Cashel. As a result, he found these acts would not have been foreseeable by Monsignor Ryan.

> [265] On the question of foreseeability ... the misconduct with which we are concerned would have been unthinkable. Therefore, any disclosure made to the priest would have been assessed as to its credibility on the basis of what he knew at the time. At that time, in my view, it would not have been foreseeable that these acts could have taken place.

275 For the reasons that follow, we conclude that the judge made two errors in his analysis and conclusion on foreseeability.

276 The first relates to whether a subjective or objective standard is used in assessing reasonable foreseeability. The judge indicated that a subjective test is applied, stating "[f]oreseeability by definition is the subjective view of the observer" (para. 244).

277 However, with respect, this is not the standard. The Supreme Court confirmed in *Rankin's Garage* that the test is objective, stating at paragraph 53 that "[w]hether or not something is 'reasonably foreseeable' is an objective test", and that the "analysis is focused on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did".

278 The focus in this case, then, should not have been on Monsignor Ryan, but rather on whether a reasonable person in Monsignor Ryan's circumstances at Mount Cashel, in light of the disclosures regarding sexual abuse, "ought reasonably to have foreseen the harm" (*Rankin's Garage*, at para. 53), if no action was taken.

279 The judge's statement that "foreseeability by definition is the subjective view of the observer", is arguably ambiguous in terms of whether he meant the "observer" to be Monsignor Ryan or a reasonable person in Monsignor Ryan's position. However, it is apparent from the judgment that the judge was applying a subjective standard of foreseeability, focusing on what Monsignor Ryan would have believed, rather than an objective, reasonable person standard.

280 The judge's focus on whether disclosures of sexual abuse were understood and believed by Monsignor Ryan illustrates this application of a subjective, rather than objective standard. The judge stated that he believed that disclosures of sexual abuse were made, noting: "... I do not doubt that the disclosures were made. I found the testimony and the written statements believable and accept that Msgr. Ryan was told" (para. 267).

281 However, the judge also indicated that he was not persuaded that *Monsignor Ryan* understood or believed the disclosures. He observed that these disclosures "may have either not been believed or may have been misunderstood by the confessor" (i.e. Monsignor Ryan). He concluded on this point: "Consequently, while I believe their testimony, I am not persuaded that the priest would have fully understood or believed what had been said" (para. 268).

282 Applying an objective test of reasonable foreseeability, the question to be considered is not what Monsignor Ryan would have understood or believed. It is whether a reasonable person in his situation ought to have foreseen harm if no action was taken. The judge makes no reference to what a reasonable person ought to have foreseen. We conclude that the judge erred in this regard.

283 The second error in the judge's approach is that the focus was on whether the *abuse* was foreseeable. However, when assessing foreseeability, the Supreme Court has indicated that the focus must be on whether *harm or injury* to the plaintiff was foreseeable. It is the foreseeability of harm resulting from a failure to act which must be considered, not whether people would have believed the Brothers were sexually assaulting the boys.

284 In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), the Supreme Court stated that the main issue to be determined in this context is whether injury or harm to a plaintiff is reasonably foreseeable.

> [32] Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

285 The key question is whether, on an objective analysis, a person in Monsignor Ryan's situation ought to have reasonably foreseen that future harm might result from a failure to act. Ultimately this question was not addressed because the judge's

focus was on foreseeability of the particular abuse disclosed to Monsignor Ryan, not foreseeability of harm from a general failure to act.

286 The judge emphasized that it would not have been foreseeable that the specific *acts* had occurred. But *Deloitte & Touche* compels a different question — whether it ought to have been foreseeable to a reasonable person in Monsignor Ryan's circumstances that there was a risk of future harm to the boys if no action was taken. These are not the same and cannot be conflated.

287 Further, even with regard to Monsignor Ryan's own understanding and beliefs, the judge's finding that Monsignor Ryan may not have understood or believed the disclosures of sexual abuse might be regarded as speculative, and unsubstantiated by the evidence. While there was evidence about the Brothers' positive reputation, described in the judgment as "stellar", there was no evidence regarding Monsignor Ryan's state of mind, beliefs or understanding of the sexual abuse disclosures. As the judge noted, unfortunately we do not have the benefit of Monsignor Ryan's testimony (para. 217).

288 Also, while the evidence was that the Brothers enjoyed a good reputation with the general public, the public did not have the same knowledge that Monsignor Ryan had about multiple allegations of sexual abuse. The public did not view matters through the same lens as a chaplain living and working at Mount Cashel, to whom these allegations had been made about the Brothers.

289 The judge also noted that some of the witnesses expressed uncertainty as to whether their allegations of sexual abuse would be believed, given the power imbalance that existed and the Brothers' positive reputation. However, this is not determinative. What matters is not whether the boys thought they would or would not be believed, but whether a reasonable person, in the position of chaplain and priest at the orphanage, advised of sexual abuse by the boys, ought to have foreseen harm from inaction.

290 As well, the judge noted the evidence from one witness who testified that when he told Monsignor Ryan that he had been sexually abused, Monsignor Ryan said he would follow up with the Superior at Mount Cashel. The judge noted this evidence, as follows: "At that time, he said, the priest promised to speak to the Superior about the situation" (para. 212). There is no indication that the judge did not accept or believe this evidence. However, Monsignor Ryan's promise to speak to the Superior about the abuse would be unnecessary, and would make no sense, if it is assumed he did not understand or believe that a boy had been sexually abused by a Brother.

291 In summary, in our respectful view, the judge erred in his analysis of foreseeability in two respects. First, he applied a subjective standard when the appropriate standard is objective (*Rankin's Garage*, at para. 53). Second, he did not address the primary question of foreseeability of future harm (*Deloitte & Touche*, at para. 32).

292 Applying a correctness standard of review (*Rankin's Garage*, at para. 19), we find that that the judge erred in his analysis, and, consequently, in concluding that the foreseeability requirement was not met.

293 The foreseeability analysis in this case should have been focused on whether an individual serving as resident chaplain at Mount Cashel, to whom direct disclosures of abuse were made, ought to have reasonably foreseen harm resulting to the boys in future if no action was taken. If so, then the harm was foreseeable. In this case, we would conclude that it was.

294 In the result, we have determined that the requirements of both proximity and foreseeability have been met in this case. As such, we conclude that a *prima facie* duty of care has been established pursuant to the first stage of the *Anns*/*Cooper* test.

**Should the Prima Facie Duty of Care be Negated for Policy Reasons?**

295 In the second stage of the *Anns*/*Cooper* test we consider whether, for policy reasons, a *prima facie* duty of care should be negated, and should not be recognized.

296 In *Broome*, Cromwell J. indicated at paragraph 14 that the second stage of the test is "concerned with whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty".

297 The Supreme Court in *Rankin's Garage* stated at paragraph 20 that when a *prima facie* duty of care is established, and the second stage of *Anns*/*Cooper* is engaged, "the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized".

298 As discussed above, the judge found no *prima facie* duty of care, and no policy analysis was undertaken under the second stage of *Anns*/*Cooper*. He noted that the Archdiocese made no argument that a *prima facie* duty of care should be negated for policy reasons.

299 Similarly, on appeal the Archdiocese did not argue that there was any policy reason to displace a *prima facie* duty, if one was found to exist. We conclude that the *prima facie* duty of care is not displaced.

300 We make one further observation. Although there was no argument directly on the issue, we note that most of the disclosures of sexual abuse were made to Monsignor Ryan in the context of confession. Therefore, the confidential nature associated with the so-called "seal of the confessional" might have been advanced as a possible residual policy issue in this context, potentially negating any duty of care to act on disclosures made in the confessional.

301 However, in our view, it is inappropriate to consider this issue at this time for a number of reasons. First, the issue was not argued on appeal. Second, and because it was not argued, there was no evidence or submissions "to establish that there are residual policy reasons why this duty should not be recognized" (*Rankin's Garage* , at para. 20).

302 Third, as discussed further below, the judge made a finding that, despite the fact that most of the disclosures were made in confession, the evidence was that, in these circumstances, "notwithstanding the seal of the confessional" it was possible to have "found a way to bring the issue outside the confines of the confessional" (para. 269). The judge's conclusion relating to the seal of the confessional was not appealed. We were not asked to review it. As such, we need not consider the matter further nor make a determination on this point.

303 Fourth, and significantly, while most of the sexual abuse disclosures were made in the context of confession, the evidence indicates that some were made outside confession where there would be no issue regarding the seal of the confessional.

304 Accordingly, we conclude that the second stage of *Anns*/*Cooper* has no application to the present matter. A *prima facie* duty of care exists and has not been negated for policy reasons.

**The Judge's Breach of Duty Analysis**

305 Although he found no duty of care, the judge went on to consider whether, if a duty of care did exist, there was a breach of that duty. He concluded, based on the evidence at trial, that there was no breach.

306 The judge identified four requirements the appellants would have to prove to establish a breach of duty: first, that Monsignor Ryan was informed of the sexual abuse; second, that he understood the disclosures and believed they were credible; third, that he could have addressed the disclosures notwithstanding that they were made in confession; and fourth, that having understood the disclosures, Monsignor Ryan did nothing about them (para. 266). The judge outlined these requirements as follows:

> [266] In respect of the evidence, there were a number of weaknesses undermining the Plaintiffs submission of liability on the part of Msgr. Ryan. Assuming the existence of a duty of care, in order to prove on a balance of probabilities that there was a breach of that duty the Plaintiffs had the burden to prove:
>
> 1. That the priest had been informed of the abuse by disclosures in the confessional;
>
> 2. That the priest would have understood what was being communicated, and believed that the disclosures were credible;

3. That he could have addressed the disclosures, notwithstanding the seal of the confessional; and

4. That the priest, having understood the disclosures, did nothing about them.

307 He found that the appellants satisfied two of the requirements listed above. First, he accepted that the disclosures regarding sexual abuse were actually made to Monsignor Ryan, stating:

> [267] On the first issue, I do not doubt that the disclosures were made. I found the testimony and the written statements believable and accept that Msgr. Ryan was told.

308 Second, he concluded that while some of the disclosures of sexual abuse were made in confession, that did not preclude Monsignor Ryan from acting on the information:

> [269] The seal of the confessional was an important consideration. ...the seal was a religious belief and does not necessarily bind the civil law. The evidence of both Canon Law experts was to the effect that a priest could have found a way to bring the issue outside the confines of the confessional. In addition, we are dealing with children at the time, who, even if aware of the confidential nature of confession, could not be bound therefore by any implicit acceptance of privacy. I would not accept the seal of the confessional as a defence.

309 These findings were not appealed and need not be further considered.

310 The judge concluded that the remaining two requirements listed above were not satisfied. These were that Monsignor Ryan understood and believed the disclosures of sexual abuse, and that it was proved that Monsignor Ryan failed to act in light of the disclosures.

311 On the first of these, relating to Monsignor Ryan's understanding and belief of the disclosures, the judge stated that it was important to consider the subjective belief of Monsignor Ryan. He noted that the appellants must prove that "the priest would have understood what was being communicated, and believed that the disclosures were credible" (para. 266).

312 While the judge believed the disclosures of sexual abuse had been made by the boys, he was not persuaded that the disclosures would have been understood or believed by Monsignor Ryan. He stated:

> [268] ... I am left with some doubt about whether the priest received the messages as told by the boys. ... Those disclosures may have either not been believed or may have been misunderstood by the confessor. Several of the witnesses, including the Plaintiffs, confirmed in their testimony that they were not even certain how to describe what had happened to them. All of them also indicated that it was unlikely they would be believed. The question of believing their disclosures must also be considered in the context of the times. The reputation of the Brothers was such that no one would have considered this kind of abuse was possible. Consequently, while I believe their testimony, I am not persuaded that the priest would have fully understood or believed what had been said.

313 This issue has already been considered above, in the discussion on whether a duty of care existed. For the reasons provided above, the judge erred in using a subjective test and addressing the wrong legal question. As noted above, the fact that the Brothers enjoyed a good reputation in the community, or that the boys themselves thought it would be unlikely they would be believed, is not determinative. The question is not whether Monsignor Ryan understood the disclosures (there was no evidence he did not understand them) or whether he believed them to be true, but whether a reasonable person in this circumstance, being apprised of sexual abuse, would have foreseen harm in not acting.

314 This issue relates mainly to whether a duty of care existed, not whether there was a breach of duty. As it has already been considered above, the issue need not be addressed further, except to note that it does not provide a basis to conclude there was no breach of duty.

315 Finally, the judge found that the evidence at trial did not prove on a balance of probabilities that Monsignor Ryan failed to act when told of the sexual abuse. As a result of this finding, the judge concluded there was no breach of duty.

***The Judge did not Explicitly Identify the Standard of Care***

316 Before assessing the judge's conclusion that there was no breach of duty, we note that the judgment does not explicitly define what, exactly, was Monsignor Ryan's duty of care. There is no definitive statement setting out the standard of care against which Monsignor Ryan's conduct was to be measured.

317 The judge observed that Monsignor Ryan's duty would have been to "act" or "take action" when told of the abuse. This action would have involved at least disclosing or reporting the allegations of abuse to the Brother Superior at Mount Cashel, and possibly taking further action and advising the Archbishop in the event the Superior did not act.

318 This would have been a duty at common law because a statutory duty to report the abuse of children did not exist in this province until created by legislation, well after the 1950s.

319 The judge noted:

> [234] It might be said that becoming aware of the sexual assaults being committed by the Christian Brothers against [a] child would have raised a duty to do something about it, given that in his role as chaplain he would have had the ability to broach the issue with those in authority. ...
>
> . . .
>
> [253] ... [Notwithstanding that disclosures were made in confession, the witnesses] all felt, however, that with knowledge, Msgr. Ryan could have found a way to communicate with the Superior of the orphanage, and barring action, report to the Archbishop.
>
> . . .
>
> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. ...

320 On appeal, neither party provided submissions as to what standard of care Monsignor Ryan had to meet and neither party alleged that the judge had erred in respect of the standard of care. The main issue was whether the evidence established that Monsignor Ryan failed to act, and whether the judge erred in his analysis of the evidence.

321 We consider next whether the judge erred in his breach of duty analysis in two respects: first, in the burden of proof he applied when assessing claims involving historical sexual assaults; and second, in his assessment of the evidence and his conclusion that the evidence did not establish a breach of duty by Monsignor Ryan.

***Did the Judge Err Regarding the Applicable Burden of Proof in Historic Claims?***

322 The appellants submitted on appeal that the judge required them to meet "an impossible burden to prove the historic sexual assaults". Presumably this refers to the judge's determination that negligence had to be established on a balance of probabilities, through the evidence presented at trial, notwithstanding that witnesses or documentary evidence might no longer be readily available due to the significant passage of time.

323 The judge recognized the challenges in bringing or defending an historic claim.

> [51] The Defendant has submitted that the court consider the difficulty of dealing with evidence of an historical nature. The passage of time itself had imposed serious prejudice in responding to the claims of the Plaintiffs. ...

. . .

> [53] Another factor was the prejudice caused by the loss of evidence and the unavailability of witnesses. The difficulty of recall and memory after so many years was an obstacle to important details relevant to establishing or defending the cause of action.

324 Both parties requested that the judge interpret the historic evidence in a manner most favourable to their respective positions.

> [59] Both sides have asked the court to scrutinize the historical record from their perspective. The Defendants have argued that caution should be exercised when considering incomplete evidence, testimony where memories have faded, and documents for which the authors are not available to testify as to their significance or context. On the other hand, the Plaintiffs have asked the court to draw conclusions from that same evidence, and in doing so undertake an analysis that may border on speculation. Neither approach is helpful.

325 The judge rejected these requests. Instead, he determined that the civil burden of proof applies in claims arising from historical sexual assaults, notwithstanding that evidence may have been lost or witnesses may no longer be available to testify.

326 Citing the Supreme Court of Canada decision in *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), the judge noted that the burden of proof in civil claims, including in the context of evidence submitted relating to historic sexual assaults, remained that of proof on a balance of probabilities.

> [60] In examining this issue, I find that there is nothing new in the concepts raised by the Defendant respecting historical evidence. The test was and still is proof on the balance of probabilities, and the Plaintiffs must meet that standard. ...
>
> [61] In *F.H. v. McDougall*, 2008 SCC 53the Supreme Court of Canada addressed the standard of proof in civil cases. Justice Rothstein stated quite clearly that no matter the nature of the evidence, the civil standard must be applied. He said, at paragraph 40:
>
> > 40. ... I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

327 The *McDougall* case, like the present case, also dealt with a civil claim arising out of historic sexual assaults against a child in an institutional, educational setting. In the late 1960s, McDougall was an Oblate Brother at a residential school in British Columbia operated by a religious organization, the Oblates of Mary Immaculate. It was alleged that, during his time at the school, he sexually abused the plaintiff, who was then a young student at the school.

328 The Supreme Court confirmed in *McDougall* that the standard of proof for civil liability remains immutable, even in the context of assessing "evidence of events that are alleged to have occurred many years before."

> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. ... In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

329 We cannot accept the appellants' submission on appeal that the judge established "an impossible burden to prove the historic sexual assaults". The burden of proof was not impossible to meet. Rather it was the civil burden confirmed in *McDougall*. The judge acknowledged the difficulty in assessing evidence relating to events that had occurred many decades previously. He reiterated that the civil burden of proof on a balance of probabilities, confirmed by the Supreme Court in *McDougall*, would

have to be satisfied before liability could be imposed. He concluded that "the normal civil burden of proof" had to be met, "no more, no less".

> [65] ... Where the evidential record is not complete, the court either is put in the position of speculating or must consider the credibility of the propositions put forth based on the scanty evidence presented. The overarching principle, however, is that the Plaintiffs have the burden of proving their case on the balance of probabilities. That requires more than speculative assertions but does not require them to meet a higher standard of proof.
>
> [66] ... In this case, the presentation of evidence, both documentary and *viva voce*, of historical events will simply have to meet the normal civil burden of proof, no more, no less.

330 The judge did not deviate from or relax the established civil burden of proof because the claims involved historic events. Had he done so, he would have erred. Rather he followed *McDougall*, and was correct to do so. We conclude that the judge made no error in his analysis and application of the burden of proof in this respect.

***The Evidence at Trial Regarding Breach of Duty***

331 Five witnesses testified at trial about their interactions with and disclosures to Monsignor Ryan. Four of these were the appellants and one was a non-party witness who was a resident at Mount Cashel in the same time period as the appellants.

332 Two of the four appellants testified that they made no disclosures about sexual abuse to Monsignor Ryan at any time, either in confession or otherwise.

> [207] The first of the Plaintiffs to testify, G.E.B. # 26 ..., said that the priest was housed in separate quarters ... In respect of the sexual abuse he suffered, he said he did not disclose to Msgr. Ryan, as he felt no one would believe it.
>
> . . .
>
> [209] The third of the Plaintiffs to testify, G.E.B. # 33 ..., did not indicate any disclosure of abuse in the confessional. ...

333 The judge noted that one of the appellants testified that he spoke to Monsignor Ryan in confession about the conduct of the Brothers, but that this related to harsh physical discipline and physical mistreatment.

> [208] The second of the Plaintiffs to testify, G.E.B. # 50 ... said he thought Msgr. Ryan was the "head priest", and he resided in his own quarters to which the students did not have access. ... He attended confession weekly, and said he told Msgr. Ryan about the physical abuse. He said the physical discipline was too harsh, and thought perhaps something could be done about it. ...

334 One appellant testified that he told Monsignor Ryan, in confession, about sexual abuse.

> [210] The fourth Plaintiff, G.E.B. #25 ... said that Msgr. Ryan was there for mass and confessions. He said he did not remember the priest being around the boys, or anywhere at Mount Cashel, other than in the chapel. He testified he did confess the incidents of sexual abuse by a civilian employee, an electrician, and one of the Brothers. He said Msgr. Ryan did not react but concluded the confession in the normal way. He said he understood confession was completely private and confidential.

335 The non-party witness testified that he spoke to Monsignor Ryan, in confession and outside confession, about sexual abuse by the Brothers. He also testified that, shortly after one of these discussions with Monsignor Ryan, two offending Brothers left Mount Cashel.

> [211] The testimony of a non-plaintiff witness ... was a little more detailed. He was a resident at Mount Cashel during this same period. While he said he was sexually abused by Brother Lasik, he was not a party to the proceeding.

> [212] [The witness] testified that he told Msgr. Ryan on three occasions about Lasik's conduct. On one occasion the priest responded that he had to go to confession, where he told him the same thing. He said it was possible he was told to confess because the priest thought he was lying, not because he believed the story about sexual abuse. At that time, he said, the priest promised to speak to the Superior about the situation. He testified that on another occasion he spoke to Msgr. Ryan and a brother, T.I. Murphy, about his loss of faith because of the abuse. Shortly after that, he said, two of the abusing Brothers left the orphanage.

336 Written statements were also admitted into evidence without objection from three other individuals, who were not parties in this action but were residents at Mount Cashel in the same time period as the appellants. These statements indicated that the individuals had told Monsignor Ryan, in confession, about having been sexually assaulted.

> [213] In addition to this testimony, the written statements of three individuals were submitted into evidence. All three had been residents of Mount Cashel in the mid-1950's, the period with which we are concerned in this case. All three statements referred to disclosure of sexual assault in the confessional to Msgr. Ryan.

***Did the Judge Err in Assessing the Evidence and Finding No Breach of Duty?***

337 The standard of review to be applied to a determination as to whether there was a breach of duty, was considered by the Supreme Court of Canada in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.). The Court indicated that a determination of this type was a question of mixed law and fact (at 690):

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, which would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. ...

338 The Supreme Court in *Housen* provided further guidance on the standard of review. The Court noted that where the issue on appeal involves a trial judge's interpretation of the evidence as a whole, the appropriate standard of review is palpable and overriding error.

> [36] ... The general rule ... is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

339 Referencing its earlier decision on standards of review in *Housen*, the Supreme Court in *Salomon*, with Wagner C.J.C. writing for the majority, reiterated at paragraph 32 that the guiding principle is that, "absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge."

340 The Court in *Salomon* further observed that a palpable and overriding error must be obvious and determinative of the outcome. To better illustrate what a palpable and overriding error entails, the Court referenced metaphors used by the Quebec Court of Appeal in *G. (J.) c. Nadeau*, 2016 QCCA 167 (C.A. Que.), to the effect that a palpable and overriding error is not obscure or difficult to locate (not a "needle in a haystack"), but is direct and apparent (a "beam in the eye"), and that "it is impossible to confuse these ... notions" (*Salomon*, at para. 33).

*The Judge's Assessment of the Evidence*

341 The Supreme Court in *Housen*, *Salomon*, and other authorities has indicated that a palpable and overriding error must be identified before an appellate court can disturb a judge's finding in these circumstances. Having considered the judge's finding on this standard of review we conclude, for the reasons that follow, that the judge made no palpable and overriding error in assessing the evidence and concluding that there was no breach of duty.

342 In order to determine whether Monsignor Ryan breached a duty of care, the judge carefully considered the evidence of the four appellants and one non-party witness who testified, as well as the written statements from the three former residents of Mount Cashel. He summarized the evidence as follows:

> [219] We do know, from the testimony of [the non-party witness], and one of the written statements, that shortly after these disclosures, two of the offending Brothers, Lasik and Ford, left Mount Cashel. Again, we do not know the circumstances of their leaving, and there was no evidence that it was related to any action by Msgr. Ryan, or just happenstance. The difficulty is that there just is insufficient evidence to draw a conclusion.
>
> [220] ... Of the five witnesses (four Plaintiffs and [the non-party witness]) only two reported sexual abuse to the priest during confession. That was G.E.B. #25 ... and [the non-party witness]. The former testified that he mentioned this in confession only once. [The non-party witness] testified that he told Msgr. Ryan three times, once in confession.
>
> [221] One other, G.E.B. # 50 ..., reported only harsh discipline, but did not testify about any sexual abuse. The other two, G.E.B. # 26 ... and G.E.B. # 33 ... testified that they did not communicate any abuse, sexual or otherwise, to the priest either in confession or outside.

343 The judge noted that a determination as to whether there was a breach of duty must be based on the evidence, and not on speculation or conjecture.

> [218] ... while the Plaintiffs conceded that these utterances are not determinative of whether sufficient notice was provided to assess the question of negligence, there being the establishment of a duty of care and breach of that duty, there remains the issue that we do not know if anything was done as a follow-up. Most of the statements included the assertion that there was nothing done as a result of the disclosure, notwithstanding that several indicated Msgr. Ryan promised to follow up with the Superior. However, there is no evidence either way. The Plaintiffs are suggesting that the court speculate about the actions of Msgr. Ryan.

344 The judge concluded there was no breach of duty because the evidence at trial did not establish, on a balance of probabilities, that Monsignor Ryan failed to act in light of disclosures made to him about sexual abuse. He held that, in the absence of evidence to satisfy the civil burden, speculation as to what Monsignor Ryan may or may not have done is insufficient to ground liability. He rejected the suggestion that the court should "speculate about the actions" of Monsignor Ryan (para. 218).

345 The judge also noted the evidence of the non-party witness who testified that two Brothers left Mount Cashel after the witness had advised Monsignor Ryan of sexual abuse by these Brothers. The judge observed that "there was also evidence that shortly following the disclosure of one of them, the offending Brothers were removed from the orphanage" (para. 270).

346 Notwithstanding the timing of these events (that is, after the witness told Monsignor Ryan of the abuse two offending Brothers left the orphanage), the judge found there was insufficient evidence to conclude there was a direct, causal connection between the disclosure made to Monsignor Ryan and the Brothers' departure from the orphanage shortly thereafter:

> [292] ...There is also no evidence that nothing was done, and some, albeit weak, evidence that something may have been done by the priest, in that the offending Brothers were removed from the orphanage shortly after the disclosure. I accept that contemporaneous connection may not prove a causal connection. However, it would only be speculation to say Msgr. Ryan did nothing.

347 Overall, the judge found that the evidence at trial simply did not establish that Monsignor Ryan failed to act. As such he concluded, at paragraph 270, that it would be inappropriate and speculative to reach a conclusion that Monsignor Ryan breached the duty of care without sufficient evidence to support this conclusion:

> [270] Finally, it is not clear what happened as a result of these disclosures. While the witnesses said it appeared nothing was done in response to their disclosures, there was also evidence that shortly following the disclosure of one of them, the offending Brothers were removed from the orphanage. This does not prove that Msgr. Ryan was responsible for this action. But there was also no evidence whatsoever that nothing was done. It would be speculative to decide either way. ...

348 He reiterated his conclusion that, in the absence of evidence, "[s]peculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs":

> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. One witness ... said that shortly after he disclosed, the offending Brothers left the orphanage. This could mean nothing, or it could mean that the priest did, in fact, intervene. We just do not know, and it would be speculation to conclude one way or the other. Speculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs, and therefore, in the absence of any malfeasance, or nonfeasance, there is nothing for which the Archdiocese can be vicariously liable.

349 The judge concluded that the evidence did not establish that Monsignor Ryan failed to act on the information provided to him about the sexual abuse of boys at Mount Cashel, stating:

> [251] For breach of a duty, there must be evidence of either malfeasance or nonfeasance. As noted above, there is no evidence that nothing was done, and perhaps some evidence that might suggest something was done. There is evidence of a promise to speak to the Superior about the issue. There is no evidence that he did, but also no evidence to the contrary. But we have evidence that the offending Brothers left at about that time. We do not know if there is a connection between Msgr. Ryan's promise and their departure. The evidence just is not before the court.

350 These excerpts from the judgment, set out above, reveal a considered assessment of the evidence on the breach of duty issue. There was no real argument on appeal that the judge had erred by misapprehending the evidence or by improperly assessing or weighing conflicting evidence regarding Monsignor Ryan's actions. There was no conflicting evidence to reconcile. Rather, in the judge's assessment, there was insufficient evidence on which to conclude that Monsignor Ryan had breached the duty of care.

**Did the Judge Make a Palpable and Overriding Error in Not Drawing an Inference from the Evidence**

351 While the appellants' position was not framed in these precise terms, they are effectively arguing that the judge erred by not drawing an inference, from the evidence, that Monsignor Ryan did not act when told of the allegations of sexual abuse.

352 For this argument to succeed, it must be shown that the judge made a palpable and overriding error. In *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138 (S.C.C.) at para. 38, the Supreme Court reiterated the principle set out in *Housen*, that the "standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself" (*Nelson (City)*, at para. 38). Similarly, in *Fontaine v. British Columbia (Official Administrator)* (1997), [1998] 1 S.C.R. 424 (S.C.C.) at para. 34, the Court stated that the "finding of facts and the drawing of evidentiary conclusions from those facts is the province of the trial judge, and an appellate court must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error".

353 In *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.) at para. 89, the Supreme Court indicated that "only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence" would it be appropriate for an appellate court to "make their own findings and draw their own inferences". (See also *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (S.C.C.) at para. 69.)

354 As discussed above, there was little evidence about Monsignor Ryan's response to the sexual abuse disclosures. One witness provided evidence that might possibly suggest that Monsignor Ryan acted in response to the sexual abuse disclosure, resulting in two Brothers leaving Mount Cashel. That witness, a non-party, testified that he told Monsignor Ryan about the abuse and the two offending Brothers left Mount Cashel shortly thereafter. This may have been interpreted as support for the conclusion that Monsignor Ryan had taken action. However, the judge did not infer from this any link between Monsignor Ryan being told of the abuse and the Brothers' departure. He held that it would be conjecture to conclude that Monsignor Ryan took action and spoke to the Superior, and that the two Brothers left the orphanage as a result of Monsignor Ryan's intervention. Such a conclusion, the judge determined, would be speculative at best, amounting to guesswork.

355 The judge found that it would also be speculative to infer from the evidence that Monsignor Ryan took no action. There must be a proper evidentiary basis from which to draw an inference. Otherwise conclusions reached from the inference-drawing process may be regarded as speculative or conjecture.

356 Having regard to all the evidence, the judge concluded the evidence did not support drawing an inference that Monsignor Ryan failed to act when told of sexual abuse. In this circumstance, the judge found that the evidence did not establish a breach of duty.

357 As the Supreme Court noted at paragraph 33 of *Salomon*, citing *Nelson (City)*, simply because "an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made".

358 Similarly, in *L. (H.)*, the Supreme Court stated that appellate review in this context involves determining whether the trial judge's factual inferences are "reasonably supported by the evidence". If so, "the reviewing court cannot *reweigh the evidence* by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own" (*L. (H.)*, at para. 74) [emphasis in original]. Similarly, absent a palpable and overriding error, a judge's decision not to draw an inference, in circumstances where the judge determines that an inference is not warranted or is not supported by the evidence, also attracts appellate deference.

359 The judge's decision reveals a careful assessment of the evidence on this issue. He concluded, based on his review of the evidence, that the burden of proof on a balance of probabilities was not satisfied. That is, the evidence was not "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, at para. 46). As a result, he found no breach of duty.

> [252] As a consequence, with very weak evidence on either the knowledge to be imputed to Msgr. Ryan, and whether he acted on that knowledge, the Plaintiffs have not met their burden of proof on this issue. ...

360 The judge summarized the evidence relating to Monsignor Ryan by concluding that "there is no evidence that nothing was done, and perhaps some evidence that might suggest something was done" (para. 251). He summarized his conclusion on liability, noting: "If a breach of a duty was dependent on evidence of failure to report or remedy the situation, then there is no evidence of such a breach" (para. 270).

361 We conclude that the judge did not err in this regard. The judge was entitled, based on the evidence, to reach the conclusion that he reached. His conclusion that a breach of duty was not established was "reasonably supported by the evidence". No palpable and overriding error has been shown regarding the judge's analysis of the evidence or his ultimate finding.

362 As such no appellate intervention is warranted. Intervention in this circumstance would be contrary to the guidance provided by the Supreme Court regarding the proper role of an appellate court. There being no palpable and overriding error, appellate restraint and deference is appropriate.

363 Before leaving the analysis on negligence, we note that causation must also be proved for the appellants' claims to succeed. A causation analysis in this case would involve assessing the causal link between Monsignor Ryan's alleged failure to act when told of sexual abuse and the damages incurred by the appellants.

364 In a causation analysis, the circumstances of each appellant would need to be considered individually, as each would have been different. For example, one appellant's claim was based on one incident of abuse. That appellant testified that he told Monsignor Ryan about the abuse in confession. There were no subsequent incidents of sexual abuse relating to that appellant, which means the abuse giving rise to the claim occurred before Monsignor Ryan was told about it. In that situation, it would need to be considered whether Monsignor Ryan's alleged failure to act caused damages for abuse which had already occurred before the disclosure was made to him. Of course, evidence from other witnesses would also need to be considered regarding

any disclosures of abuse to Monsignor Ryan that may have preceded the incident related to this appellant. As well, individual causation analyses would be required for each of the other appellants.

365 There was no analysis or findings relating to causation in the judgment. A causation analysis may have been considered unnecessary by the judge given that he found no duty of care and no breach of duty. There is no indication that causation was conceded or resolved at trial. However the issue was not referenced as a ground of appeal, it was not addressed by either party in their written or oral submissions, and this Court was not asked to consider it. As such, we make no determination on causation. An appropriate causation analysis would be required if a breach of duty was established.

366 We next consider whether the judge erred in deciding there was no breach of a fiduciary duty by Monsignor Ryan.

**Was there a Fiduciary Relationship Between Monsignor Ryan and the Appellants? If so, was there a Breach of Fiduciary Duty?**

367 The appellants claimed that Monsignor Ryan's responsibilities to them as a priest hearing confessions, as well as his general role as chaplain at Mount Cashel, created a fiduciary relationship. They argued that Monsignor Ryan breached his fiduciary duty by failing to act when he was told of sexual abuse.

368 The judge dismissed this argument, finding that no fiduciary relationship existed between Monsignor Ryan and the appellants. Having found no fiduciary relationship, the judge did not consider whether there was a breach of fiduciary duty. The appellants appeal the judge's findings in this regard.

369 The Supreme Court in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) at para. 62, indicated that the "first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise."

370 In *Blackwater*, McLachlin C.J.C. described a fiduciary duty in the following terms:

> [57] A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests: *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 (S.C.C.), para.49.

371 The Supreme Court in *PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (S.C.C.), described two types of fiduciary relationships. The first are those specific relationships that have been recognized as fiduciary because of the nature and character of the relationship. These are referred to as *per se* fiduciary relationships.

372 Examples of *per se* fiduciary relationships include relationships between a solicitor and client (see for example *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.)); a doctor and patient (see for example *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (S.C.C.), *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.), and *Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre*, 2013 SCC 53, [2013] 3 S.C.R. 341 (S.C.C.)); an executor and beneficiaries of an estate (see for example *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754 (S.C.C.)); and, directly relevant to this case, a priest and penitent.

373 The other category includes relationships (which are not *per se* fiduciary) where a fiduciary duty is nonetheless found to exist in a specific context, because of the particular circumstances of a relationship. These are referred to as *ad hoc* fiduciary relationships.

374 While the argument was not framed in these precise terms, the appellants appear to be arguing that the judge erred in concluding that their relationship with Monsignor Ryan was neither a *per se* nor an *ad hoc* fiduciary relationship.

375 First, the appellants submit that the relationship between a priest and penitent is *per se* fiduciary. As disclosures of sexual abuse were made to Monsignor Ryan in the context of confession, the argument is that a *per se* fiduciary relationship was created.

376 Second, it is more generally argued that Monsignor Ryan's role as chaplain at Mount Cashel should have been recognized as having created an *ad hoc* fiduciary relationship with the appellants.

377 These arguments will be considered separately, beginning with the argument that a *per se* fiduciary relationship existed.

378 For the reasons that follow we conclude that, even if a fiduciary relationship existed, no breach of a fiduciary duty has been established.

***Per se Fiduciary Relationship***

379 The judge concluded there was no fiduciary relationship. He did not distinguish between a *per se* and *ad hoc* fiduciary relationship, and he did not directly address the argument that a relationship of priest and penitent is a *per se* fiduciary one.

380 There is authority for the proposition that a priest/penitent relationship is a *per se* fiduciary relationship. For example, in *McInerney*, at 149, the Supreme Court references "a confessor and his penitent" as falling within this category. Similarly, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 606, the Supreme Court noted "priest and penitent" as an example in this respect.

381 In this case, there would be a presumption that a *per se* fiduciary relationship was created between the appellants and Monsignor Ryan arising from the fact that Monsignor Ryan heard their confessions. As such, it is necessary to examine whether there was a breach of fiduciary duty in this circumstance.

382 In doing so, it is useful to consider the observation of Cromwell J. in *Galambos*, that "not every legal claim arising out of a *per se* fiduciary relationship ... will give rise to a claim for a breach of fiduciary duty". Cromwell J. noted:

> [36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. ... It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

383 Assuming the existence of a *per se* fiduciary relationship (arising from the priest/penitent relationship) it is important to consider the specific circumstances to determine if there has been a breach of fiduciary duty flowing from this relationship.

384 In this regard, the evidence at trial is significant. The evidence indicates that all four of the appellants regularly attended confession with Monsignor Ryan, generally once weekly. As discussed above, three of the four appellants did not make disclosures about sexual abuse. Two of the appellants testified that they never told Monsignor Ryan about the sexual abuse, either during confession or otherwise. One of the appellants testified that he told Monsignor Ryan, during confession, about physical abuse.

385 Assuming a *per se* fiduciary duty arose from the relationship between Monsignor Ryan as priest and the appellants as penitents, it is difficult to see how a breach of fiduciary duty occurred with respect to the appellants who made no sexual abuse disclosure during confession.

386 In these circumstances where no disclosure of sexual abuse was made to him, it has not been established how Monsignor Ryan betrayed the penitents' trust or loyalty or acted in a way that breached a "trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests" (*Blackwater*, at para. 57). The evidence does not support the conclusion that there was a breach of fiduciary duty in this context. There was no evidence of a breach of the trust inherent in a fiduciary relationship. A fiduciary duty should not be confused with a duty of care in negligence in this regard.

387 One of the appellants testified that he did tell Monsignor Ryan, during confession, about sexual abuse. The argument is that Monsignor Ryan breached his fiduciary duty in that instance, presumably by failing to act in light of the disclosure.

388 In our view this argument cannot succeed for two reasons.

389 First, the breach of fiduciary duty claim is premised on Monsignor Ryan's alleged nonfeasance, and that he failed to act when told of the sexual abuse. However, as discussed above, the judge made no error in concluding that the evidence at trial did not establish this.

390 Second, it is alleged that there was a *per se* fiduciary relationship created by the priest/penitent relationship, and that a vulnerable penitent came to harm. Therefore, the argument is that Monsignor Ryan breached his fiduciary duty. However, the fact a vulnerable person in a fiduciary relationship has been harmed does not automatically amount to a breach of fiduciary duty. What is also required is evidence of misconduct by the fiduciary in abusing or betraying the fiduciary relationship.

391 The law of fiduciaries is aimed at constraining and responding to a fiduciary's misconduct. As observed by Cromwell J. in *Galambos*, it is focused on protecting the vulnerable party "against abuse of power" by the fiduciary and monitoring "the abuse of a loyalty reposed" in the fiduciary.

> [67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: "[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, <u>the fiduciary principle monitors the abuse of a loyalty reposed</u>" [emphasis in original].

392 Instances of a breach of a "loyalty reposed" can be readily seen, for example, when a physician exploits the vulnerability of a patient (see *Norberg*) or an executor misappropriates estate funds (see *Cowper-Smith*). In cases where a breach is established, a court can intervene (see for example *Cowper-Smith*, at para. 41).

393 However, there is no evidence that Monsignor Ryan took advantage of the priest/penitent relationship or otherwise abused his power, or the trust and loyalty of the appellants.

394 Therefore, no breach of a *per se* fiduciary relationship has been established.

***Ad hoc Fiduciary Relationship***

395 The judge appears to have focused exclusively on whether an *ad hoc* fiduciary relationship was created by Monsignor Ryan's general role as chaplain at Mount Cashel. He concluded no such fiduciary relationship existed.

> [224] ... The Plaintiffs argue that by placing Msgr. Ryan at Mount Cashel, he was placed in a special relationship with the residents. The Plaintiffs used the words "fiduciary relationship" to describe the relationship, however, I do not accept that this was made out. ...

396 The judge concluded that Monsignor Ryan had no fiduciary duty because he "was not placed in a position of trust, although as chaplain, he would have had some responsibility to act in a manner that was in the spiritual interest of the boys" (para. 225).

397 The appellants argue that the judge erred in finding no *ad hoc* fiduciary relationship arising from Monsignor Ryan's role as resident chaplain at Mount Cashel. We conclude that it is not necessary to determine whether an *ad hoc* fiduciary relationship was created in these circumstances. That is because, even if an *ad hoc* fiduciary relationship existed, no breach of fiduciary duty was established.

398 For the same reasons provided above in finding no breach of a *per se* fiduciary duty, the evidence at trial does not establish a breach of fiduciary duty arising from an *ad hoc* fiduciary relationship. Again, no evidence was provided which could substantiate an abuse of power, trust or loyalty by Monsignor Ryan, necessary to prove a breach of fiduciary duty.

399 Additionally, the argument that Monsignor Ryan breached an *ad hoc* fiduciary duty is also based on his alleged failure to act when advised of sexual assault. However, as discussed above, the judge made no error in concluding that the evidence at trial did not establish this. Therefore, no breach of fiduciary duty was established.

400 As a result, even if an *ad hoc* fiduciary duty existed, we find no breach of fiduciary duty by Monsignor Ryan in the present circumstances.

**Summary and Disposition on this Ground of Appeal**

401 The appellants argued that the judge erred in finding that Monsignor Ryan did not breach a fiduciary duty and in concluding that he was not negligent.

402 Regarding the alleged breach of fiduciary duty, the judge found that no fiduciary relationship existed, and therefore did not consider whether Monsignor Ryan breached a fiduciary duty. We conclude that a *per se* fiduciary relationship is presumed based on the priest/penitent interaction, and an *ad hoc* fiduciary relationship may have arisen from Monsignor Ryan's role as chaplain.

403 However in either case, even if a fiduciary relationship existed, the evidence discloses no basis to conclude there was a breach of fiduciary duty. The onus of proving a breach of either a *per se* or an *ad hoc* fiduciary duty is on the appellants. In our view, this onus has not been discharged.

404 Regarding the alleged negligence, we conclude Monsignor Ryan owed a duty of care to the appellants and that the judge erred in finding there was no duty of care. However, we also conclude the judge did not err in finding there was no breach of duty. This is because it was not proved on a balance of probabilities that the duty of care was breached.

405 As a result we find no error in the judge's conclusion that, as the requirements for establishing negligence were not satisfied, Monsignor Ryan was not negligent.

406 Because the judge found no negligence, he also found no vicarious liability:

> [271] Accordingly, I find no tortious conduct on the part of Msgr. Ryan, and hence no vicarious liability on the part of the Archdiocese.

407 We agree with this conclusion. As Monsignor Ryan's negligence was not established, the Archdiocese cannot be vicariously liable for Monsignor Ryan's conduct.

408 Accordingly we dismiss this ground of appeal.

***Issue 3: Did the judge err in concluding that the Archdiocese was not directly negligent?***

409 The appellants argued that the judge erred by not finding "direct negligence" with respect to the Archdiocese. The appellants claimed that the Archdiocese knew about the sexual abuse, by a civilian employee and by the Brothers at Mount Cashel, and that the Archdiocese was directly negligent in failing to take action in light of this knowledge.

410 In order for the Archdiocese to be found negligent in these circumstances, it must be proved that it had knowledge of the sexual abuse and breached its duty of care to the appellants by failing to take appropriate action in light of this knowledge.

411 The appellants' claim of direct negligence was based primarily on the allegation that the Archdiocese received direct information that a civilian employee had abused a boy at Mount Cashel, and that it had failed to act upon this information. The appellants argue that the Archdiocese was thereby negligent in failing to take appropriate action.

412 As discussed earlier in this judgment, the evidence at trial was that a former civilian employee of Mount Cashel went to the Archbishop's residence to report sexual abuse. He reported that another civilian employee had sexually abused one of the

boys at Mount Cashel, and that the police had been made aware of this. As the Archbishop was away at the time, the report was made to Father O'Keefe, the Archbishop's secretary, who documented the allegation.

413 Father O'Keefe advised Monsignor Murphy, the administrator of the Archdiocese. Monsignor Murphy, shortly thereafter, sent for Brother Carroll, the Superior at Mount Cashel, to meet and discuss the matter, and Father O'Keefe, Monsignor Murphy and Brother Carroll met. Several days later Brother Carroll advised Father O'Keefe that the civilian employee in question had been removed and would have no further involvement with Mount Cashel.

414 The judge dismissed the appellants' claim that the Archdiocese was negligent in this context. He found that, based on the evidence, there was no breach of duty by the Archdiocese. In reaching this conclusion, the judge considered the testimony of various witnesses regarding the proper response by the Archdiocese to an allegation of sexual abuse.

415 The judge was satisfied that "on this one incident where the office of the Archbishop became aware of one case of abuse, it was handled appropriately" (para. 290). He concluded at paragraph 293 that, "[a]s for the one disclosure during this period directly to the office of the Archbishop, there was appropriate follow-up in accordance with Canon Law, and satisfying any duty that existed in civil law." Consequently, the judge rejected the argument that the Archdiocese was directly negligent.

416 While the allegation of direct negligence was primarily based on this disclosure of sexual abuse by a civilian employee, discussed above, the judge also considered the appellants' further argument that the Archdiocese had direct knowledge of the Brothers' sexual abuse of the appellants, and had failed to act appropriately. The judge rejected this argument.

417 We also conclude that this argument cannot succeed, for two reasons. First, and unlike the allegation regarding the civilian employee, there was no evidence that the Archdiocese has direct knowledge of the Brothers' abuse.

418 Second, presuming the argument is that the Archdiocese had knowledge of the abuse because Monsignor Ryan was told of it, and also presuming that Monsignor Ryan's knowledge could be imputed to the Archdiocese (there was no evidence or finding on this point), in any event the judge found that the evidence at trial did not establish that Monsignor Ryan breached the duty of care. That is, the evidence did not show that Monsignor Ryan failed to take appropriate action in light of the disclosures.

419 The judge noted on this point:

> [299] Even if I accept this evidence as sufficient to raise a duty to intervene, we have no evidence whether the priest followed up with the Superior of the orphanage. One witness, ..., said that shortly after he disclosed, the offending Brothers left the orphanage. This could mean nothing, or it could mean that the priest did, in fact, intervene. We just do not know, and it would be speculation to conclude one way or the other. Speculation is not sufficient to satisfy the legal burden imposed on the Plaintiffs, and therefore, in the absence of any malfeasance, or nonfeasance, there is nothing for which the Archdiocese can be vicariously liable.

420 The judge's finding in this respect is discussed in greater detail above, in Issue 2. As discussed above, we have concluded that the judge made no error in finding that Monsignor Ryan did not breach the duty of care.

421 On appeal, the appellants did not seriously press this argument respecting direct negligence of the Archdiocese, and made only minor reference to the argument in the oral and written submissions. In any event, the appellants did not establish that the judge erred in concluding that the Archdiocese discharged its duty of care by dealing appropriately with the report of sexual abuse by a civilian employee. Nor did the appellants establish that the judge erred in finding there was no evidence that the Archdiocese had direct knowledge of the Brothers' abuse of the appellants, or in concluding that the evidence did not prove Monsignor Ryan breached a duty of care by failing to act when advised of the abuse.

422 Accordingly, there is no basis on which the Archdiocese could be found directly negligent, and the appeal in this regard must fail.

*Additional Observations*

423 Before leaving the issues on appeal, we offer the following observations in two areas. The first area relates to the expert evidence of Dr. Fitzgerald.

424 The appellants argue that the judge permitted Dr. Fitzgerald to give contextual evidence "beyond the scope of his expertise", and that the judge inappropriately relied on it.

425 The judge qualified Dr. Fitzgerald as "an expert in history, particularly of Newfoundland and related history in Newfoundland, and the history of the Roman Catholic Church in Newfoundland." The appellants say that Dr. Fitzgerald's expert evidence ought to have been limited to the pre-Confederation era, because his qualifications indicate this was his area of expertise. However, the judge ruled that Dr. Fitzgerald had "sufficient academic, publishing, and research experience to give opinion in the areas requested by counsel."

426 The areas counsel for the Archdiocese wanted Dr. Fitzgerald to address were set out in a letter from Dr. Fitzgerald to counsel for the Archdiocese dated March 6, 2016. The fourth area asked for Dr. Fitzgerald's comment on "the Administration, operation and control of the Mount Cashel Orphanage and school and involvement of the Archdiocese of St. John's and interaction with the Christian Brothers."

427 Dr. Fitzgerald provided a report which was admitted into evidence. He summarized his opinion in its introduction, saying:

> [T]hat the corporate entity known historically, and at present as the Roman Catholic Episcopal Corporation (RCEC) of St. John's, and before incorporation as the Diocese of St. John's, played no controlling, managerial, or oversight role whatsoever in the administration, fundraising, operations, or running of the Mount Cashel orphanage, or of, or over the assignment, work, supervision, or reassignment of Irish Christian Brothers who worked in Newfoundland.

428 Dr. Fitzgerald's testimony shows that he testified to historical facts respecting the relationship between the Archdiocese and the Brothers at Mount Cashel and gave his opinions on the import and meaning of those historical facts. His interpretation of the facts supported his opinion, which he also gave, that the Archdiocese played no contributing managerial oversight role whatsoever in the operation of Mount Cashel or over the Brothers.

429 While a recognized historian, Dr. Fitzgerald was not an expert in the relationship between the Archdiocese and the Brothers at Mount Cashel. Neither did he profess to be. Nevertheless, he was permitted to not only attest to historical facts respecting the Brothers at Mount Cashel and the Archdiocese and give his interpretation of them, but to go further and give conclusive opinion on the closeness of the relationship between the Brothers at Mount Cashel and the Archdiocese.

430 Expert witnesses are permitted to opine on matters when it is *necessary* to assist a fact-finder in understanding information which is outside the experience and knowledge of a judge or jury or "necessary to enable a trier of fact to appreciate the matters in issue due to their technical nature" (*R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at 23). The line between historical facts and interpreting what they mean is often blurred, and Dr. Fitzgerald's evidence respecting interpretation of historical facts doubtless assisted the Court. However, his evidence went well beyond interpreting historical facts and went so far as to opine on the very issue the judge was to decide. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.) at paras. 14-18, the Supreme Court of Canada cautioned against the use of experts to draw ready-made conclusions from factual evidence, saying that such practice is only allowed when the fact finder is not necessarily equipped to draw inferences from the evidence. In this case, there was nothing about the evidence that was technical or difficult to understand such that expert opinion respecting the relationship between the Archdiocese and the Brothers was required. It was the judge's role, not Dr. Fitzgerald's, to determine, on the basis of the evidence, whether the Archdiocese played a managerial or oversight role in running Mount Cashel or in the work of the Brothers. Accordingly, it was neither necessary nor proper for Dr. Fitzgerald to be permitted to opine on this fundamental issue.

431 There is another concern respecting Dr. Fitzgerald's evidence. Dr. Fitzgerald had access to the Archdiocese's archives to select material to inform his opinion. The plaintiffs had no access to the Archdiocese's archives. The material Dr. Fitzgerald selected from the Archdiocese's archives to support his evidence was provided to the plaintiffs, just as the material the plaintiffs

relied on was provided to Dr. Fitzgerald. However, the resources from which the parties could draw was different. Both parties were able to conduct research through publicly available archives, but the plaintiffs had no access to the archival material in the Archdiocese's archives. There is a certain inequity in this situation, given that the Archdiocese's archives could provide a fertile and valuable resource for relevant material, and trial fairness dictates that the usual course by far in cases where expert evidence is adduced is that all experts have access to the same information on which to base their evidence.

432 This concern should not be interpreted as suggesting that Dr. Fitzgerald was not a credible witness. There are no concerns about his credibility or the sincerity of his opinions. The concern is that the nature of his mandate could have caused him to overlook material which the plaintiffs may not have overlooked had they been able to have access to it.

433 In light of our earlier findings on vicarious liability, there is no need to determine whether the judge erred in his treatment of the testimony of this witness.

434 Secondly, we observe that neither the Christian Brothers Institute Inc. nor any other Christian Brothers organization participated in the trial. Had that occurred, the evidence might have been presented, argued and interpreted differently to show more or less responsibility on the part of the Archdiocese. In this regard, we note the judge's view, with which we agree, that had a Christian Brothers organization with some responsibility for the Brothers at Mount Cashel participated in the trial as a defendant, there would be little doubt as to its vicarious liability for the Brothers' conduct. We say this because we are confident, as the judge was, that the sexual abuse of the appellants occurred as described by them. We also note the judge's references to partial payments of damages having been made to the appellants on behalf of the Christian Brothers, although we have no information respecting the provenance of these payments. In the circumstances, we feel it appropriate to say that if a Christian Brothers organization had been found vicariously liable at trial, in allowing the appeal respecting the Archdiocese's vicarious liability we would have apportioned vicarious liability between the organization and the Archdiocese, in accordance with the Supreme Court of Canada decision in *Blackwater* that there is no principled reason why two defendants cannot be held vicariously liable for the same wrong in consideration of their respective levels of responsibility. However, what that apportionment would have been is not possible to determine.

**CROSS-APPEAL ON DAMAGES**

435 Although the judge determined that there was no liability, he was requested by the parties to assess provisional damages for each of the plaintiffs. He did so, in paragraphs 302-646, addressing issues under the *Limitations Act*, S.N.L. 1995, c. L-16.1, and issues respecting how damages for each of the four plaintiffs ought to be assessed.

436 The Archdiocese appealed the damages assessment of three of the four plaintiffs. For ease of reference, we continue to refer to the parties as the "Archdiocese" and the "appellants", the appellants being the three respondents on cross-appeal (G.E.B. #25, G.E.B. #26, and G.E.B. #33).

437 The judge's provisional assessment of damages for each of the three appellants was as follows:

(a) Awards for general and aggravated damages:

(i) G.E.B. #25 - $125,000

(ii) G.E.B. #26 - $240,000

(iii) G.E.B. #33 - $325,000

(b) Awards for Economic Loss (including pre-judgment interest):

(i) G.E.B. #25 - $357,500

(ii) G.E.B. #33 - $1,628,500

438 In calculating the global damage awards, the judge deducted amounts received by each plaintiff from what he described as the "Christian Brothers Institute". The amounts deducted were $77,332.76 for G.E.B. #25, $84,887.15 for G.E.B. #26, and $72,666.13 for G.E.B. #33.

439 The judge noted that while the *Limitations Act* provides a proscription period for actions respecting personal injuries or torts committed against the person (sections 5 and 6), section 8 creates an exception for sexual torts. The judge found that the physical abuse experienced by the appellants, which was acknowledged by the parties, was not actionable under the *Limitations Act* and that damages could only be awarded for sexual abuse. Neither party took issue with this finding. Therefore, all of the issues identified for the purpose of the cross-appeal relate to damage awards for sexual torts.

440 In its cross-appeal, the Archdiocese alleges the following six errors in the judge's provisional assessment of damages:

> 1) The judge erred when he assessed the damages on the basis of the material contribution test rather than the "but for" test;
>
> 2) The judge erred in failing to properly consider the impact of parental loss, abandonment, and the physical abuse at the orphanage for the three appellants when assessing the award for general and aggravated damages;
>
> 3) The judge erred in failing to properly consider the genetic link to alcohol abuse in the lives of two of the appellants when assessing the award for general and aggravated damages;
>
> 4) The judge erred in the assessment of the claim for loss of income for G.E.B. #25 when he concluded that there was a causal relationship between the sexual abuse and his inability to advance in the ranks of the Canadian military;
>
> 5) The judge erred in the assessment of the claim for loss of income for G.E.B. #33 when he concluded that there was a causal relationship between the sexual abuse and his inability to work after the age of 38 years of age; and
>
> 6) The judge erred in the manner in which he awarded pre-judgment interest on the claims for loss of income of G.E.B. #25 and G.E.B. #33.

441 Decisions on damages attract a high level of appellate deference. This Court has described the applicable standard of review in *Bromley*:

> [16] ... The issues relating to... the quantum of damages are questions of mixed fact and law. Those grounds of appeal can only succeed if the trial judge made an error on an extricable question of law or a palpable and overriding error.

442 After stating that the phrase "palpable and overriding error" encapsulates the highest level of appellate deference, the Court went on:

> [18] ... It is not enough for the appellant to show that the trial judge considered one irrelevant factor, or that he or she failed to consider one relevant one. An appellate court will only intervene if the error is significant enough to displace the strong arguments in favour of deference.

***Issue 1: Did the judge err by failing to apply the correct test in assessing damages?***

443 The Archdiocese argues that the judge erred by assessing the claims for general and aggravated damages based on the material contribution test rather than the "but for" test. It argues that this would be an extricable error in principle attracting a review on the correctness standard. The Archdiocese maintains that the "but for" test recognizes that compensation for negligent conduct should only be awarded where there is a substantial connection between the negligent conduct and the injury, and that compensation ought not to be awarded for debilitating effects of pre-existing conditions that the appellants would have suffered in any event (Archdiocese's factum on cross-appeal at para. 62).

444 The appellants disagree, stating that the judge applied the "but for" test in a robust, common sense fashion which included a consideration of the extent to which the circumstances of each plaintiff allegedly contributed to the injuries. The appellants point to several examples in the judge's decision where he applied the "but for" test, including examples where the application of the test also resulted in findings favourable to the Archdiocese:

> • "Causation in law requires the Plaintiff to prove that the injury arose from the actionable conduct of the defendant. ... The concept has often been stated as the "<u>but for</u>" test." (paras. 329-330)
>
> • "In assessing damages, I must find that "<u>but for</u>" the sexual abuse, the other circumstances of the Plaintiffs' lives made no meaningful contribution to the injury they suffered." (para. 331)
>
> • "In summary, causation is a significant issue in this case. I must be satisfied that, <u>but for</u> the sexual abuse on the Plaintiffs, they would not have suffered the loss. I must consider whether the sexual abuse as a causal factor, which is actionable, can be divided from the physical abuse, which is not actionable." (para. 350)
>
> • "I have already dealt with option 1, on the basis that there is little evidence, and very speculative to assume he would have chosen university <u>but for</u> the sexual abuse." (para. 441)
>
> • "Therefore, I am not satisfied that [G.E.B. #26] can say that <u>but for</u> the sexual abuse he would have pursued the PhD program. There were too many other reasons not to pursue it at that time." (para. 528)

(Emphasis added.)

445 At the hearing of the appeal, counsel for the Archdiocese conceded that the judge had applied the "but for" test and was correct when he found that "but for" the abuse, the appellants would not have suffered damage.

446 The judge's reasons support that this was the approach taken. He consistently applied the "but for" test throughout his reasoning. Accordingly, there is no error in the judge's application of the "but for" test.

***Issue 2: Did the judge err in failing to properly consider the impact of parental loss, abandonment, and the physical abuse at the orphanage for three appellants when assessing the award for general and aggravated damages?***

447 The Archdiocese submits that the judge erred in his calculation of the quantum of damages, arguing that the judge should have reduced the damages to account for the appellants' respective "original positions". The Archdiocese submits that there were several factors not considered by the judge that would have adversely affected the "original position" of each of the appellants. These include the loss of parents at a young age, abandonment at the orphanage by the remaining parent, the lack of heat and food while at Mount Cashel, the physical and emotional abuse while at Mount Cashel, and family history of alcohol abuse.

448 In other words, while the Archdiocese concedes that the sexual abuse was a cause of the ultimate harm suffered by each of the appellants, it argues that the judge should have accounted for other causes of that harm. This issue also arises in the third ground of the cross-appeal.

*Parties' Positions on G.E.B. #25*

449 At trial, G.E.B. #25 was awarded $125,000 in general and aggravated damages. In coming to this decision, the judge cited *M. (D.) v. W. (W.)*, 2013 ONSC 4176 (Ont. S.C.J.). In that case, a 12 year old boy had been sexually abused on one occasion by his uncle, and was awarded $95,000 in general and aggravated damages.

450 The Archdiocese argues that the award of $125,000 for general and aggravated damages was too high:

> The award of general and aggravated damages for [G.E.B. #25] in the amount of $125,000.00 fails to account for the loss of a parent at a young age, the abandonment to the orphanage, the separation from his sisters and the deprivation he experienced, all of which shaped his "original position" well before any sexual abuse took place. The abuse was moderately

invasive, but over a very short period of time. The impact of the abuse was mild. The award for [G.E.B. #25] should not have exceeded $75,000.00 (Archdiocese's factum on cross-appeal, at para. 77).

451 The appellants submit that the higher award of $125,000 was justified. First, they argue that unlike in *M. (D.) v. W. (W.)*, G.E.B. #25 experienced three incidents of sexual abuse at the hands of two different individuals. Second, the appellants point to the judge's finding that G.E.B. #25 was found to be a "thin skull plaintiff", as opposed to a "crumbling skull plaintiff":

> [423] ...While [Drs. Toborowsky and Badgio, the Archdiocese's expert witnesses] said that the pattern of aggressiveness was established early, and not related to sexual abuse, they also agreed that a child who suffered parental loss the way [G.E.B. #25] did would be more vulnerable to impacts from sexual abuse. This description fits the classic "thin skull" scenario.

*Parties' Positions on G.E.B. #26*

452 The judge found that the sexual abuse suffered by G.E.B. #26 was severe and fell within the range of awards for long term sexual assaults. The judge awarded G.E.B. #26 $240,000 for general and aggravated damages.

453 The Archdiocese argues that the award was too high, and points to *B. (E.) v. Order of the Oblates of Mary Immaculate (British Columbia)*, 2001 BCSC 1783 (B.C. S.C.), in support of their position. In that case, the plaintiff experienced sexual abuse for a longer period of time than G.E.B. #26. The plaintiff in *B. (E.)* did not experience the same trauma of parental loss and physical abuse that G.E.B. #26 experienced. In that case, the plaintiff was awarded general and aggravated damages of $150,000 ($199,000 adjusted for inflation as of 2016). The Archdiocese argues as follows:

> The award of general and aggravated damages for [G.E.B. #26] in the amount of $240,000.00 once again proceeds on the assumption that the impact of the loss of a parent, the abandonment to the orphanage and the physical abuse cannot be separated from the impact of the sexual abuse. On this incorrect approach, [G.E.B. #26] was overcompensated; he was placed in a position better than his "original position". The abuse was mild, with limited impact as demonstrated by his lifetime accomplishments. The award of general and aggravated damages should not have exceeded $150,000.00 (Archdiocese's factum on cross-appeal at para. 79).

454 The appellants disagree that the award of $240,000 was too high. They point to the judge's findings that G.E.B. #26's "experience of sexual abuse was severe" (para. 455), and that G.E.B. #26's experience of parental loss and abandonment rendered him a thin skull plaintiff, as opposed to a crumbling skull plaintiff (para. 503).

455 The appellants argue that a higher award than that in *B. (E.)* was justified based on the circumstances:

> The trial judge awarded [G.E.B. #26] $240,000. Given that [G.E.B. #26] was thin skulled and vulnerable, and that there has been a trend for courts to acknowledge the severe impacts of sexual abuse on victims over their lifetime, it was open to the trial judge to award a moderately higher amount in the present case than in *B.(E.)* (appellants' factum on cross-appeal at para. 59).

*Parties' Positions on G.E.B. #33*

456 The judge found that the sexual abuse suffered by G.E.B. #33 was severe and fell within the range of awards for long-term sexual assaults, awarding $325,000 for general and aggravated damages.

457 The Archdiocese submits that the abuse suffered by G.E.B. #33 was mild and that award was too high. The Archdiocese argues that the judge "failed to untangle the sexual abuse from all of the other trauma which shaped G.E.B. #33, including the loss of a parent, the abandonment to the orphanage, the physical abuse, job loss and family breakdown". The Archdiocese argues that the case law does not support an award of $325,000 for G.E.B. #33:

> The case law does not support such a high award. In *B.(E.) v. Order of the Oblates of Mary Immaculate (British Columbia)*, 2001 BCSC 1783,] the plaintiff was assaulted about twice a week from age 7 to 11 at a residential school. The abuse was

serious. The impact was severe. General and aggravated damages were assessed at $150,000.00 ($199,000.00 in 2016). The plaintiff in *M.(K.M.) v. [Roman Catholic Episcopal Corporation of the Diocese of London*, 2011 ONSC 2143,] received an awarded [*sic*] of general and aggravated damages of $190,000.00 ($206,000.00 in 2016). She experienced mild to moderate abuse at the hand of a parish priest from age 7 to age 10. The trial judge did not acknowledge that the jury award of $347,293.00 in *Langstaff v. Marson*, [2014 ONCA 510,] where the plaintiff was very severely assault [*sic*] by a teacher for 15 months, was overturned on the basis of judicial bias, so that it is an outlier of no assistance to the court. The award for [G.E.B. #33] should not have exceeded $200,000.00 (Archdiocese's factum on cross-appeal at para.82).

458 The appellants argue that the award of $325,000 was reasonable based on the circumstances. G.E.B. #33 had testified that Brother Lasik would fondle his genitals and buttocks three to four times a week for about one and a half to two years, until he was about 13 years old. The judge found that G.E.B. #33 was "abused mercilessly over an extended period" of time (para. 537). The appellants submit that the judge was alert to the other sources of trauma in G.E.B. #33's life and accordingly factored them into his analysis.

459 The appellants also point to the judge's finding that the impact of the sexual abuse was most severe for G.E.B. #33, and further that:

> [581] In my view, the evidence disclosed a man who entered Mount Cashel with vulnerabilities associated with parental loss. He appeared to lack the resilience of some of the other Plaintiffs and was therefore more susceptible to the trauma inflicted by Brother Lasik. I view his situation as a "thin skull" situation, and any defendant has to take a claimant as they are. I believe he was abused sexually and physically while at Mount Cashel, and that the sexual abuse has had a significant impact on his subsequent life.

*Law & Analysis*

460 Both the Archdiocese and the appellants cite *Johnstone v. Sealand Helicopters Ltd.* (1981), 35 Nfld. & P.E.I.R. 76 (Nfld. C.A.), as correctly setting out the approach to be taken on appellate review of an assessment of damages:

> [7] ... On an appeal from an assessment of damages, the first and prime concern of an appellate court, in my view, must be to look at the overall award in light of all the evidence. If that global figure is within what the court regards as a proper range for the injuries sustained in the circumstances, that award should not be interfered with even though there might not be complete agreement with all facets or details of the trial judge's reasoning. It is not the function of this Court to critically examine all aspects of an award in every instance, but such detailed analysis should only be entered upon if the award, at first encounter, appears to be inordinately low or excessive. As has been stated many times, the assessment of general damages in personal injury cases requires the exercise of his discretion by a trial judge based on all the circumstances. Because such assessments are incapable of exactitude, an appellate court should be reluctant to interfere with that discretion unless there is good reason for doing so. To put it another way, it is not our purpose to examine with a fine-tooth comb the details of every award brought before us. Further, as re-stated recently by the Supreme Court of Canada in *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at page 435;
>
>> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

461 The Archdiocese submits that the judge erred in his approach and that the awards for general and aggravated damages were too high:

> The law required that the trial judge untangle the different sources of damage to ensure that the Plaintiffs were only compensated for the loss caused by the actionable wrong. The Plaintiffs were to be placed in the position they would have

been in absent the sexual abuse. They were not to be placed in a position better than the original one. The trial judge proceeded upon a mistake or wrong principle (Archdiocese's factum on cross-appeal at para. 73).

462 The appellants submit that, according to the approach set out in *Johnstone*, the judge's assessment of the damages would not warrant appellate intervention as the judge carefully assessed all of the evidence, examined awards for damages in similar cases, reviewed and made findings with respect to multiple experts and made decisions in line with awards for similar injuries.

463 The Archdiocese acknowledged that the judge appropriately applied the thin skull principle because the appellants were children when the abuse took place and were therefore inherently vulnerable. The Archdiocese did not point to any errors in the judge's findings that the appellants were thin skull plaintiffs. Rather, the Archdiocese argued that the awards were too high when compared to the cases cited by the judge.

464 The judge reviewed relevant case law on awards of general and aggravated damages for sexual abuse. He separated the case law into two categories, those that involved "less frequent sexual assault and abuse" and those that involved "more frequent and long-term abuse with greater impact".

465 The awards of general and aggravated damages for cases involving the "less frequent" sexual abuse ranged from $46,000 to $150,000, while the awards for cases involving "more frequent" sexual abuse ranged from $98,000 to $347,293 (paras. 360-363).

466 The judge also recognized that there appeared to be a trend towards higher awards for cases involving childhood sexual abuse: "It is clear that over time the awards have increased significantly, reflecting the change in the view of the courts towards the impacts of child sexual abuse" (para. 363).

467 We are of the view that the judge carefully balanced the evidence, including the expert opinions, and came to a decision supported by the evidence and in line with awards for similar injuries. This is not a case where the awards were "inordinately low or excessive" as contemplated by *Johnstone*. Rather, the awards of general and aggravated damages were in accordance with the ranges established in the jurisprudence. This is particularly true when the older awards are adjusted for inflation. Furthermore, the judge recognized the trend towards higher awards for childhood sexual abuse. The awards of general and aggravated damages do not warrant appellate intervention.

***Issue 3: Did the judge err in failing to properly consider the genetic link to alcohol abuse in the lives of two of the appellants (G.E.B. #25 and G.E.B. #33) when assessing the awards for general and aggravated damages?***

*Parties' Positions on G.E.B. #25*

468 The Archdiocese argues that the judge's failure to consider the genetic link to alcohol abuse in the life of G.E.B. #25 is an error. There was limited argument on this point. The Archdiocese's position is that the judge did not consider the alleged history of alcohol abuse in G.E.B. #25's family when assessing the award for general and aggravated damages.

469 The appellants argue that the judge did consider G.E.B. #25's potential genetic link to alcohol abuse, and that the judge found that the sexual abuse by the Christian Brothers is what triggered G.E.B. #25's alcoholism.

*Parties' Positions on G.E.B. #33*

470 The Archdiocese alleges that the judge made a palpable and overriding error when he concluded that there was insufficient evidence to find that G.E.B. #33's father had an alcohol use disorder. To support this position, the Archdiocese points to the testimony of G.E.B. #33's sister regarding their father's history with alcohol use:

> Q. In your recollection, did your father have any issues around alcohol abuse?
>
> A. Not that I know of but I was ten years old. You know I was out playing most of the time. We were, we — home for meals and home for bed. He was usually around after work.

. . .

> Q. So, if we accept for the moment some of the evidence we've heard that he did have problems with alcohol abuse, it would have been hidden from you?
>
> A. I think so.

(Trial transcript, June 7, 2016, page 9, lines 8-16, and page 23, lines 15-19)

471 The appellants disagree and state that the findings of the judge were supported by the documentary evidence and witness testimony.

*Law & Analysis*

472 As discussed above, *Housen* provides that where a trial judge's finding of facts is at issue, the applicable standard of review is that of palpable and overriding error.

473 With respect to G.E.B. #25, the judge did consider the potential impact of G.E.B. #25's family's history with alcohol abuse when assessing the award for general and aggravated damages:

> [404] [Dr. Goldstein] also agreed that just because family members abused alcohol was not a predictor of alcohol abuse. Environmental factors were more important than the genetic connection. This indicated that [G.E.B. #25] may have been predisposed to alcohol abuse, but that the trigger was the abuse at Mount Cashel.

474 With respect to G.E.B. #33, the judge held that the evidence did not support a finding that G.E.B. #33's father was an alcoholic:

> [578] Drs. Toborowsky and Badgio appeared to place some credence on a theory that his alcoholism was more due to genetic factors than the abuse he suffered. It was based on comments [G.E.B. #33] had made in medical records many years previously about the alcoholism of his father, and several uncles. I had the benefit of hearing the testimony of both [G.E.B. #33] and his older sister. His sister testified that their father was not an alcoholic but did have some health problems. [G.E.B. #33] testified that when he reported earlier to hospital staff and the experts during their evaluations that his father was an alcoholic, he was mistaken. He said he based it on his own perceptions as a young boy before his admission to the orphanage that his father spent a lot of time in his room. His sister's testimony presented a different picture, and a more credible one since she was older and would have had a more realistic perspective on their father. As a consequence, I accept that any attempt to assign genetics to his alcohol abuse instead of the abuse at Mount Cashel was more likely than not in error.

475 Furthermore, the judge found that G.E.B. #33's alcoholism was "materially due to the sexual abuse he suffered at the hands of Brother Lasik" (para. 582).

476 It is clear from the reasons that the judge was aware that both G.E.B. #25 and G.E.B. #33 potentially had a family history of alcoholism that could have impacted their original position. The judge also held the appellants were considered to be thin skull plaintiffs as opposed to crumbling skull plaintiffs.

477 Furthermore, we see no error in the judge's handling of G.E.B. #33's sister's testimony regarding their father's alcohol use. G.E.B. #33's sister did not testify that her father was an alcoholic. Rather, she testified that her father most likely would have hid his alcoholism, if in fact he did have a problem with alcohol use. The testimony of G.E.B. #33's sister indicates that she was unaware as to whether her father was an alcoholic. The Archdiocese did not point to any other evidence to support their position that G.E.B. #33's father was an alcoholic.

478 The judge was aware of and considered the plaintiffs' potential family history with alcoholism as well as the evidence of the expert witnesses.

479 We conclude that the Archdiocese has not demonstrated that the judge erred in his consideration of this issue respecting G.E.B. #25 and G.E.B. #33. Accordingly, there is no basis for this Court to intervene in the judge's assessment for the awards of general and aggravated damages on this ground of appeal.

***Issue 4: Did the judge err in the assessment of the claim for loss of income for G.E.B. #25 when he concluded that there was a causal relationship between the sexual abuse and his inability to advance in the ranks of the Canadian military?***

480 The judge concluded that G.E.B. #25 would have advanced to a low level of non-commissioned officer if he had not been sexually abused. The judge relied on expert evidence to calculate the difference in lost income at $197,000 and the loss of pension at $160,000 for a total loss of income award of $357,000 (which included pre-judgment interest of $118,220 calculated from 1957-1991).

481 The Archdiocese argues that there was an insufficient evidentiary basis to find that there was a causal relationship between the sexual abuse suffered by G.E.B. #25 and his inability to advance in the ranks of the Canadian military. It argues that there were other reasons, such as the physical and emotional abuse suffered while at Mount Cashel, which could have explained why G.E.B. #25 failed to advance in the military.

482 The appellants disagree. They argue that the expert evidence led at trial reflected the reality of the type of injuries suffered by the appellants and that the evidence spoke to their indivisible nature. As such, the appellants argue that the judge's conclusion regarding G.E.B. #25's claim for loss income was supported by the evidence.

483 The judge recognized that he was required to distinguish between the impact of the physical and emotional abuse suffered by G.E.B. #25, and the sexual abuse:

> [438] ... The challenge is to separate the impact of the general violent environment at Mount Cashel from the impact of three incidents of sexual abuse he experienced. I have already found that the sexual assaults were significant in his attitude and response to authority. These would be critical factors in progression in the military. I accept that he likely would have had some opportunity for promotion but for the sexual abuse. Since he was already compromised, I believe it would have been at the lower level.

484 The judge recognized that G.E.B. #25 "was already compromised" due to the physical and emotional abuse he suffered, and thus held that his opportunity for promotion would have been at a "lower level". The judge also considered the impact the physical and emotional abuse would have had on G.E.B. #25 in making his assessment.

485 Furthermore, the judge stated that: "...I have to find the loss was due to the three incidents of sexual abuse, and not due to the statute-barred physical abuse." Further, "[a]ll of the experts agreed that the sense of betrayal that arose from the sexual assault by Brother J.E. Murphy was likely to have been the basis for [G.E.B. #25's] attitude towards authority in the military". The judge found that the sexual abuse suffered by G.E.B. #25 "contributed materially to his failure to advance to the lower level of non-commissioned officer" (para. 442).

486 It is clear from the judge's reasoning that he considered the evidence relevant to this issue. The Archdiocese did not demonstrate the judge committed a palpable and overriding error in his treatment of the causation issue. Accordingly, there is no basis to intervene in the judge's assessment of G.E.B. #25's claim for loss of income, with the exception of the calculation of pre-judgment interest, which will be addressed later in these reasons.

***Issue 5: Did the judge err in the assessment of the claim for loss of income for G.E.B. #33 when he concluded that there was a causal relationship between the sexual abuse and his inability to work after the age of 38?***

487 The judge determined that G.E.B. #33 was the plaintiff most seriously affected by the sexual abuse. The judge found that the sexual abuse, which was intensive, extended over a period of close to two years. The judge stated that "it was the sexual abuse which permeated all aspects of his life. His ability to carry on a career was substantially and materially harmed by his experience of sexual abuse" (para. 590). The judge awarded G.E.B. #33 $899,500 as loss of income after age 38 until the age of retirement at 62 based on calculations provided by the appellants' expert. Pre-judgment interest was awarded separately and will be dealt with later in these reasons.

488 The Archdiocese submits that the judge erred in considering irrelevant factors and not considering relevant factors in the assessment of G.E.B. #33's claim for loss of income. In particular, it argues that G.E.B. #33 had a genetic link to alcohol abuse, which would have negatively affected his employment opportunities.

489 The Archdiocese claims that the judge was unfairly critical of their experts' evidence. The Archdiocese points to the assessment made by Dr. Foote, where G.E.B. #33 was asked to explain why he drank. When assessed by Dr. Foote, G.E.B. #33 explained that he did "not understand why he [drank] other than to help him relax". The Archdiocese alleges that by the time G.E.B. #33 testified at trial, his evidence had changed; he had testified that he thought he drank to self-medicate because of his experience at Mount Cashel.

490 The Archdiocese also points to the judge's assessment of G.E.B. #33's sister's testimony regarding their father's use of alcohol as another potential error. It claims that her testimony supported the conclusion that G.E.B. #33's father had an alcohol use disorder, which would have established a genetic link to alcohol abuse for G.E.B. #33.

491 The appellants submit that the judge's findings are clearly supported by the documentary and *viva voce* evidence. With respect to G.E.B. #33's potential genetic predisposition to alcoholism, the appellants point to the judge's finding that G.E.B. #33 presented as a thin skull plaintiff. The appellants argue that even if G.E.B. #33 had been predisposed to alcohol abuse (which they point out the judge found he was not), the event that triggered any alcohol use issues was the sexual abuse at Mount Cashel.

492 As discussed above, the judge considered both the testimony of the Archdiocese's experts and the testimony of G.E.B. #33's sister, and concluded as follows regarding the genetic link to alcohol use:

> [578] Drs. Toborowsky and Badgio appeared to place some credence on a theory that his alcoholism was more due to genetic factors than the abuse he suffered. It was based on comments [G.E.B. #33] had made in medical records many years previously about the alcoholism of his father, and several uncles. I had the benefit of hearing the testimony of both [G.E.B. #33] and his older sister. His sister testified that their father was not an alcoholic but did have some health problems. [G.E.B. #33] testified that when he reported earlier to hospital staff and the experts during their evaluations that his father was an alcoholic, he was mistaken. He said he based it on his own perceptions as a young boy before his admission to the orphanage that his father spent a lot of time in his room. His sister's testimony presented a different picture and a more credible one since she was older and would have had a more realistic perspective on their father. As a consequence, I accept that any attempt to assign genetics to his alcohol abuse instead of the abuse at Mount Cashel was more likely than not in error.

493 The judge held that the evidence failed to establish that G.E.B. #33's father was an alcoholic and declined to find that G.E.B. #33's alcohol abuse was due to genetics as opposed to the sexual abuse he suffered at Mount Cashel. He found that G.E.B. #33's ability to carry on a career was substantially and materially harmed by his experience of sexual abuse.

494 As already noted, the judge carefully considered G.E.B. #33's sister's testimony. The Archdiocese has not demonstrated any error in the way the judge handled this evidence and his conclusions respecting it. Neither has the Archdiocese demonstrated error in the judge's assessment of the Archdiocese's experts' testimony. As the appellants point out in their submissions, a person who suffers from alcohol abuse often gains a greater understanding as to the root cause of the problem over time and this may be particularly true when a person, such as G.E.B. #33, is reluctant to discuss the potential underlying causes such as sexual abuse. It was not unreasonable to conclude that G.E.B. #33's understanding and explanation as to why he drank evolved over time.

495 It is clear from the judge's reasoning that he considered all of the evidence relevant to this issue. The Archdiocese did not demonstrate the judge committed a palpable and overriding error in his treatment of the causation issue. Accordingly, there is no basis to intervene in the judge's assessment of G.E.B. #33's claim for loss of income, with the exception of the calculation of pre-judgment interest, which will be addressed next.

***Issue 6: Did the judge err in the manner in which he awarded pre-judgment interest on the claims for loss of income of G.E.B. #25 and G.E.B. #33?***

496 The judge did not award pre-judgment interest on the non-pecuniary damages (paras. 372-374). Neither party took issue with the judge's reasoning in this regard. This issue was not appealed to this Court. As such, this Court makes no determination on this point. However, the judge did award pre-judgment interest on the economic loss awards. For G.E.B. #25's past loss of income, the judge accepted the calculations of the appellants' expert witness and included pre-judgment interest in the amount of $118,220.00 calculated from 1957. For G.E.B. #33, the award of past loss of income included pre-judgment interest of $729,000 calculated from 1975.

*Parties' Positions on Pre-Judgment Interest*

497 The Archdiocese took the position that the judge incorrectly relied on the interest calculations of the expert witness and instead should have determined the date on which the causes of action arose. Their position was that the statements of claim were issued in 1999 and that the limitation period for tort actions at that time was two years and therefore the causes of action could not have arisen prior to 1997.

498 The appellants took the position, referring to the 1990 version of the *Judgment Interest Act*, R.S.N. 1990, c. J-2, (the "*1990 Act*") that interest should be calculated from the day the causes of action arose. In the appellants' view, that date is when the sexual abuse occurred, based on the fact that there is no limitation period because of the nature of the misconduct.

499 This Court raised with the parties whether an award of pre-judgment interest was permitted in this case, as the sexual abuse committed by the Christian Brothers occurred in the 1950s when there was no statutory provision for pre-judgment interest. The first *Judgment Interest Act*, S.N. 1983, c. 81, (the "*1983 Act*") in the province did not come into force until 1984.

500 At the conclusion of the hearing, the Court requested additional submissions from the parties respecting the applicability of the *1990 Act*. Neither party had addressed this issue at the hearing of the appeal.

501 The parties were asked to consider two decisions of the Supreme Court of Newfoundland and Labrador, where that court ruled that the *1983 Act* did not have retroactive effect and no pre-judgment interest was payable on causes of action that arose prior to the *Act* coming into force in 1984. The two decisions are *Slaney v. Ellis* (1993), 108 Nfld. & P.E.I.R. 181 (Nfld. T.D.) and *Benedict v. Sealand Helicopters Ltd.* (1993), 111 Nfld. & P.E.I.R. 66 (Nfld. T.D.). The parties were requested to address whether this Court should adopt the reasoning in those two cases, as well as whether there is jurisdiction to award pre-judgment interest on damages in tort regardless of the provisions of either *Act*.

502 The appellants argue that the *1990 Act* should apply in this case, and that even if it does not, there is a basis in common law to make an award for pre-judgment interest.

503 The Archdiocese disagrees that the *1990 Act* applies, citing the two decisions referenced above in support of their position. The Archdiocese also maintains that this Court does not have the ability to award pre-judgment interest at common law.

*Pre-Judgment Interest at Common Law*

504 The appellants argue that this Court may award pre-judgment interest at common law, separate and apart from the legislation, acknowledging that the majority of cases dealing with common law entitlement to pre-judgment interest are in relation to contract law. They rely on this Court's reasoning in *Baldwin v. Chalker* (1984), 48 Nfld. & P.E.I.R. 86 (Nfld. C.A.) to support their position, arguing that *Baldwin* stands for the proposition that where a court is satisfied that the circumstances of

the case justify pre-judgment interest then it should be awarded, regardless of whether the action was founded in contract or tort. The decision in *Baldwin* does not, in our view, stand for such a proposition. Rather, the Court in *Baldwin* was simply stating that since liability had already been admitted, it was of little consequence whether the action was founded in contract or tort or both.

505 The Court in *Baldwin* reviewed the decision in *Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56 (Nfld. T.D.), which dealt with whether interest could be awarded in the absence of legislation authorizing pre-judgment interest:

> [4] As to the claim for interest by way of damages the learned trial Judge was of the view that he was bound by the case of *Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56, a decision of Mifflin J. (as he then was), and concluded, but with reluctance, that interest by way of damages was not recoverable in the absence of provincial legislation authorizing pre-judgment interest.
>
> [5] In my respectful view *Goodyear & House Ltd. v. Eaton* is not authority for such a broad proposition. In that case the plaintiff sued the defendant for the price of goods sold and delivered. It also claimed interest on the debt. Mifflin J., adopting the statement of Lord Herschell L.C. in the *London Chatham & Dover Ry. v. Smith Eastern Ry.*, [1893] A.C. 429 at 437 (H.L.), concluded that interest was not recoverable where there had been no agreement, express or implied, by the customer to pay it. That common law principle established by a long line of authorities, applies only where a debt is owed but is unlawfully withheld. It has no application where, as here, a professional man is sued for breach of his duty to use reasonable care.

506 In *Baldwin*, the purchaser was unable to obtain title to the property he had purchased through his solicitor, and the Court determined that, in addition to the purchase price, legal fees and out of pocket expenses, the purchasers were entitled to be reimbursed for loss of interest on money borrowed to buy the property. The Court determined that the rule to be adopted in cases such as this was one of *restitutio in integrum*. The Court concluded that the loss of interest was recoverable by way of damages on the breach of the solicitor's undertaking as it could "reasonably be supposed to have been in the contemplation of both parties at the time the contract was made..." (*Baldwin*, at para. 8). This was not a case of pre-judgment interest but rather a decision that the purchasers were entitled to recover damages for the interest paid on money borrowed.

507 The appellants also reference *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), in support of the proposition that pre-judgment interest is available at common law. The Supreme Court of Canada confirmed that courts have the jurisdiction to award pre- and post-judgment interest at both common law and in equity. *Bank of America* involved the appellate court's failure to confirm the trial judge's' award of compound interest (as opposed to simple interest). The Supreme Court stated at paragraph 50: "... contract law principles may require such interest to be compounded so as to award the plaintiff the benefit of the bargain." In *Bank of America*, the common law jurisdiction to award pre-judgment interest flowed from the application of contract law.

508 The Archdiocese argues that there is no basis in common law to award pre-judgment interest on damages for sexual abuse and cites the Supreme Court of British Columbia's decision in *Blackwater v. Plint*, 2001 BCSC 997 (B.C. S.C.). The question before the court was whether to award pre-judgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. The British Columbia legislation contained a similar provision to that of this province, which stated the legislation applied only to those causes of action that arose after the legislation came into force. Brenner C.J.S.C. stated as follows:

> [925] The plaintiffs claim pre-judgment interest on the damages awarded. Entitlement to court order interest is statutory. There was no right to pre-judgment interest at common law. The *Court Order Interest Act*, R.S.B.C. 1996 c. 79 does not apply to causes of action that arose before June 1, 1974. Any and all sexual and physical abuse in these actions as well as any other legal wrongs suffered occurred before June 1, 1974. When the Legislature elected to remove the limitation period for claims of a sexual nature, it could at the same time have amended the provisions of the *Court Order Interest Act*. It chose not to do this. In the absence of such an amendment I conclude that the plaintiffs are not entitled to court order interest.

509 The issue of court ordered interest in *Blackwater* was not considered on appeal by the British Columbia Court of Appeal. Neither was it considered in the decision by the Supreme Court of Canada.

510 In *Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85 (N.L. C.A.), this Court reviewed the history and application of judgment interest in this province. Cameron J.A. stated as follows regarding pre-judgment interest at common law:

> [80] Prior to the introduction, in 1983, of legislation providing for its payment, pre-judgment interest was denied in this Province, except in very narrow circumstances: *Goodyear & House Ltd. v. Eaton* (1971), 2 Nfld. & P.E.I.R. 56. The payment of pre-judgment interest on non-pecuniary damages is not a development of the common law but the result of legislative action.

This paragraph refers, by way of footnote, to two older cases dealing with claims for debts in which interest was allowed: *Prowse v. The Government of Newfoundland* (1900), 8 Nfld. L.R. 386 and *Whiteway v. Newfoundland* (1897), [1897-1903] Nfld. L.R. 482 (Nfld. C.A.), noting that neither was cited in *Goodyear & House Ltd.*

511 Mercer J.A. concurring with Cameron J.A., except in respect to an issue pertaining to calculation of non-pecuniary damages, considered the reasoning in *Bank of America*, and stated that prior to the enactment of judgment interest legislation, common law in this jurisdiction prohibited an award of pre-judgment interest on damages, absent a pre-existing contractual obligation to pay interest.

512 We conclude that while there may be limited circumstances in which the common law may be relied upon to support a claim for judgment interest, in this case, given the enactment of statutory provisions, there is no basis in common law to award pre-judgment interest on the damages for economic loss.

*Statutory Approach — Legislative History*

513 The *1983 Act* was proclaimed into force on April 2, 1984. Section 10 of the *1983 Act*, entitled "Transitional", stated as follows:

> 10. This Act does not apply to a cause of action that arises before the coming into force of this Act, or to a judgment debt payable before the coming into force of this Act.

514 The revised *1990 Act* is substantially the same as the *1983 Act*, except that the *1990 Act* did not include the transitional or commencement provisions.

515 In *Slaney*, the plaintiff was injured in a motor vehicle accident on March 27, 1984 and commenced an action for his injuries. The judge held that the plaintiff was entitled to $51,838 for loss of income from the date of his injuries to the date of the trial (June 1, 1992). The plaintiff also sought pre-judgment interest.

516 The accident occurred a few days before the *1983 Act* was proclaimed. Therefore, on its face, under the *1983 Act* the claim for pre-judgment interest would be barred under section 10 because the cause of action arose before it came into force. However, the *1990 Act* did not contain a section similar to that of section 10 of the *1983 Act*. In *Slaney*, the plaintiff argued that the *1990 Act* allowed for a person to claim pre-judgment interest for a cause of action that arose before the date the *1983 Act* came into force (April 2, 1984). The respondent disagreed and argued that entitlement to pre-judgment interest was specifically excluded under the provisions of the *1983 Act*, in force at the time the action arose, and that it could not be awarded now. The trial judge held that the plaintiff was not entitled to pre-judgment interest as the cause of action arose prior to the *1983 Act* coming into force:

> [109] ... In my view the elimination of the limiting section from the revised *Act* is not tantamount to a statement of legislative intent to clothe that *Act* with retroactive effect to cover causes of action arising before the date of proclamation of the *Judgment Interest Act* in 1984. I find that the Plaintiff is not entitled to pre-judgment interest. My finding in that respect, of course, does not affect his right to post-judgment interest in accordance with the *Judgment Interest Act*, c. J-2, R.S.N. 1990.

517 In *Benedict*, the plaintiff was injured in a helicopter accident in 1978 and commenced an action for negligence in 1980 prior to the proclamation of the *1983 Act*. At trial, in 1993, the question arose as to whether pre-judgment interest should be

awarded, or whether such an award was barred due to section 10 of the *1983 Act*. Mercer J. at paragraph 76 concluded that: "the non-inclusion of Section 10 in the 1990 *Act* does not clothe that *Act* with retroactive effect."

518 Mercer J. went on to consider the impact of the *Revised Statutes, 1990 Act*, S.N. 1991, c. 41 (the "*Revised Act*") and concluded at paragraph 78 that:

> ... Section 9(1) of the *Revised Act* clearly states that the revised statutes shall not operate as new laws but shall be construed as a consolidation of the law. Section 9(3) explicitly deals with the situation where the provisions of the revised statutes are not the same as the previous enactments. The provisions of previous enactments apply to all earlier transactions, matters and things. Therefore the provisions of Section 10 of the 1983 *Act* continue to apply, thereby denying pre-judgment interest to the cause of action in this case which arose in 1978.

*The Reasoning in Slaney and Benedict*

519 The appellants argue that this Court should not adopt the reasoning in *Slaney* and *Benedict*. They say that the reasoning in those cases is incorrect and, in any event, inapplicable to the present case because they fail to analyze the legislative objective for the elimination of section 10. They also submit that there was no consideration of the changes in law over the years regarding compensation for victims of sexual abuse and finally, that an overly broad interpretation of the presumption against the retrospective operation of statutes was applied.

520 The Archdiocese argues that the reasoning in *Slaney* and *Benedict* should be applied, with the effect that the *1990 Act* would not have retrospective application to a cause of action that arose prior to the *1983 Act* coming into force. The Archdiocese cites the *Revised Act* in support of its argument.

521 Sections 10 and 11 of the *1983 Act*, the provisions entitled "Transitional" and "Commencement" respectively, were removed in 1990 when the statutes of the province were consolidated under the *Revised Act*. Consolidation provided a record of all statutes in force prior to January 1, 1991, including any amendments that had been made.

522 The *1990 Act* provides that it is not retrospective, through the operation of section 9(3) of the *Revised Act* and section 10 of the *1983 Act*. The *1990 Act* is not the same as the *1983 Act* in that it does not contain the language of section 10. This engages section 9(3) of the *Revised Act*:

> (3) If on any point the provisions of the revised statutes are not in effect the same as the previous enactments for which they are substituted, ... with respect to all earlier transactions, matters and things the provisions of the previous enactments prevail.

523 In applying the provisions of section 9(3) of the *Revised Act* and considering section 10 of the *1983 Act*, we conclude that the *1990 Act* does not apply to a cause of action that arose before the *1983 Act* came into force.

524 "Transitional" and "Commencement" provisions were removed from many, if not all, statutes that came into force prior to January 1, 1991. For example, *The Young Persons Offences Act*, S.N. 1984, c. 2, also contained a "Transitional" provision (section 26) and a "Commencement" provision (section 33). These "Transitional" and "Commencement" provisions were similarly removed from the revised statute, *Young Persons Offences Act*, R.S.N. 1990, c. Y-1.

525 We conclude that the elimination of section 10 appears to have more to do with the consolidation of the statutes in 1990 rather than a conscious decision on the part of the legislature to remove the statutory preclusion set out in section 10 of the *1983 Act*.

526 The appellants further submit that the reasoning in *Slaney* and *Benedict* failed to consider the legislative objective for the elimination of section 10 from the *1990 Act*. However, the appellants fail to submit any evidence or jurisprudence in this regard, or point to any discussion in the legislature, either through *Hansard* or some other means, where the elimination of section 10 was discussed or debated.

527 The appellants argue that when the statutory preclusion was included in the *1983 Act*, the legislature had not turned its mind to sexual misconduct as a civil cause of action. In support of this argument, they cite section 8(2) of the 1995 *Limitations Act* which provides that there is no limitation period for actions involving sexual misconduct committed against a person that was under the care of another person, organization or agency.

528 The supplementary submissions of the appellants do not indicate how such developments regarding the limitation period for historical sexual abuse of a child would impact this Court's decision to adopt the reasoning in *Slaney* and *Benedict*. Rather, it appears that the appellants are arguing that since the legislature had not turned its mind to sexual misconduct as a civil cause of action until 1995, the legislature had not considered such a cause of action when it enacted the *1983 Act*. The appellants appear to be implying that if the legislature had considered sexual misconduct as a civil cause of action in 1983, that it would have granted an exception for such a cause of action under section 10 of the *1983 Act*, as it did under section 8(2) of the *Limitations Act*. If this is indeed the position of the appellants, it is merely speculative about what the legislature might have done had it turned its mind to the issue.

529 The appellants also argue that the presumption against the retrospective operation of statutes was given an overly broad interpretation in *Slaney* and *Benedict*, and that such an interpretation was contrary to the objective of compensation. In making this argument, the appellants rely on *Fontaine v. Canada (Attorney General)*, 2017 MBQB 21 (Man. Q.B.), which dealt with an award for pre-judgment interest under the *Judicature Act*, R.S.O. 1970, c. 228 on a cause of action that arose in the 1950s — approximately 20 years prior to the applicable legislation coming into force. In our view, the Ontario [1] legislation referred to in *Fontaine* is distinguishable from the legislation in this province for the following reasons. In 1977, amendments were made to the 1970 *Judicature Act*, which established a statutory entitlement to pre-judgment interest in what became section 36 of the *Judicature Act*, R.S.O. 1980, c. 223. At paragraph 81 of *Fontaine*, section 36(7) of the 1980 *Judicature Act* is referenced:

> (7) This section applies to the payment of money under judgments delivered on or after the 25th day of November, 1977, but no interest shall be awarded under this section for a period before that date.

530 The Ontario scheme lacked the same limitation that section 10 of the *1983 Act* places on an award for pre-judgment interest. Rather, the only limitation on an award of pre-judgment interest under the Ontario legislative regime referenced in *Fontaine* is that no pre-judgment interest should be awarded under the *Act* for the period before November 25, 1977. As such, the judge held at paragraph 82 in *Fontaine* that the "statute makes it clear that there is a discretion to award pre-judgment interest as I may find just to do so, at least as far back as November 25, 1977".

531 Section 10 of this province's 1983 legislation, states that if a cause of action arose prior to the *1983 Act* coming into force then the *Judgment Interest Act* has no application. Thus, the reasoning in *Fontaine* is distinguishable due to the differences in the two legislative regimes.

532 We see no errors in the way the *1990 Act* or the *Revised Act* were interpreted and applied in *Slaney* and *Benedict*, and no reason why this Court should depart from the reasoning in those cases. We now turn to when the causes of action arose to determine if the *1990 Act* would apply in this case.

*Causes of Action*

533 Accordingly, if the appellants' causes of action arose prior to the *1983 Act* coming into force, then by operation of section 10 of the *1983 Act* and section 9 of the *Revised Act*, there could be no award for pre-judgment interest.

534 However, if the appellants' causes of action arose after the *1983 Act* came into force, pre-judgment interest may be awarded under the consolidated *1990 Act*.

535 The appellants' factum on cross-appeal at paragraph 74 states that the causes of action arose "when the plaintiffs were abused". The appellants do not suggest a definitive date for when the causes of action arose in their supplementary submissions. Rather, they say at paragraph 22 that "if it is necessary to determine the date the various causes of action arose in the present

case, it should be a date that does not disadvantage the plaintiffs." At paragraph 20 of their supplementary submissions, they refer to the *Limitations Act* which provides that there is no limitation period for actions arising from sexual misconduct in these circumstances and argue that "courts no longer have to parse out the events of a tort involving sexual abuse to determine exactly when a cause of action accrued."

536 The Archdiocese submits that the causes of action did not arise until the appellants' statements of claim were issued in 1999, or at the earliest, two years earlier due to the two-year limitation period set out in section 5(a) of the *Limitations Act* which reads:

> 5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> > (a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

537 Section 5(a) of the *Limitations Act* is of no application in this case, because section 8 of that *Act* states that there is no limitation period for claims of sexual abuse like those in this case. As such, section 5(a) should not impact the date on which the causes of action arose for limitations purposes.

538 While it may be unnecessary to determine when the causes of action arose in this case for the purposes of the *Limitations Act*, the same cannot be said of the *1990 Act*. *Slaney* and *Benedict* reason that if the cause of action arose prior to the *1983 Act* coming into force, the legislation would not apply. Furthermore, under section 4(1) of both the *1983 Act* and the *1990 Act*, pre-judgment interest may only be awarded from the date the cause of action arose until the day of judgment. Therefore, it is necessary to determine the date the causes of action arose in order to see if the legislation applies and if so, whether pre-judgment interest could be awarded under the *1990 Act*.

**Did the judge make a finding as to when the cause of action arose?**

539 The judge did not make explicit findings in relation to the dates on which the causes of action arose. He did not make a finding as to when the cause of action arose based on discoverability principles outlined and adopted in the jurisprudence for historical sexual abuse. He did not consider the impact of the *Limitations Act* of 1995 on the revival of a cause of action previously statute-barred, which allowed for certain parts (the sexual abuse but not the physical abuse complaint) of this litigation to proceed. He did not consider the impact of the 1999 Supreme Court of Canada decision in *Bazley* on the determination of when the causes of action (the historical sexual assaults with vicarious liability implications for institutions) arose in the circumstance of this litigation.

540 The judge heard evidence from the appellants' expert, Ms. Cara Brown, a forensic economist, regarding the calculation of damages and pre-judgment interest. It would appear from her testimony that she calculated pre-judgment interest from 1957 for G.E.B. #25 and from 1975 for G.E.B. #33 up to the date she testified. Ms. Brown testified that she relied on the interest rates set out under the *Regulations* of the *Judgment Interest Act* for the period from 1984 up to 2016, and the Bank of Canada rate from 1957 up to 1984, by taking the average rate between October and November of each year and then reducing that average by one percent.

541 Ms. Brown testified as to how she determined the starting date for her calculation of pre-judgment interest for G.E.B. #25 and G.E.B. #33 She testified that for G.E.B. #25, she used 1957 as a date when he started earning income and that no one had directed her to use that date. For G.E.B. #33 she testified she used 1975 because that was the date from Dr. Goldstein's report where "negative things started happening in [G.E.B. #33's] life."

542 In accepting the dates and calculations from Ms. Brown, perhaps the judge determined that this was when the causes of action arose. However, he did not make a specific finding in this regard. Alternatively, perhaps he merely accepted that this would be the period of economic loss for the two appellants if pre-judgment interest was awarded.

543 The judge also considered the fact that one of the appellants did not disclose the sexual abuse until decades later and described the events that led up to the disclosure. The judge appears to connect this appellant's disclosure of the sexual abuse to the criminal investigations into the Christian Brothers and the Hughes Inquiry.

> [575] One of the interesting things about this case is that none of the Plaintiffs spoke of the sexual abuse until many years later. They all testified that they feared the stigma attached to an admission that they had been involved in sexual activities with any of the Brothers. [G.E.B. #33] was no different. Even though it had a serious impact on his marriage, he refused even to disclose to his wife. When he was contacted by Sergeant Mark Wall of the Royal Newfoundland Constabulary in the 1990's he initially was not prepared to disclose anything about sexual abuse. It was only later after Sgt. Wall persisted that he agreed to disclose. That was in the context of the criminal investigations in the 1990's against several Brothers, including Brother Lasik. These matters came to light after testimony at the Hughes Commission which reported in 1991.

544 The Supreme Court of Canada in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), discussed limitation periods and the application of the discovery principle regarding claims of historical sexual misconduct. The Court began by reviewing the discoverability rule generally. On this point, the Court referred to comments by Le Dain J. in *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) at 224:

> ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ...

The Court went on to adopt this principle and stated that it applies to cases involving historical sexual misconduct (in that case, incest) where La Forest J. stated at 35:

> In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. ...

545 In the present case, the judge made no finding nor was there any evidence before him as to when the appellants had a substantial awareness of the harm done and its likely cause. He did not make a finding as to when the cause of action would have arisen or crystallized using the discoverability principle.

***Parties' Positions as to When the Causes of Action Arose***

546 The Archdiocese submits at paragraph 18 of its supplementary submissions, there was "no evidence at trial that G.E.B. #25 or G.E.B. #33 received therapeutic assistance before the statement of claim was issued, nor any evidence that they independently developed a substantial awareness of the harm and its likely cause at any time". The Archdiocese argues that the causes of action therefore did not arise until the appellants filed their statements of claim in 1999.

547 The Archdiocese submits that to allow interest to run from a historical date, such as 1957, where the Archdiocese did not receive notice of the claim until 1999, some 42 years later, would offend principles of fairness. Additionally, the claim against the Archdiocese is in part, one of vicarious liability. The Archdiocese contends that the impact of the 1999 Supreme Court of Canada decision in *Bazley* created vicarious liability implications for institutions in circumstances of historical sexual assault. The Archdiocese queries in submission as to how an institution could be liable for pre-judgment interest from 1957 to 1999 when the claim was not even within the ambit of risk articulated by the Court at that time.

548 The Archdiocese takes the position that there is no distinction for this purpose in the words "cause of action arises" (*Judgment Interest Act*) or "cause of action crystallizing" (*M. (K.) v. M. (H.)*). Further, there being no evidence of therapeutic treatment, or any other disclosures or reports to service providers, there could be a presumption that the causes of action arose when the statements of claim were filed in 1999. This date is coincidental with when the Supreme Court of Canada first ruled that vicarious liability was legally available for claims of historical sexual abuse.

549 The Archdiocese submits that the judge erred by not conducting the analysis required under the *1990 Act* to determine when the causes of action arose. It argues, in the absence of evidence of therapeutic treatment for either of these plaintiffs, the most logical approach would be to determine that the causes of action arose in 1999 when the statements of claim were issued. Alternatively, it could be returned to the judge to receive evidence and submissions to determine when the causes of action arose.

550 The appellants submit the significance of *Bazley* is only that it allowed vicarious liability claims for historical sexual abuse to proceed. They argue that 1999 is not some sort of hard or bright line — it is merely a decision of the Supreme Court of Canada in 1999 that recognized the right of individuals to sue in these historic cases.

551 In response to the fairness argument put forward by the Archdiocese, the appellants submit that fairness favours their position. They argue that just as the law respecting vicarious liability and limitation periods for historical sexual abuse claims have evolved, so too should the law regarding pre-judgment interest.

552 The appellants submit that one of the purposes of pre-judgment interest is to compensate a plaintiff for the deprivation of monies to which the plaintiff has been found to be entitled. The appellants argue that because there was a finding of economic loss, they should recover pre-judgment interest for the entire period that they were deprived of the money.

553 The Archdiocese submits that this purpose for awarding pre-judgment interest must be tempered by fairness, and fairness requires that a defendant must know that a plaintiff may commence or has commenced a claim so that money may be reserved to earn interest during the period of litigation. In this case, the Archdiocese argues that it could not have reserved funds as it did not have any knowledge of the claims prior to the suits being filed in 1999.

*Law & Analysis*

554 According to section 4(1) of the *Judgment Interest Act* (both versions), a court should calculate pre-judgment interest from the day the cause of action arose to the day of judgment at a rate determined by averaging the interest rates in effect during that period. In this case, if the causes of action arose prior to 1983, then no pre-judgment interest would be awarded. If the causes of action did not arise until the early 1990s or 1999 when the statements of claim were issued, then according to section 4(1) of the *Act*, pre-judgment interest would be calculated from then until the date of judgment. Accordingly, we are of the view that the judge erred in awarding pre-judgment interest for the period from 1957 or 1975 to the date of hearing without making any finding as to when the causes of action arose.

555 Much of the Canadian jurisprudence regarding when the cause of action arose, for pre-judgment interest purposes, has adopted the discoverability approach (as opposed to the date of the abuse), holding that interest should be calculated from the date a plaintiff reasonably discovers the injury.

556 The Nova Scotia Court of Appeal took this approach in *R. (G.B.) v. Hollett*, 1996 NSCA 121, 139 D.L.R. (4th) 260 (N.S. C.A.), leave to appeal to S.C.C. refused, (1997), 160 N.S.R. (2d) 80 (note) (S.C.C.). This case involved the defendant (Hollett) who was a counsellor at the Nova Scotia Home for Girls where R. (G.B.), the plaintiff, was a student. Beginning in October 1976, the plaintiff began to stay at the defendant's home, where she was abused emotionally, physically and sexually. It was not until 1993, some 17 years later, that the plaintiff commenced a civil action against Mr. Hollett.

557 In 1991, the plaintiff read newspaper accounts of allegations of sexual abuse at the Nova Scotia Home for Girls, which she testified triggered her memories of the abuse she suffered. As a result, she disclosed her relationship with Mr. Hollett to the authorities, which led to him being convicted in November 1992 of sexual intercourse with a person under the age of 16.

558 A year later, in 1993, the plaintiff commenced a civil action against Mr. Hollett. The judge found that prior to November 1992, the plaintiff was not substantially aware of the harm inflicted and that Mr. Hollett was the likely cause of that harm. As such, the judge held that the cause of action did not arise until November 1992 and awarded pre-judgment interest from that date to the date of judgment. R. (G.B.) appealed this decision, arguing that the cause of action arose when the abuse occurred and sought pre-judgment interest from June 1977 to the date of judgment.

559 The Nova Scotia Court of Appeal dismissed this ground of appeal, stating:

> 184 The appellant cannot contend that she has lost the use of the money, or has been deprived of the use of the money, (awarded to her in this litigation) prior to November 1992, when she was not even aware, prior to November 1992, that she had a claim to advance. Likewise, from the Crown's perspective, it cannot be said that the Crown was failing to make proper recompense to the appellant, since June 1977, when the Crown was not even aware until some time after November 1992 that the appellant had a damage claim against the Crown.
>
> . . .
>
> 186 In my opinion, in awarding the appellant pre-judgment interest from November 1992 to the date of judgment, the trial judge neither "penalized" the appellant nor "rewarded" the Crown. To say that the Crown should pay interest, for 16 years prior to November 1992, when not only did it not know that the appellant was making a claim against the Crown, but the appellant did not know that herself, is contrary to the purpose and intent of the pre-judgment interest legislation.

560 The Court's analysis in *R. (G.B.)* applied the discoverability principle to determine the date the cause of action arose even though the actual sexual abuse occurred much earlier. The Court rejected the appellant's claim for pre-judgment interest back to the date of the actual abuse.

561 The judge in the present case did not apply the discoverability principle and made no finding as to when the appellants would have had substantial awareness of the harm done and its likely cause. There is only an inferential discussion that could lead one to infer that one of the appellants may not have discovered his cause of action until the investigation into the Christian Brothers commenced in the early 1990s. Without an analysis by the judge (who merely noted the first time one of the appellants disclosed the sexual abuse to anyone was in the 1990s fearing the stigma of disclosure), we find we are unable to use the discoverability principle to determine when the causes of action arose.

562 Is the analysis and application of the discoverability principle the only way to determine when the cause of action arose in this case? If so, this could result in remitting the matter to the judge to determine when the causes of action arose for the purposes of calculation of pre-judgment interest. This would not be the most desirable course of action given the passage of time, the ages of the appellants, the benefit to the parties of concluding the litigation and for the reasons outlined above in the discussion of the *Madsen Estate* and *Matchim* principles.

563 The *Limitations Act* in 1995 removed the limitation period for historical sexual misconduct, under certain conditions, which were statute-barred under the previous legislation. The following are the relevant portions of the *Limitations Act* which contemplate reviving causes of action:

> **No limitation period**
>
> 8. (2) Notwithstanding sections 5, 6, 7, 9 and 22, where misconduct of a sexual nature has been committed against a person and that person was
>
> > (a) under the care or authority of;
> >
> > (b) financially, emotionally, physically or other-wise dependant upon; or
> >
> > (c) a beneficiary of a fiduciary relationship with
>
> another person, organization or agency, there shall be no limitation period and an action arising from that sexual misconduct may be brought at any time.
>
> (3) <u>Notwithstanding section 24</u>, subsection (2) shall apply regardless of when the cause of action arose.
>
> **Extinguishment of Rights**

17. (1) A cause of action and the right or title on which it is based are extinguished upon the expiration of the limitation period for that cause of action.

(2) Where under another Act, an order extending a limitation period is made after the limitation period has expired, that order <u>revives the cause of action</u> and the right or title on which it is based.

**Application of Act**

24. (1) This Act applies to causes of action that arose before this Act comes into force as well as to causes of action that arise after this Act comes into force.

(2) Nothing in this Act <u>revives a cause of action</u> in respect of which the limitation period has expired before this Act comes into force.

(Emphasis Added.)

564 The *Limitations Act* contemplates "reviving" causes of action. When read together, sections 8(3) and 24(2) would have the effect of reviving causes of action based on sexual misconduct that would have been statutorily barred under the former *Limitation of Personal Actions Act*, R.S.N. 1990, c. L-15.

565 The concept of a cause of action being revived by a *Limitations Act* was discussed by the British Columbia Court of Appeal in *P. (J.) v. Sinclair* (1997), 37 B.C.L.R. (3d) 366, 148 D.L.R. (4th) 472 (B.C. C.A.). In that case, J.P. had commenced an action in October of 1993 for sexual misconduct against a former teacher and the School District. J.P.'s claim would have been statutorily barred under the former *Limitations Act*, however in the early 1990s there were amendments made to that province's *Limitations Act* to eliminate limitation periods in relation to claims based on sexual misconduct. The British Columbia Court of Appeal had to decide whether the amendments to the *Limitations Act* revived J.P.'s claims, which had been previously extinguished by statutory limitation, and thus allow J.P. to commence/continue her claims based on the alleged sexual misconduct.

566 The British Columbia Court of Appeal reviewed the old and new versions of the *Limitations Act*, as well as the amending *Act*, and determined that the amendments to the *Limitations Act* did have the unusual effect of reviving causes of action where they had been previously extinguished under the former *Limitations Act*.

567 Were the appellants' causes of action revived with the introduction of the *Limitations Act* in 1995 in the circumstances in this case? An appropriate conclusion to be drawn from the facts of this litigation is that the causes of action must have been previously statutorily barred due to the operation of the limitation periods in place at the time. The causes of action were revived by the operation of the *Limitation Act* and the appellants were able to commence an action in 1999 for the historical sexual abuse but not for the physical abuse which had occurred at the same time.

568 The removal of the statutory bar in 1995, while having the effect of reviving the cause of action, does not necessarily mean that this is when the cause of action arose for the purpose of section 4 of the *Judgment Interest Act*.

569 According to section 4 of the *Judgment Interest Act*, pre-judgment interest should be calculated from "the day the cause of action arises to the day of judgment". It is not clear that revival of the cause of action is equivalent to the date the cause of action arose for calculation of pre-judgment interest. Judgment interest should be calculated from the date the cause of action arose, not necessarily the date the cause of action was revived.

570 The causes of action pursued by the appellants in this case were claims that the Archdiocese was vicariously liable for the historical sexual abuse endured by the appellants.

571 The state of the law respecting vicarious liability in these circumstances was beginning to evolve in the late 1980s and 1990s. Four appellate court decisions that dealt with the issue of vicarious liability in the context of sexual assault prior to *Bazley* included: *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) 531, 15 D.L.R. (4th) 581 (Ont. H.C.), aff'd, (1986), 57

O.R. (2d) 781, 34 D.L.R. (4th) 767 (Ont. C.A.); *M. (F.W.) v. Mombourquette*, 1996 NSCA 125 (N.S. C.A.); *B. (J.) v. Jacob* (1998), 204 N.B.R. (2d) 254, 166 D.L.R. (4th) 125 (N.B. C.A.); and *A. (C.) v. C. (J.W.)* (1998), 60 B.C.L.R. (3d) 92, 166 D.L.R. (4th) 475 (B.C. C.A.).

572 It is noteworthy that, except for the decision in *Q. v. Minto Management Ltd.*, each of the other decisions cited or referred to the lower courts' decisions in *Bazley* and recognized that the law in this area was evolving. Furthermore, the Courts in*B. (J.) v. Jacob* and *A. (C.) v. C. (J.W.)*. explicitly recognized that leave to appeal to the Supreme Court of Canada in *Bazley* had been granted. The lower courts may have been signaling to litigants that a decision from the Supreme Court of Canada would provide some guidance, in that vicarious liability in these circumstances was not settled, and that the area of law needed clarification from the Supreme Court of Canada.

573 Prior to the decision in *Bazley*, the appellants would not have been aware that they had a cause of action arising from sexual abuse in which it would be possible to hold the Archdiocese vicariously liable. Their statement of claim was issued approximately six months after the decision in *Bazley*.

574 The Archdiocese has submitted that 1999 is the date when the causes of action arose. The appellants have submitted in their supplementary brief "if it is necessary to determine the date the various causes of action arose in the present case, it should be a date that does not disadvantage the plaintiffs."

575 The *Judgment Interest Act* contains a discretionary provision that may apply in the calculation of pre-judgment interest. Section 3(3) states as follows:

> (3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or a part of the amount for which judgment is given,
>
> > (a) refuse to award interest under this Act; or
> >
> > (b) award interest under this Act at a rate or for a period or both other than a rate or period determined pursuant to section 4.

576 We have found that the amendment to the *Limitations Act* in 1995 revived the appellants' causes of action and that this may provide the earliest possible date for the application of pre-judgment interest. We have also found that the 1999 decision in *Bazley* provided guidance and confirmation of the potential for institutional vicarious liability for historical sexual abuse, followed shortly thereafter by the issuance of the statements of claim by the appellants. We have also considered the parties' arguments with respect to fairness and equity. In all of the circumstances, we rely on the discretion available to us in section 3(3) of the *Act* and award pre-judgment interest from December 29, 1999.

577 In summary, on the issue of pre-judgment interest, we conclude that a common law entitlement to an award of pre-judgment interest is available only in limited circumstances. We confirm the approach taken in *Slaney* and *Benedict* regarding the application of the *1983 Act* and *1990 Act*. Further, the analysis in *Benedict* sets out a principled approach to the interpretation of the revisions under the *1983 Act* and *1990 Act*. Pre-judgment interest on the economic loss awards will be calculated from the date the statements of claim were filed until the date of judgment.

*Disposition of the Cross-Appeal*

578 In the result, we dismiss the first five grounds of the cross-appeal and allow the cross-appeal respecting the calculation of pre-judgment interest. Pre-judgment interest is to be calculated on the economic loss awards for G.E.B. #25 and G.E.B. #33 from December 29, 1999 to the date of judgment.

**SUMMARY AND CONCLUSION**

579 With respect to the appeal on liability, we find the judge erred in concluding that the Archdiocese is not vicariously liable for the Brothers' sexual abuse of the appellants. We conclude the Archdiocese is vicariously liable in this regard, and allow the appeal on this issue.

580 The judge did not err in concluding that the Archdiocese was not vicariously liable for Monsignor Ryan's conduct. Further, the judge did not err in deciding that the Archdiocese is not directly negligent. The appeal on these grounds is dismissed.

581 With respect to the cross-appeal on damages, the judge did not err on the first five issues, discussed above. The cross-appeal on these issues is dismissed. However, we find that the judge erred respecting the issue of pre-judgment interest, and we allow the cross-appeal on this issue.

582 In the result, the appeal is allowed and the cross-appeal is allowed in part.

**COSTS**

583 Rule 58(1) of the *Court of Appeal Rules*, N.L.R. 38/16, allows for a lump sum costs award. The parties jointly submit that a lump sum costs award of $150,000.00 plus disbursements and HST with respect to costs at trial of this matter would be appropriate. Costs were sought at trial but the judge did not hear submissions or make an order. Rule 58(2) provides this Court with the jurisdiction to do so. Accordingly, the appellants shall have their trial costs, in the amount above, as agreed to by the parties.

584 The appellants were successful on the appeal and are awarded costs for two counsel on the appeal, under column 3 of the scale of costs in the *Court of Appeal Rules*.

585 On the cross-appeal, success was mixed. The appellants were successful on a number of issues and the Archdiocese was successful on the issue of pre-judgment interest, which has a significant monetary impact on the award of damages. As such, there shall be no order as to costs on the cross-appeal.

*Appeal allowed; cross-appeal allowed in part on issue of pre-judgment interest.*

Footnotes

1 This matter was part of a multi-province class action where parties agreed that Ontario legislation would be used.

# TAB 8

2002 SCC 33, 2002 CSC 33
Supreme Court of Canada

Housen v. Nikolaisen

2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 2002 CSC 33, [2002] 2 S.C.R. 235, [2002] 7 W.W.R. 1, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 112 A.C.W.S. (3d) 991, 211 D.L.R. (4th) 577, 219 Sask. R. 1, 272 W.A.C. 1, 286 N.R. 1, 30 M.P.L.R. (3d) 1, J.E. 2002-617, REJB 2002-29758

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

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

Heard: October 2, 2001

Judgment: March 28, 2002 *

Docket: 27826

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

Counsel: *Gary D. Young, Q.C.*, *Denis I. Quon*, *M. Kim Anderson*, for Appellant
*Michael Morris*, *G.L. Gerrand, Q.C.*, for Respondent

**Headnote**
Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.
Municipal law --- Municipal liability — Negligence — General principles
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Municipality knew or should have known of disrepair of road and was liable under s. 192 of Rural Municipality Act, 1989 — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.
Rues et autoroutes --- Entretien et remise en état — Obligation de remettre en état — Étendue de l'obligation — Panneaux de signalisation et signaux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Accident a eu lieu sur une portion dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Même si le conducteur avait les facultés affaiblies, il ne conduisait pas d'une façon téméraire qui l'aurait empêché de voir, ou qui lui aurait permis de faire abstraction, d'un panneau, s'il y en avait eu un.
Droit municipal --- Responsabilité municipale — Négligence — Principes généraux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Municipalité connaissait ou aurait dû connaître le mauvais état du chemin; elle était donc responsable en vertu de l'art. 192 de The Rural Municipality Act, 1989 — Accident a eu lieu sur une partie dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.
The plaintiff was a passenger in a motor vehicle driven by N. The vehicle was involved in an accident, which rendered the plaintiff a quadriplegic. At trial, N was found negligent in taking the curve in the rural road at an excessive rate of speed while

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

**Held:** The appeal was allowed.

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

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

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

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence actions need not be accorded deference in every case. The municipality's duty of care is limited to a duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. The mere existence of a hazard does not give rise to a duty to erect a sign. The fact that the hazard was hidden did not automatically give rise to the conclusion that it would pose a risk to a reasonable driver, nor did the expert testimony relied on support that finding. The trial judge's factual findings did not support the conclusion that the municipality was in breach of its duty. A more in-depth analysis of the state of the road was required. The Court of Appeal was correct in finding that the road was obviously not designed to accommodate travel at a general speed of 80 km/h or that drivers would be somehow fooled by the dual nature of the road. The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair of the road. The trial judge failed to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known. The municipality did not have actual knowledge of prior accidents, which had occurred on different portions of the road than the subject location. The mere occurrence of an accident did not indicate a duty to post a sign. The evidence indicated that the accident occurred as a result of N's level of impairment and not from any failure on the municipality's part. As the legislature had clearly imposed a statutory duty of care on the municipality, it was not necessary to find a common law duty of care. It was only reasonable to expect a municipality to foresee accidents which occurred as a result of the conditions of the road, not the conditions of the driver. The appeal should be dismissed.

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

**Arrêt:** Le pourvoi a été accueilli.

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ». La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

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

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

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

**Table of Authorities**

**Cases considered by *Iacobucci, Major JJ.*:**

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

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

*Canadian National Railway v. Muller* (1933), 41 C.R.C. 329, [1934] 1 D.L.R. 768 (S.C.C.) — referred to

*Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504, 56 C.P.R. (2d) 145, 35 N.R. 390, 122 D.L.R. (3d) 203, 1981 CarswellNat 582F (S.C.C.) — referred to

*Cork v. Kirby MacLean Ltd.*, [1952] 2 All E.R. 402 (Eng. C.A.) — followed

*Dubé v. Labar*, 36 C.C.L.T. 105, [1986] 3 W.W.R. 750, 68 N.R. 91, 42 M.V.R. 1, [1986] 1 S.C.R. 649, 2 B.C.L.R. (2d) 273, 1 Y.R. 81, 27 D.L.R. (4th) 653, 1986 CarswellYukon 4, 1986 CarswellYukon 13 (S.C.C.) — referred to

*Galaske v. O'Donnell*, [1994] 5 W.W.R. 1, [1994] 1 S.C.R. 670, 112 D.L.R. (4th) 109, 43 B.C.A.C. 37, 69 W.A.C. 37, 166 N.R. 5, 89 B.C.L.R. (2d) 273, 21 C.C.L.T. (2d) 1, 2 M.V.R. (3d) 1, 1994 CarswellBC 152, 1994 CarswellBC 1238, [1994] S.C.J. No. 28 (S.C.C.) — followed

*Goodman Estate v. Geffen*, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — followed

*Gottardo Properties (Dome) Inc. v. Toronto (City)*, 1998 CarswellOnt 3004, (sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9)* 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.) — followed

*Hodgkinson v. Simms*, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.) — referred to

*Horsley v. MacLaren*, [1969] 2 O.R. 137, (sub nom. *Matthews v. MacLaren)* 4 D.L.R. (3d) 557 (Ont. H.C.) — referred to

*Ingles v. Tutkaluk Construction Ltd.*, 183 D.L.R. (4th) 193, 2000 SCC 12, 2000 CarswellOnt 447, 2000 CarswellOnt 448, 46 O.R. (3d) 736 (headnote only), 8 M.P.L.R. (3d) 1, 49 C.C.L.T. (2d) 1, 251 N.R. 63, 1 C.L.R. (3d) 1, 130 O.A.C. 201, [2000] 1 S.C.R. 298, [2000] S.C.J. No. 13 (S.C.C.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — followed

*McLean v. McCannell*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639, 1937 CarswellOnt 105 (S.C.C.) — considered

*Palsky v. Humphrey*, [1964] S.C.R. 580, 48 W.W.R. 38, 45 D.L.R. (2d) 655, 1964 CarswellAlta 36 (S.C.C.) — referred to

*Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — followed

*"Rhone" (The) v. "Peter A.B. Widener" (The)*, 148 N.R. 349, [1993] 1 S.C.R. 497, 101 D.L.R. (4th) 188, 1993 CarswellNat 1376, [1993] 1 Lloyd's Rep. 600, 1993 CarswellNat 1888 (S.C.C.) — considered

*Ryan v. Victoria (City)*, 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

*Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

*Schwartz v. R.*, 17 C.C.E.L. (2d) 141, (sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, (sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, (sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — followed

*St-Jean c. Mercier*, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — followed

*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — followed

*Underwood v. Ocean City Realty Ltd.*, 12 B.C.L.R. (2d) 199, 1987 CarswellBC 69 (B.C. C.A.) — followed

*Van de Perre v. Edwards*, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, (sub nom. *P. (K.V.) v. E. (T.))* 275 N.R. 52, (sub nom. *K.V.P. v. T.E.)* 156 B.C.A.C. 161, (sub nom. *K.V.P. v. T.E.)* 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — followed

*Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504, 67 C.R.T.C. 87, [1951] 2 D.L.R. 465, 1951 CarswellNat 272 (S.C.C.) — considered

**Cases considered by *Bastarache J.*:**

*Bose Corp. v. Consumers Union of U.S. Inc.* (1984), 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, 38 Fed. R. Serv. 3d 1421, 10 Media L. Rep. 1625 (U.S. Mass.) — considered

*Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 4 W.W.R. 194, 20 Admin. L.R. (2d) 1, 89 B.C.L.R. (2d) 1, 19 C.C.L.T. (2d) 268, [1994] 1 S.C.R. 420, 42 B.C.A.C. 1, 67 W.A.C. 1, 2 M.V.R. (3d) 43, 164 N.R. 161, 112 D.L.R. (4th) 1, 1994 CarswellBC 128, 1994 CarswellBC 1236, [1994] S.C.J. No. 20 (S.C.C.) — considered

*Canada v. Pharmaceutical Society (Nova Scotia)*, 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353, [1992] S.C.J. No. 67 (S.C.C.) — considered

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

*Diebel Estate v. Pinto Creek (Rural Municipality) No. 75*, *(*sub nom. *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality))* 149 Sask. R. 68, 1996 CarswellSask 584 (Sask. Q.B.) — considered

*Fafard v. Quebec (City)*, 55 S.C.R. 615, 39 D.L.R. 717, 1917 CarswellQue 8 (S.C.C.) — considered

*Galbiati v. Regina (City)* (1971), [1972] 2 W.W.R. 40, 1971 CarswellSask 93 (Sask. Q.B.) — considered

*Goodman Estate v. Geffen*, [1991] 5 W.W.R. 389, 42 E.T.R. 97, *(*sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, *(*sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — considered

*Jaegli Enterprises Ltd. v. Ankenman* (1978), 95 D.L.R. (3d) 82, 1981 CarswellBC 726 (B.C. S.C.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, 21 B.C.L.R. 155, *(*sub nom. *Taylor v. Ankenman)* 112 D.L.R. (3d) 297, 1980 CarswellBC 137 (B.C. C.A.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — considered

*Jennings v. Cronsberry*, *(*sub nom. *R. v. Jennings)* [1966] S.C.R. 532, 57 D.L.R. (2d) 644, 1966 CarswellOnt 61 (S.C.C.) — considered

*Just v. British Columbia*, 1 C.C.L.T. (2d) 1, [1989] 2 S.C.R. 1228, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140, 1989 CarswellBC 234, 1989 CarswellBC 719, [1989] S.C.J. No. 121 (S.C.C.) — considered

*Kolesar v. Jeffries* (1977), *(*sub nom. *Joseph Brant Memorial Hospital v. Koziol)* [1978] 1 S.C.R. 491, 2 C.C.L.T. 170, *(*sub nom. *Kolesar v. Joseph Brant Memorial Hospital)* 15 N.R. 302, 77 D.L.R. (3d) 161, 1977 CarswellOnt 448, 1977 CarswellOnt 465 (S.C.C.) — considered

*Levey v. Rodgers (Rural Municipality)*, [1921] 3 W.W.R. 764, 15 Sask. L.R. 31, 63 D.L.R. 452, 1921 CarswellSask 185 (Sask. C.A.) — referred to

*Moge v. Moge* (1992), [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, [1993] R.D.F. 168, 1992 CarswellMan 143 (Eng.), 1992 CarswellMan 222 (Fr.), [1992] S.C.J. No. 107 (S.C.C.) — considered

*Nelson v. Waverley (Rural Municipality No. 44)*, 65 Sask. R. 260, 1988 CarswellSask 140 (Sask. Q.B.) — considered

*Nielsen v. Kamloops (City)*, [1984] 5 W.W.R. 1, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 66 B.C.L.R. 273, 1984 CarswellBC 476, 1984 CarswellBC 821 (S.C.C.) — considered

*Parkland No. 31 (County) v. Stetar* (1974), [1975] 1 W.W.R. 441, [1975] 2 S.C.R. 884, 3 N.R. 311, 50 D.L.R. (3d) 376, 1974 CarswellAlta 131, 1974 CarswellAlta 196 (S.C.C.) — referred to

*Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — considered

*Ryan v. Victoria (City)*, 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

*Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

*Schwartz v. R.*, 17 C.C.E.L. (2d) 141, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — considered

*Shupe v. Pleasantdale (Rural Municipality)*, [1932] 1 W.W.R. 627, 1932 CarswellSask 25 (Sask. C.A.) — considered

*St-Jean c. Mercier*, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — considered

*Swinamer v. Nova Scotia (Attorney General)*, 19 C.C.L.T. (2d) 233, 20 Admin. L.R. (2d) 39, 112 D.L.R. (4th) 18, 129 N.S.R. (2d) 321, 362 A.P.R. 321, [1994] 1 S.C.R. 445, 2 M.V.R. (3d) 80, 163 N.R. 291, 1994 CarswellNS 3, 1994 CarswellNS 433 (S.C.C.) — referred to

*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — considered

*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 25 C.C.E.L. (2d) 153, 144 D.L.R. (4th) 385, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 98 O.A.C. 241, [1997] 1 S.C.R. 487, 44 Admin. L.R. (2d) 1, 97 C.L.L.C. 220-018, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 208 N.R. 245, 1997 CarswellOnt 244, 1997 CarswellOnt 245, [1997] L.V.I. 2831-1, [1997] S.C.J. No. 27 (S.C.C.) — considered

*Van de Perre v. Edwards*, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, (sub nom. *P. (K.V.) v. E. (T.))* 275 N.R. 52, (sub nom. *K.V.P. v. T.E.)* 156 B.C.A.C. 161, (sub nom. *K.V.P. v. T.E.)* 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — considered

*Williams v. North Battleford (Town)* (1911), 16 W.L.R. 301, 4 Sask. L.R. 75 (Sask. C.A.) — considered

**Statutes considered by *Iacobucci, Major JJ.*:**

*Highway Traffic Act*, S.S. 1986, c. H-3.1

Generally — referred to

*Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1

Generally — considered

s. 192 — considered

s. 192(3) — considered

**Statutes considered by *Bastarache J.*:**

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

*Highway Traffic Act*, S.S. 1986, c. H-3.1

Generally — referred to

s. 33(1) — considered

s. 33(2) — considered

s. 44(1) — considered

*Highway Traffic Act*, R.S.O. 1960, c. 172

Generally — referred to

*Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1

Generally — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

**Words and phrases considered**

**PALPABLE**

What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

The common element in each of these definitions is that palpable is plainly seen.

**Termes et locutions cités**

**MANIFESTE**

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « ... Qui est tout à fait évident, qui ne peut-être contesté dans sa nature ou son existence. [...] *erreur manifeste* ». *Le Grand Robert de la langue française* (2 e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évident [...] Qui est clairement, évidemment tel [...] *Erreur, injustice manifeste* ». Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « ... Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* ».

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ».

***Iacobucci, Major JJ.*:**

**I. Introduction**

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.); *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.); *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60 (S.C.C.)). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

## II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

### *A. Standard of Review for Questions of Law*

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

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

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

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

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

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

### *B. Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.), at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 (S.C.C.), at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

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

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

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

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

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

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

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

13 In *Anderson v. Bessemer (City)*, 470 U.S. 564 (U.S. N.C. 1985), at pp. 574 -75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are *not* in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

*(1) Limiting the Number, Length and Cost of Appeals*

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

*(2) Promoting the Autonomy and Integrity of Trial Proceedings*

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

*(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position*

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

***C. Standard of Review for Inferences of Fact***

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts. ... Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. ...
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580 (S.C.C.), at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

> In reviewing the making of an inference, <u>the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached</u> and whether the judge proceeded on proper legal principles. ... While the standard

of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be *reasonably supported* by the findings of fact of the trial judge, but whether the trial judge made a *palpable and overriding* error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra*. McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

25 Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the *only* area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the *principal* rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on *all* conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

***D. Standard of Review for Questions of Mixed Fact and Law***

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3), to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, *supra*, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2 (S.C.C.), at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.)).

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

*McLean v. McCannell*, [1937] S.C.R. 341 (S.C.C.), at p. 343; see also *Dubé v. Labar*, [1986] 1 S.C.R. 649 (S.C.C.), at p. 662, and *Canadian National Railway v. Muller* (1933), [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.), at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

*Galaske*, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean c. Mercier*, 2002 SCC 15 (S.C.C.), at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, <u>such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts.</u> [Emphasis added.]

34 A good example of this subtle principle can be found in *"Rhone" (The) v. "Peter A.B. Widener" (The)*, [1993] 1 S.C.R. 497 (S.C.C.), at p. 515. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (p. 516). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

**III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality**

***A. The Appropriate Standard of Review***

38 We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule by which to determine another case where the facts are different ...

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

***B. The Trial Judge Did Not Commit an Error of Law***

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

> ... omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal ref'd [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a

strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

41 The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such <u>the road is used by those who may not have the same degree of familiarity with it as do residents</u>.
>
> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, <u>this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet</u>.
>
> ... where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, <u>it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation</u>. [Italics in original; underlining added.]
>
> ([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a *motorist, exercising ordinary care*, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

43 With respect to the *speed* of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 km/h road until you are too far into the tight curve to able to respond".

44 The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the *ordinary motorist* and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 47). At para. 42, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 48). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge* test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others: *Toneguzzo-Norvell*, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

47 A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the *ordinary* driver, not the *negligent* driver.

48 To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-142)

and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

***C. The Trial Judge Did Not Commit A Palpable or Overriding Error***

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge. With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

53 In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

> If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

54 Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner *in its entirety*. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. *In this regard* I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 52-65) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague,

based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 52). However, the trial judge, basing her assessment on *other* portions of the expert evidence, found that the nature of the road was such that a motorist could be deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

57 We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal ... that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

58 As noted by McLachlin J. in *Toneguzzo-Norvell*, *supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, *supra*, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

**IV. Knowledge of the Municipality**

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

61 The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 72). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations

such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

62 In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 72). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above, it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person *in the same circumstances*" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had *knowledge* of the particular hazard in question, in the view of the trial judge, they should have *caused the municipality to investigate* Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1988 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard

from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that *in these circumstances* it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the municipality knew or ought to have known of the disrepair.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

**V. Causation**

70 We agree with our colleague's statement at para. 82 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean Ltd.*, [1952] 2 All E.R. 402 (Eng. C.A.), at p. 407, quoted with approval in *Horsley v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. This presumption, absent sufficient evidence of misapprehension or neglect is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para.15.

73 For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

74 As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

**VI. Common Law Duty of Care**

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

**VII. Disposition**

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

***Bastarache J.*:**

**I — Introduction**

78 This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

**II — Factual Background**

80 The sequence of` events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately 10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

81 A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

82 When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook

Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act, 1989*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The province of Saskatchewan has some 45,000 kilometres of bladed trails.

85 According to the provincial scheme of road classification, both bladed trails and local access roads are "non designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

**III — Relevant Statutory Provisions**

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-261

> **192.**(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.
>
> . . . . .
>
> 2. Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.
>
> 3. Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

*The Highway Traffic Act, 1986*, S.S., c. H-3.1

> **33.**(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:
>
> (a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on a highway.

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44.(1) No person shall drive a vehicle on a highway without due care and attention.

**IV — Judicial History**

***A. Saskatchewan Court of Queen's Bench,* [1998] 5 W.W.R. 523**

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Pleasantdale (Rural Municipality)*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality... the situation of the road therein, whether required to be used by many or by few; ... to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. Regina (City)* (1971), [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

89 Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

> It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para.90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

> Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

92 Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

***B. Saskatchewan Court of Appeal,*** **[2000] 4 W.W.R. 173, 2000 SKCA 12**

93 On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

94 Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made and error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

> 1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
>
> 2. To assess the issue of whether persons requiring to use the road, exercising ordinary car [sic], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

> 3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

96 According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra*. In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it".

97 Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had that trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

**V — Issues**

100

> A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?
>
> B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?
>
> C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?
>
> D. Does a common law duty of care coexist alongside the statutory duty of care?

**VI — Analysis**

***A. Did the Court of Appeal Properly Interfere with the Decision at Trial?***

*(1) The Standard of Review*

101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what

the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

102 Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam*, *supra*, at para. 60; *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.) , at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.), at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.), at para. 26). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.)). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

104 My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

105 By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), at p. 833; *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90). The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

106 In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and

appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of facts involves some measure of interpretation of that rule, and thus more law-making"(emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485 (U.S. Mass. 1984) , at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

108 My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

109 Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean c. Mercier*, 2002 SCC 15 (S.C.C.), a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2 (S.C.C.), is authority for the proposition that when the question of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Jaegli Enterprises Ltd. v. Ankenman* (1978), 95 D.L.R. (3d) 82 (B.C. S.C.)). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Jaegli Enterprises Ltd. v. Ankenman* (1980), 112 D.L.R. (3d) 297 (B.C. C.A.)). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident". On the issue of causation, a question of fact, Sexton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiff's claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

112 This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.)), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

*(2) Error of Law in the Reasons of the Court of Queen's Bench*

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

115 The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge*, *supra*, at p. 558; *Levey v. Rodgers (Rural Municipality)*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek (Rural Municipality) No. 75* (1996), 149 Sask. R. 68 (Sask. Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*Jennings v. Cronsberry*, [1966] S.C.R. 532 (S.C.C.), at p. 537; *Parkland No. 31 (County) v. Stetar* (1974), [1975] 2 S.C.R. 884 (S.C.C.), at p. 892; *Fafard v. Quebec (City)* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety."

116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety." Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v. North Battleford (Town)* (1911), 4 Sask. L.R. 75 (Sask. C.A.) (Court en banc), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact ... I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." <u>He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient ...</u> [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

118 The appellant in this case argued, at paras. 26-27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a <u>hazard to the public</u>. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is <u>not readily apparent to users of the road. It is a hidden hazard</u> ...
>
> ... where the existence of ... bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign <u>so that a motorist, using</u>

> <u>ordinary care, may be forewarned, adjust speed and take corrective action</u> in advance of entering a dangerous situation. [Emphasis added.]

119 The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality No. 44)* (1988), 65 Sask. R. 260 (Sask. Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate look-out considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

> His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. <u>On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour</u>. [Emphasis added.]

121 The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

122 In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

123 The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and

to pay greater attention to the potential presence of hazards when driving on a road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on ... " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, *and* where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an

eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution [Respondent's Record, Vol. II, at pp. 373-76]. The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> ... if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

131 The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

132 Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. ... You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?
>
> A. As in regards to travelling through the curves, yes, that's right, yeah.
>
> Q. Yes. And you did not know what was coming as you approached the curve, that is correct?
>
> A. That's correct, yes.
>
> Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?
>
> A. Or a tractor or a cultivator or something, that's right.
>
> Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?
>
> A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default

speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

134 Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

> Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?
>
> A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.
>
> Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see — you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?
>
> A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.
>
> Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?
>
> A. Yes, it changed, yes.
>
> Q. Now you were faced with something other than a straight road?
>
> A. M'hm. Yes.
>
> Q. Now you were on — and at some point along there the surface of the road changed, did it not?
>
> A. Yes.
>
> Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?
>
> A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.
>
> Q. <u>Yes. And all those differences were obvious, were they not?</u>
>
> A. <u>Well, I — they were clear, satisfactorily clear to me, yes</u>. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by

a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

137 I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

138 Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

139 In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to reassess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court." (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65) They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge *only* to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

> If the R.M did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. <u>While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents</u>, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers.

141 My colleagues refer to the decision of *Van de Perre v. Edwards*, 2001 SCC 60 (S.C.C.), in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*, *supra*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

***B. Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?***

143 Pursuant to s. 192(3) of the *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of *The Rural Municipality Act, 1989*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing. [Emphasis added.]
>
> I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular.

145 Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

146 I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of trees and vegetation which grew up along the sides of the road.

149 In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

150 The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Kolesar v. Jeffries* (1977), [1978] 1 S.C.R. 491 (S.C.C.), at pp. 503-4:

> ... "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge if there were credible evidence before him <u>upon which he could reasonably base his conclusion</u>". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the Act was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial

judge remarked: "Cst. Forbes does not recall any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. *Forbes and Healy are only two of nine members of the RCMP Detachment at Shellbrook*" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the R.C.M.P. members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

***C. Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?***

158 The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the road three times in the 18 to 20 hours preceding the accident.

161 I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the R.C.M.P, supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

162 Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties that are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> ... At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. ... if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. ... But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> <u>Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver</u>. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on

> the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

164 In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence. It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> ... No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the Criminal Code process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

166 At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

167 In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

168 I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of

the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other evidence" is to turn one's back on review for reasonableness.

***D. Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of the Act?***

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.), at p. 424:

> ... if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 (S.C.C.); *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider

the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

175 The Courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

**VII — Disposition**

176 In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

*Appeal allowed.*

*Pourvoi accueilli.*

Footnotes

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