Court File No.: CV-12-9545-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

# SUPPLEMENTARY BRIEF OF AUTHORITIES

September 1, 2021

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# I N D E X

# Tab 1

File No. SJC-294-2016

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

CITATION: Saint John Recycling v. FERODOMINION, ETAL. *2020 NBQB 127*



BETWEEN:

**048835 N.B. Inc., doing business under the name of Saint John Recycling**

(Plaintiff)

– and –

**FERODOMINION, a partnership of FERO WASTE & RECYCLING INC., 655227 N.B. Inc. and 655228 N.B. Inc.**

(Defendants)

| | |
|---|---|
| BEFORE: | Justice Darrell J. Stephenson |
| AT: | Saint John, N. B. |
| DATES OF HEARING: | December 17, 2018, May 24, 2019, December 13, 2019 and February 20, 2020. |
| POST-HEARING BRIEFS: | March 31, 2020 |
| DATE OF DECISION: | August 24, 2020 |
| COUNSEL: | 048835 N.B. Inc., doing business under the name of Saint John Recycling – Donald V. Keenan |
| | FERODOMINION and 655228 N.B. Inc. – M. Morley Rinzler |
| | 655227 N.B. Inc. – Ryan MacDonald |
| | FERO Waste & Recycling Inc. – Stephen J. Hutchison, Q.C. |

***Stephenson, J.***

**Introduction**

[1] This is my decision in the matter of the following:

(a) Motion in which Fero Waste & Recycling Inc. ("**Fero Waste**") is the Moving Party and 048835 N.B. Inc ("**048835**") is the Respondent; and

(b) Motion in which 655227 N.B. Inc. ("**655227**") and 655228 N.B. Inc. ("**655228**") (collectively, the "**Numbered Companies**") are the Moving Parties and 048835 is the Respondent.

(the "**Motions**")

[2] Under the Motions, Fero Waste and the Numbered Companies (collectively the "**Moving Parties**") seek dismissal of the June 23, 2016 action (the "**Action**") in which 048835 is the Plaintiff and FeroDominion, a partnership of the Moving Parties, (the "**Partnership**") is the Defendant on various grounds. The Motions are framed as requests for summary judgment pursuant to **Rule 22**.

[3] We are informed that Fero Waste sold its interest in the Partnership to the Numbered Companies on January 3, 2012, and ceased to be a partner as of that date. We are further informed that the Partnership changed its name to A.P.D.R. Enterprises on February 23, 2012, and now operates under that name as a partnership of 655228 and 645615 New Brunswick (2011) Ltd. (a successor, by way of amalgamation, to 655227).

[4] The Action was commenced against, and has been defended by, the Partnership and its partners under the original names of those entities. As such, this decision will make use of the original names, notwithstanding that such names are in some cases no longer reflective of subsisting entities.



**Appearances**

[5] The Motions have been before the Court for some time. The first appearance, on December 17, 2018, resulted in the Order attached hereto as Schedule "A". The second appearance, on May 24, 2019, resulted in the Order attached hereto as Schedule "B". The parties returned to Court to present argument on December 13, 2019, following which unsolicited written submissions were forwarded to the Court by counsel for Fero Waste. That triggered a response from counsel for 048835, and resulted in the Court scheduling a further hearing on February 20, 2020. Following that hearing, counsel were given until March 31, 2020 to submit final written submissions. Consequently, the Court has a very comprehensive record before it.

**Issues**

[6] Under the Action, 048835 claims damages against the Partnership for breach of a February 28, 2011 Supply Agreement made between 048835 and the Partnership (the "**Supply Agreement**"). Under the Motions, the Moving Parties ask that they be granted summary judgment and the Action be dismissed, because 048835 sold its interest in the Supply Agreement and hence had no capacity to bring the Action at the time it was commenced. They further maintain that 048835 waived its rights and is no longer able to enforce the Supply Agreement. Finally, they argue that 048835 has no entitlement to enforce any breaches under the Supply Agreement prior to June 23, 2014 (the Action was filed June 23, 2016) by operation of Section 5(1)(a) of the **Limitation of Actions Act** (New Brunswick) (the "**Act**").

[7] The Moving Parties ask that summary judgment be granted pursuant to **Rule 22.04(1)(a)** on the basis that there is no genuine issue requiring a trial. **Rule 22.04(2)** and the applicable jurisprudence tells us that, for purposes of evaluating that request, I must first consider the evidence submitted by the parties. In that regard, Justice Karakatsanis noted as follows in **Hryniak v. Mauldin**, 2014 SCC 7:

> "[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] .....When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective.....the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."

[8] Hence, the first question to be addressed is whether the necessary facts are before the Court to permit me to properly adjudicate upon the grounds raised by the Moving Parties. I note that if that were not the case, I would have the option of employing the grounds of inquiry set out in **Rule 22.04 (2) and Rule 22.04(3)**. However, in this instance, I believe the record before the Court affords me an adequate basis upon which to adjudicate upon the matters in issue.

**Standing**

[9] The first ground raised by the Moving Parties is that 048835 had no standing to commence the Action. As noted, the Action was commenced on June 23, 2016. It is the contention of the Moving Parties that, on the date the Action was commenced, 048835 had no title or interest in the Supply Agreement or any rights arising thereunder, and therefore possessed no capacity to commence the Action.

[10] Establishing an appropriate record, and providing the parties with time to prepare argument with respect to this issue, was in large part responsible for the number of appearances that have taken place. At the December 17, 2018 appearance the Court directed full disclosure of a February 29, 2016 Asset Purchase Agreement made between 048835, Shred Guard Inc. ("**Shred Guard**") and Stephen Yaffe (the "**Shred Guard Agreement**") – see Schedule "A". The Shred Guard Agreement was disclosed and, when the parties returned to Court on May 24, 2019 to discuss the implications of that disclosure, they were requested to address the admissibility of an Addendum to the Shred Guard Agreement (the "**Shred Guard Addendum**") placed before the Court as an attachment to an April 4, 2019 Affidavit of Mr. Yaffe (the "**Yaffe Affidavit**"). The Court's May 24, 2019 decision, to admit the Yaffe Affidavit into evidence, resulted in a further adjournment to permit the further discovery of Mr. Yaffe, with respect to the Shred Guard Agreement and Shred Guard Addendum, and to provide counsel with time to prepare argument. Mr. Yaffe was at all relevant times the President of 048835.

[11] So what do we know? The Supply Agreement was entered into on February 28, 2011 for a 5-year term. Section 8 of the Supply Agreement read as follows:

> "The Seller (the Partnership) shall not during the term of this agreement, sell to any other party other than the Buyer (048835) the Product (loose cardboard) or any other product which is the same or similar to the Product and is being recycled for a substantially similar purpose as the Product. The Seller hereby agrees to supply and sell a minimum of 4000 tons of Product per year to the Buyer." **(bracketed text added)**

[12] The evidence of the parties differs with respect to the circumstances that lead to the inclusion of Section 8 in the Supply Agreement. Resolution of that dispute is not necessary for purposes of this decision; the Numbered Companies having agreed at the initial hearing that they would abandon their request for summary judgment on the grounds raised in their Motion in respect of which significant factual matters are in

dispute– see Schedule "A". The parties, as well as the recitals to the Supply Agreement, acknowledge that it was concluded in conjunction with the purchase by the Partnership of the assets of Dominion Refuse Collectors, pursuant to a January 2011 Purchase Agreement. Under the Action, 048835 claims damages against the Partnership for breach of the Supply Agreement. The damages claimed are quantified on the basis of the Partnership's failure to supply the stipulated minimum of 4000 tons of cardboard during each year the Supply Agreement was in force and effect.



[13] Specifically, 048835 maintains that there was a shortfall each year during the term of the Supply Agreement, as follows:

| Period | Quantity Supplied | Shortfall |
|---|---|---|
| March 1, 2011 – February 29, 2012 | 2154.37 | 1845.63 |
| March 1, 2012 – February 28, 2013 | 2246.68 | 1753.32 |
| March 1, 2013 – February 28, 2014 | 2069.65 | 1930.35 |
| March 1, 2014 – February 28, 2015 | 2085.76 | 1914.24 |
| March 1, 2015 – February 28, 2016 | 1979.62 | 2020.38 |
| Total | 10,536.08 | 9463.92 |

[14] The Affidavit of Mr. Albino Pischiutta, dated August 23, 2018 and filed in support of the Number Companies' Motion (the "**Pischiutta Affidavit**"), provides background information with respect to the Supply Agreement. Mr. Pischiutta identified himself as a shareholder of the Numbered Companies with personal knowledge of the matters deposed to in the Pischiutta Affidavit. He informs us that, in early 2012, the Numbered

Companies sold the assets of the Partnership, including the Supply Agreement and certain other assets, to Royal Environmental Inc ("**Royal**").

[15] The February 2, 2012 Purchase Agreement attached to the Pischiutta Affidavit did not include the "Purchased Net Assets" Schedule, so we are not able to independently verify precisely which assets were transferred. However, Mr. Pischiutta continues on to tell us that he was contacted in May 2012 by Mr. Yaffe with a proposal to extend the term of the Supply Agreement for a further 5 years. Mr. Pischiutta advises that he put Mr. Yaffe into contact with Mr. Brian Dubblestyne and Mr. Tim Fielding, who he identifies as "representatives" of Royal. In the draft "Extension and Amendment of Agreement" prepared by Mr. Yaffe's counsel, the supplier is identified as Fero Waste and not the Partnership.

[16] Exhibits 8 and 9 to the Pischiutta Affidavit, as well as excerpts from Mr. Yaffe's discovery (Exhibit "N" to the Affidavit of Mr. Brian Dubblestyne, dated August 11, 2018, filed in support of the Fero Waste Motion (the "**Dubblestyne Affidavit**")), reflect negotiations between Mr. Fielding / Mr. Dubblestyne and Mr. Yaffe with respect to the extension of the term of the Supply Agreement and the amendment of other terms in 2012-2013. Mr. Yaffe tells us in his discovery evidence he raised the issue of the "cardboard" shortfall with Mr. Fielding in 2012-2013. Presumably this happened in the course of the negotiations, but this was not clear. Mr. Pischiutta describes the negotiations as follows in paragraph 24 of the Pischiutta Affidavit:

> "24. Mr. Tim Fielding, of Royal Environmental Inc. apparently was in discussions with the Plaintiff in regard to the Supply Agreement and attached hereto marked **Exhibit 9**, is a copy of an email from Tim Fielding to Stephen Yaffee suggesting terms to the amended Supply Agreement. An agreement or understanding was made, either oral or written, but I have no knowledge of what it was other than they continued to do business from 2012-2016..."

(Exhibit 9 was a January 10, 2013 email from Mr. Fielding to Mr. Yaffe proposing terms for a 5-year extension to the term of the Supply Agreement).

[17] The next attachment in the Pischiutta Affidavit (Exhibit 10) was a notice, dated December 17, 2015, from the Partnership (it described the Partnership as doing business as Fero Waste) to 048835 referencing the Supply Agreement. It was signed by Mr. Allan Pollard, who described himself as Director of Operations, and stated as follows:

> "We noted that the attached contract between us terminates on February 28, 2016 as per clause 4 of that agreement. As a result, we confirm that after that date Fero has no further obligation to Saint John Recycling."

[18] This was followed in the Pischiutta Affidavit by Exhibit 11. This was a redacted February 17, 2016 email from Mr. Pollard to Mr. Fielding that was, in turn, forwarded by Mr. Fielding to Mr. Dubblestyne with the following comment:

> "Brian
>
> Was this agreement disclosed at the time of purchase? I was given a copy
> of all contracts when I came to fero and this was not one of them. They are holding us to the 4000 ton and suing us for the shortfall? I will send you the other agreement I have tomorrow"
>
> (a copy of the Supply Agreement was attached to this email).

[19] I found the documentation / correspondence referenced in paragraphs 15-18 confusing, by reason of the following:

> (a) Mr. Fielding's expression of surprise at the existence of the Supply Agreement (paragraph 18) notwithstanding his negotiations with Mr. Yaffe for

the extension of same (paragraph 16) and the confirmation of termination notice forwarded by Mr. Pollard to 048835 in December 2015 (paragraph 17); and

(b) the reality that the confirmation of termination notice was described as coming from the Partnership (the record reflects it sold its interest in the Supply Agreement to Royal in February 2012 – paragraphs 15-16) which was described as doing business as Fero Waste (who we are told sold its interest in the Partnership to the Numbered Companies in January 2012 – paragraph 3).



[20] At this point I pause to note that, in 2015-2016, at least as between 048835 and Royal / Fero Waste, the status of the Supply Agreement was very much in issue and Mr. Dubblestyne (who submitted evidence in this proceeding in his capacity as Vice-President of Fero Waste) was specifically informed by his co-worker (Mr. Fielding) that "they are holding us to the 4000 ton and suing as for the shortfall" on February 17, 2016.

[21] I would also note, by reason of the observations made in paragraph 19, that there is some confusion surrounding who was interacting with 048835 in relation to the Supply Agreement. Fero Waste and Royal were (are?) related entities, although the precise nature of that relationship was not clear from the record. The sequence of interactions detailed in paragraphs 15-18 make it clear that Mr. Dubblestyne and other representatives of Fero Waste / Royal interacted with 048835 throughout the term of the Supply Agreement. In the case of the Numbered Companies it is less clear. Mr. Pischiutta tells us that the Numbered Companies sold the assets of the Partnership to Royal in 2012. However, the Partnership could only assign or delegate its responsibilities under the Supply Agreement with the consent of 048835 (paragraph 7 thereof) and no evidence of any such consent appears in the record. Moreover, 048835 sued the original counter-parties to the Supply Agreement, as identified therein and herein, and no defence has been advanced on behalf of a Moving Party that it was released from its liability under the Supply Agreement by 048835.

[22] We also know that, on February 29, 2016, 048835 entered into the Shred Guard Agreement whereunder it agreed to sell to Shred Guard all of the assets used in its recycling business, except for cash, accounts receivable and other specifically excluded assets (the "**Shred Guard Transaction**"). The Shred Guard Transaction closed on February 29, 2016, one day following the expiration of the term of the Supply Agreement. Mr. Troy Northrup, the President of Shred Guard, provided an Affidavit to the Court, which was discussed during the December 17, 2018 and May 24, 2019 appearances. In that Affidavit, Mr. Northrup stated:

> "4 It was agreed between the parties that 048835 N.B. Inc. would retain its accounts receivable which included "unbilled receivables and other debts due or accruing due to 048835 N.B. Inc. in connection with the Business.
>
> 5 Included within the unbilled receivables and other debts due or accruing to 048835 N.B. Inc. in connection with the Business is anything owing to 048835 N.B. Inc. pursuant to a Supply Agreement...."

[23] As noted during the parties various appearances, Mr. Northrup's contention that something is an account receivable does not make it so. Mr. Jaffe's discovery evidence (Exhibit "N", Dubblestyne Affidavit, and Exhibit "A" to the Affidavit of Cynthia Doucette, dated December 6, 2019 (the "**Doucet Affidavit**")) tell us that amounts owing under the Supply Agreement were never discussed between Mr. Yaffe and Mr. Northrup, and that the potential claim against the Partnership was not quantified, documented and / or invoiced prior to the closing of the Shred Guard Transaction. Bottom line, it was readily apparent to the Court that 048835's property interest under the Supply Agreement, as at February 29, 2016, constituted a residual interest under a contract and the associated "chose in action" (right to bring an action to recover a debt, money or thing – **Blacks Law Dictionary**, 2009), which fell within the definition of "Purchased Assets" under the Shred Guard Agreement. Specifically, it was not an

account receivable and did not fall within the enumerated "Excluded Assets" under the Shred Guard Agreement.

[24] The status of the Shred Guard Agreement, and the assets transferred thereunder, was discussed in general terms during the December 17, 2018 appearance on the basis of the record as it existed at that time. When the matter returned to Court on May 24, 2019 both the unredacted Shred Guard Agreement and the Shred Guard Addendum were part of the record. The Shred Guard Addendum was made "effective the 29th day of February, 2016." The operative paragraph of the Shred Guard Addendum is as follows:

> "2 For clarity, and without limiting the generality of the definition of Excluded Assets, the chose in action arising from the Supply Agreement...is specifically included as an Excluded Asset...."

We know from the Doucet Affidavit that the Shred Guard Addendum was executed on behalf of 048835 on February 28, 2019, and on behalf of Shred Guard between March 11 and 13, 2019, and that no further consideration was paid in conjunction with the execution thereof.

[25] So, where does that leave us? Mr. Northrup tells us that the Supply Agreement and amounts recoverable thereunder were not part of the Shred Guard Transaction, and he appears to have readily executed the Shred Guard Addendum to "clean up the paperwork" to reflect that reality. Mr. Yaffe's statement that he never discussed amounts owing under the Supply Agreement with Mr. Northrup is consistent with Mr. Northrup's advice that the Supply Agreement, as well as cash and accounts receivable, were excluded assets which were to be retained by 048835. Further, there is no record of Shred Guard ever exercising ownership rights in relation to, or taking any position with respect to, the Supply Agreement or any right of recovery arising thereunder. We know from Mr. Pischiutta that 048835 was intending to claim under the Supply Agreement in mid-February 2016, at a time when the Shred Guard Transaction must

have been in the process of being negotiated and documented, and put that Partnership on notice of that reality (paragraph 18). We also know that, consistent with that warning, 048835 forwarded a demand to the Partnership on May 4, 2016 and followed up to commence the Action on June 23, 2016. Taking all of this into account, it is clear that it was not the intention of the parties to the Shred Guard Transaction for title to the residual interest under the Supply Agreement to transfer from 048835 to Shred Guard on February 29, 2016. However, the Shred Guard Agreement was not reflective of that reality.



[26] Hence, we must address the impact that the manner in which the Shred Guard Transaction was documented has on the capacity of 048835 to continue with the Action. Much of the discussion at the December 13, 2019 and February 20, 2020 appearances focused on the equitable remedy of rectification. That remedy was extensively discussed by the Supreme Court of Canada in **Canada v. Fairmont Hotels Inc.**, 2016 SCC 56. The following passages from the **Fairmont** decision capture the elements of and principles which underlay a claim for rectification:

> "[38] To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.
>
> .....
>
> [54] Rectification is a centuries-old equitable remedy that gave courts discretion to correct "errors in integration" if signed documents did not reflect the true intention of the parties: see John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 589; see also Geoff R. Hall, *Canadian*

> *Contractual Interpretation Law* (3rd ed. 2016), at pp. 188-89. Where such an error occurs, "[t]he court will therefore put the agreement right . . . to conform with the parties' true intentions" (S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at p. 240).
>
> [63] Whether a mistake is unilateral or mutual, rectification is, ultimately, an equitable remedy that seeks to give effect to the true intention of the parties, and prevent errors from causing windfalls. The doctrine is also "based on simple notions of relief against unjust enrichment", namely, that it would be unfair to rigidly enforce an error that enriches one party at the expense of another: Waddams, at p. 240. As Professor Waddams notes, "[t]he doctrine is a far-reaching and flexible tool of justice" (p. 243)
> .....
>
> .....
>
> [67] Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*, [1954] O.W.N. 822 (C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (H.C.J.), at p. 766, aff'd (1990), 72 O.R. (2d) 703 (C.A.): ". . . the proper test is whether the third party relied on the document as executed and took action based on that document". (See also McCamus, at p. 595; Spry, at pp. 630-31; *Kolias v. Owners: Condominium Plan 309 CDC* (2008), 440 A.R. 389 (C.A.); *Carlson, Carlson and Hettrick v. Big Bud Tractor of Canada Ltd.* (1981), 7 Sask. R. 337 (C.A.), at paras. 24-26.)"

[27] As noted, I am satisfied that it was never the intention of the parties that the Supply Agreement, or any right of recovery thereunder, be part of the Shred Guard Transaction. Mr. Northrup (on behalf of Shred Guard) and Mr. Yaffe (on behalf of 048835) conducted themselves at all times in a manner consistent with 048835's continued ownership of any interests under the Supply Agreement. Further, there is no record of any third-party taking any action on the basis that, effective February 29, 2019, Shred Guard because the owner of any residual interest or right of recovery under the Supply Agreement. Indeed, as noted, the internal communications between Messrs. Dubblestyne, Pollard and Fielding reflect that, in mid-February 2016, the

Partnership (Fero Waste) was anticipating a claim from 048835 for breach of the Supply Agreement.

[28] Counsel for Fero Waste argued forcefully that the rights of the Partnership would be prejudiced if I did not hold 048835 and Shred Guard to the terms of the Shred Guard Agreement, because I would be depriving the Moving Parties of a defense. In my assessment, that is an overly broad categorization of what constitutes an impacted third-party right in the context of rectification.



[29] To begin, the Supply Agreement terminated the day before the Shred Guard Transaction closed so there was no continuing nexus between that transaction and the rights and obligations of the parties under the Supply Agreement. In other words, regardless of which entity (Shred Guard or 048835) held the residual right of recovery under the Supply Agreement, the Partnership had no further performance obligations thereunder on the effective date of the Shred Guard Transaction. Secondly, the record reflects no involvement by the Moving Parties with the Shred Guard Transaction or course of conduct undertaken by them in consequence thereof. The Moving Parties certainly have a right to defend the Action, but to claim a vested right to a specific defence grounded on poor legal drafting in a transaction in which they had no involvement, and did nothing in reliance upon, goes well beyond the scope of protected third-party rights. To employ the language from paragraph 67 of the **Fairmont** decision, the Moving Parties did not rely on the Supply Agreement as executed or take any action on the basis of same – in fact, they were not fully aware of this issue until I directed disclosure of the Shred Guard Agreement during the December 17, 2018 appearance.

[30] By reason of the foregoing, a Motion for rectification of the Shred Guard Agreement to exclude the Supply Agreement, and any rights of recovery arising thereunder, from the Shred Guard Transaction, could have succeeded on the basis of the **Fairmont** criteria. However, that is not what is before the Court. Instead, we

have the position of the Moving Parties that, as at June 23, 2016, 048835 had no interest in the Supply Agreement or any right of recovery arising thereunder and hence no capacity to commence the Action. 048835 counters that the Shred Guard Agreement, coupled with the Shred Guard Addendum, clarifies and confirms that 048835 has at all times been the owner of the Supply Agreement and all interests arising thereunder.

[31] The Moving Parties acknowledge that Shred Guard and 048835 were and are free to make whatever agreements they choose. They further accept that, in March 2019 following execution of the Shred Guard Addendum, the Supply Agreement and all interests thereunder were effectively excluded from the Shred Guard Transaction. However, they maintain this cannot have retrospective effect: they argue that retroactive application cannot be achieved by agreement between the parties, and can only be effected by an order of rectification from the Court.

[32] Counsel were unable to provide any on-point Canadian jurisprudence. A review of Canadian academic texts by the Court (**Fridman, Law of Contracts**, Third Edition, **Chitty on Contracts**, Twenty-Sixth Edition and **Waddams, Law of Contracts**, Fifth Edition) failed to disclose any commentary on whether the parties to an agreement can, as a matter of contract, give retroactive effect to an amending agreement to correct a drafting error. All cases regarding rectification referred to the Court involved instances where one party to an agreement was seeking rectification over the objections of a counter-party or a third-party whose economic interests would be adversely impacted by the rectification order (in the **Fairmont** case, the Canada Revenue Agency). Here, for the reasons discussed in paragraphs 29-30, the Moving Parties would not succeed if a claim for rectification was before the Court. As noted, they seek to opportunistically advance a defence they had no part in creating, the circumstances giving rise to which they had no involvement with and did nothing in reliance upon: namely, poor legal drafting by the parties to the Shred Guard Transaction. However, does that matter?

[33] All of this was discussed at the February 20, 2020 appearance, and the parties were given until March 31, 2020 to provide further written submissions to the Court. Counsel for 048835 provided nothing helpful: he reviewed the law governing applications for rectification before submitting "it is necessary for the effective date of the Addendum Agreement to be that of the Asset Purchase Agreement if the bargain of the parties to the Asset Purchase Agreement is to be as they intended." That statement is self-evident and was clear at the February 20, 2020 appearance. However, it did not address the fundamental question of whether the Court can give effect to same in the absence of a claim for rectification.



[34] Counsel for 048835 then continued on to state:

> "20 In the alternative, the Plaintiff submits that if it is necessary for an Order of rectification to be obtained from a Court, then the court has all of the facts needed to grant a rectification order if it believes that it would be equitable to do so."

I must stop here to note that the deficiency in the Shred Guard Agreement was known to 048835 by February 2019 – when the Shred Guard Addendum was prepared – and was clear to all parties who attended the May 24, 2019 appearance. No application for rectification was brought by 048835; rather it's position throughout has been that same is not necessary and that 048835 and Shred Guard were entitled to retroactively amend the Shred Guard Agreement as of right. Indeed, all parties at the December 13, 2019 and February 20, 2020 appearances (including counsel for 048835) emphasized to the Court that there was no application for rectification before it. In these circumstances, I find it incredulous that 048835 would suggest that, in the event the legal arguments being advanced by the Moving Parties were to prevail, the Court should take it upon itself (presumably on the Court's own Motion) to grant relief to 048835 (which it had over a year to seek in its own right) to permit it to continue with the Action. In my view, the Court must remain as an independent arbitrator of the matters address by the

parties in their pleadings, and not enter into the fray on behalf of a party appearing before it; in particular, one who is well-represented by experienced counsel.

[35] I now turn to the further submissions from Fero Waste. To begin, counsel for Fero Waste provided a helpful article by Gerard McMeel titled "**Contracts: Rectification and Other Ways to Correct Mistakes**" (**Thomson Reuters; Practical Law UK**, 2019). In that article, Mr. McMeel identified the three ways in which a mistake in the drafting of a contact can be rectified as follows: (i) agreement between the parties; (ii) rectification; or (iii) contractual interpretation. Contractual interpretation is not of relevance in this instance because, short of re-drafting, there is no principle of contractual interpretation that can transform the residual right of recovery under the Supply Agreement into an account receivable falling within the enumerated "Excluded Assets" under the Shred Guard Agreement.



[36] Mr. McMeel observed that an amending agreement between the parties "cannot have fully retrospective effect....the parties may agree to regulate their dealings by the corrected terms from any date they choose, but their agreement cannot change reality or bind a non-party...." He continued on to note that going to court to seek an order of rectification "with its expense and delay, will only be necessary if:

- there is a dispute and one-party refuses to agree to the rectification;
- the parties wish to ensure that rectification has retrospective effect."

[37] The principal decision referenced in Mr. McMeel's article was that of Justice Henderson in **Persimmon Homes Ltd. v. Woodford Land Ltd.**, [2011] EWHC 3109. In the **Persimmon** decision, Justice Henderson explained why a claim for rectification fell outside the scope of a dispute resolution clause in an agreement, and should properly be brought before a court, as follows:

> 21. Against this background, it is worth pausing to enquire why (as both parties agree) claims for rectification of the Agreement fall outside the scope of clause 18. I accept the submission of Mr McGhee QC for Woodford that the reason for this lies in the nature of the remedy sought. Rectification is a remedy that only the court can grant, and it is always discretionary in nature. Importantly, too, a decree of rectification has retrospective effect, with the consequence that the document in question "is to be read as if it had been originally drawn in its rectified form": see Craddock Bros v Hunt [1923] 2 Ch. 136 at 151 per Lord Sterndale MR and Snell's Equity, 32nd edition, para 16-027. This is a consequence that cannot be brought about by agreement between the parties or by the determination of an expert. It is something which it lies exclusively within the jurisdiction of the court to accomplish.



[38] Justice Henderson spoke in absolute terms of the reality that only court-ordered rectification can result in a corrected document being read as if it had been "originally drawn in its rectified form." However, as Mr. McMeel observed in his article, parties are free to contractually regulate their dealings from any date they choose, provided they do not change reality or impact third-party interests. As noted in paragraph 25, it is clear to the Court that it was not the intention of the parties that the residual interest under the Supply Agreement transfer from 048835 to Shred Guard. In that sense, the clarification documented under the Shred Guard Addendum is consistent with the reality that 048835 has at all times acted as the owner of that asset, including putting the Partnership on notice of a pending claim in February 2016, forwarding the demand in May 2016 and commencing the Action in June 2016.

[39] In an effort to reconcile the equitable remedy of rectification (only a court can direct that a document be treated for all purposes as having been originally prepared in its rectified form) with the principle that parties are, subject to the noted constraints, contractually free to regulate their dealings from whatever date they choose, I turned to American jurisprudence. Again, counsel for Fero Waste provided helpful jurisprudence. An excerpt from a 2008 article titled **Backdating**, prepared by Jeffrey Kwall of Loyola University Chicago, places the matter in context as follows:

> "As a matter of law, the parties to an agreement can make their agreement effective on whatever date they wish, provided no third party rights are compromised by the action. Hence, if a prospective employee who is to commence employment in March persuades her employer to pay her what she would have earned had she been employed since January, the parties may agree to that result by backdating their agreement to January 1 as long as no third party rights are compromised and no law is violated. Similarly, a landlord holding property in high demand might negotiate an agreement with a prospective tenant whereby, pursuant to a lease negotiated in March, the tenant agrees to pay the landlord the rents that
> would have been due for January and February had the lease begun in January. Here again, the parties might implement their agreement by backdating the lease provided no third party's rights are compromised and no law is violated."

[40] So, to summarize, we know that parties are free to contractually regulate their affairs from whatever date they chose. We have concluded that it was never the intention of the parties to transfer the right to commence the Action from 048835 to Shred Guard. In that regard, the Shred Guard Addendum, and its deeming of the Supply Agreement and any rights arising thereunder to be excluded from the Shred Guard Transaction effective February 29, 2016, is entirely consistent with the terms of the Shred Guard Transaction, and the manner in which the parties to that transaction have conducted themselves post-closing. However, it is clear from both English and American jurisprudence that parties can only retroactively re-order their affairs contractually when no third-party rights are compromised.

[41] In paragraphs 28-29, I explained why I would not accept that giving retroactive effect to the Shred Guard Addendum compromised the third-party interests of the Partnership in the context of an application for rectification. However, that is not what is before the Court. Is the same also true, given the reality that the Shred Guard Addendum constitutes a consensual retroactive memorialization by the parties to the Shred Guard Transaction of the arrangement which should have been concluded on February 29, 2016? In other words, is the interest of the Moving Parties in defending the Action on the basis of lack of standing operative to deprive 048835 and Shred

Guard of the capacity to contractually regulate the terms of the Shred Guard Transaction in the fashion which was always intended effective February 29, 2016. To answer that question, I once again turn to applicable American jurisprudence.



[42] In **Debreceni et al v. The Outlet Company**, 784 F.2013 (1986) United States Court of Appeals, First Circuit, the First Circuit Court of Appeal addressed a claim by the Fund Manager of the New England Teamsters and Trucking Industry Pension Fund (the "**Fund**") against The Outlet Company for liabilities under the **Multiemployer Pension Plan Amendment Act** of 1980 (the "**MPPAA**"). Pursuant to a 1984 amendment, an employer who had a binding agreement to withdraw from a pension fund as of September 26, 1980 was exempt from liability under the MPPAA. The Outlet Company entered into an agreement in October 1980 to sell its assets and withdraw from the Fund effective September 25, 1980. The Outlet Company contended that parties to a contract can agree to make it retroactive, to the detriment of third parties, and by virtue of that reality it had no liability to the Fundy under the MPPAA.

[43] The Outlet Company was successful at trial, and the matter was appealed to the First Circuit Court of Appeal. Justice Rosenn framed the central issue in the appeal as follows: "Here, Outlet wants to bind adversely the Fund, a third party with no voice in the Agreement, to the Agreement's retroactive effect." The Court of Appeal concluded that this could not be permitted stating: "Even if we were to accept Outlet's claim that its Agreement is retroactively binding between Outlet and United, we are unwilling to go a step further and hold the parties to a contract can make it retroactively binding to the detriment of third persons not party to the contract. To our knowledge, no court has ever so held..."

[44] However, central to the Court of Appeal's decision in **Debreceni** was the reality that the transfer / withdrawal agreement was not concluded until post – September 26, 1980, and the applicability of the liability exclusion under the MPPAA was dependent upon the existence of a binding agreement. In that regard, after observing that "an

employer's intent to act before the effective date of the MPPAA is of no consequence unless the statute's crucial temporal requirements are met", the Court of Appeal continued on to observe: "Under the laws of New York, Outlet could not be bound to the Agreement by either the agreement in principle it reached with United by September 14 or by its Board's actions on September 24 authorizing, inter alia, its officers to sign the Agreement".



[45] So, **Debreceni** stands for the proposition that parties cannot retroactively conclude an arrangement that has the effect of depriving an uninvolved third-party of a right of recovery. However, foundational to that determination was the Court of Appeal's finding that no agreement existed between the parties pre-September 26, 1980. Does the existence of the Shred Guard Agreement, and the Court's determination it was not the intention of the parties to transfer the right to commence the Action from 048835 to Shred Guard thereunder, make a difference in this context? To answer that question, I turn to one of the cases referenced in **Debreceni**, **Viacom International Inc. v. Tandem Productions Inc.**, 368 F. Supp 1264 (1974) (US District Court).

[46] The subject-matter of the Viacom litigation was the iconic American sitcom All in the Family. Viacom commenced action against Tandem to protect what it alleged were its exclusive distribution and syndication rights to the sitcom. Viacom maintained that it held these rights because they were assigned to it by Columbia Broadcasting, Inc. ("**CBS**"). Viacom contended that "Tandem granted CBS an exclusive license to distribute the program in syndication, and that CBS assigned its license to Viacom...." Tandem defended on various grounds, one of which was that the agreement between CBS and Tandem was not concluded until July 1971, which was subsequent to the effective date of an FCC regulation prohibiting "any television network from acquiring.....any ancillary interest in a television program." On the basis of this regulation, Tandem argued that CBS had no ability to affect the assignment in favor of Viacom and that such assignment was, therefore, void.

[47] The New York District Court concluded that the parties had arrived at an oral agreement on July 10, 1970. Judge Gurfein continued on to state: "Hence an assignment made at any time after July 10, 1970 would be effective under the contract, if validated by such contract" before concluding "Even had the financial interest rule become operative on October 1, 1970 as Tandem alleges, it would have been inapplicable to the transaction in issue, for I have found that there was a binding agreement for syndication between CBS and Tandem in the summer of 1970."



[48] On that basis, the New York District Court gave retroactive effect to the CBS – Tandem agreement, notwithstanding that in so doing it deprived Tandem of the ability to argue that such agreement was a nullity on the basis of the FCC regulation it alleged came into force in October 1970. Viacom and other cases in which agreements / amending agreements were given retroactive effect were described by the New York Court of Appeal as follows in **Debreceni**:

> "Although the *Viacom* district court stated as a general rule that when a written contract provides it shall be effective "as of" an earlier date, it generally is retroactive to the earlier date, 368 F.Supp. at 1270 (citing *Jeremiah Burns, Inc.*), the court made clear in its extensive discussion that it construed the retroactively-dated written contract to be a validation of an *already-existing* and partially performed oral contract. *Id.* The court found that the contract existed at an earlier date because the parties acted on the supposition that it already existed, and because the parties, unlike the parties in this case, had not intended to require a writing before being bound. Id. *In Jeremiah Burns, Inc.,* the court allowed the retroactive amendment of an already-existing contract.....
>
> Each of these prior New York cases holding that contracts may be made retroactive considered the possible effect of subsequent contracts on prior agreements. In *Viacom*, the court gave the written contract retroactive effect to embody the prior oral contract; in *Jeremiah Burns, Inc.,* the retroactive contract amended the prior agreement..... By contrast, no prior contract or outstanding agreement preceded Outlet's Agreement. Although it may be that a New York court would enforce the parties' intent to make the contract retroactively binding as to Outlet and United, nonetheless the claim for retroactive application here is significantly

> weaker than in prior cases for the reasons just stated and because of the specific cut-off date in section 558 and the policy purposes of the statute."

[49] What can we take from **Viacom** and the passages from **Debreceni** set out above? I believe it is simply this. In the absence of specific statutory direction, parties are free to contractually govern their affairs from whatever date they choose in circumstances where:

> (a) the retro-active agreement / amending agreement reflects or validates an existing agreement;
>
> (b) the conduct of the parties throughout has been consistent with that agreement – in other words, there is no change in the reality of how the parties conducted their affairs; and
>
> (c) giving effect to the agreement will not deprive a third-party of a right of recovery (like in **Debreceni**) or otherwise alter the rights or any performance obligations of the third-party in relation thereto.

[50] As noted, I am satisfied that it was never the intention of the parties that the Supply Agreement be part of the Shred Guard Transaction. Further, there is no record of any third-party relying on the Shred Guard Agreement as executed and/or taking action on the basis that, effective February 20, 2019, Shred Guard became the owner of the Supply Agreement or any residual right of recovery thereunder. Finally, the Supply Agreement terminated the day before the Shred Guard Transaction closed so, regardless of which entity held the residual right of recovery thereunder, the Partnership had no on-going performance obligations in relation thereto.

[51] Bottom line, I am not able to identify any entitlement of the Partnership impacted by giving retro-active effect to the Shred Guard Addendum. As previously noted, the Moving Parties certainly have a right to defend the Action, but to claim a vested right to a specific defence in these circumstances goes well beyond what I believe can constitute a protected third-party interest in any context. Like the New York District Court in **Viacom**, I have concluded that the reality the Shred Guard Addendum

validates the Shred Guard Transaction, as originally conceived and acted on by the parties thereto, must take procedure over the fact that giving retro-active effect to same will deprive the Moving Parties of the ability to erect an opportunistic defense grounded on poor legal drafting in a transaction to which they had no nexus and did nothing in reliance thereon. In these circumstances, to employ the language from the **McKeel** and **Kwall** articles previously referenced (paragraphs 36 and 39), there was no change in the reality of the Shred Guard Transaction and the Moving Parties cannot claim the status of impacted third-parties. In **Viacom**, the New York Court was not prepared to treat the October 1970 FCC regulation as giving rise to an impacted third-party right, on the basis that giving retro-active effect to the July 1971 licensing agreement would deprive Tandem of the ability to argue it was void. Like the Moving Parties in this instance, Tandem sought to employ a circumstance it had no role in creating (the enactment of a federal regulation) to counter the premise that parties are free to order their affairs contractually from whatever date they choose. As noted, this submission was rejected by the New York Court and I view the arguments being advanced by the Moving Parties on this issue in the same light. I believe my views in this regard are consistent with the principles discussed in the passage from **Debreceni** set out in paragraph 48.

[52] By reason of the foregoing, I find that 048835 had the necessary standing / capacity to commence the Action on June 23, 2016 and move to the second ground raised by the Moving Parties.

**Waiver**

[53] The Moving Parties contend that 048835 waived its right to claim for the alleged shortfall under the Supply Agreement. To address this contention, it is necessary to consider the record of communications between the parties. As previously noted, the Supply Agreement was entered into on February 28, 2011 for a 5-year term, and stipulated that the Partnership would supply product only to 048835 and that a minimum

of 4000 ton would be provided each year (paragraph 11). There was a significant shortfall in each year during the term of the Supply Agreement (paragraph 13). Mr. Yaffe tells us that he raised the issue of the shortfalls with Mr. Fielding in 2012-2013, presumably in the course of their negotiations for the extension of the term of the Supply Agreement (paragraph 16). However, the first reference to enforcement action appears in Mr. Pollard's email to Mr. Fielding in February 2016 (paragraph 18).

[54] In his discovery evidence (Exhibit "N", Dubblestyne Affidavit) Mr. Yaffe tells us that the management of 048835 was aware, following the expiration of each year during the term of the Supply Agreement, that they had not received the minimum 4000 tons contracted for thereunder for that year. He states that the only time he raised it with the Partnership was in the course of his 2012-2013 discussions with Mr. Fielding. Mr. Yaffe advised that 048835 treated the 4000-ton annual minimum as a cumulative amount to be made-up over the term of the Supply Agreement – this was clearly inconsistent with the language of the Supply Agreement.

[55] The Moving Parties maintain that the course of conduct adopted 048835 and Mr. Yaffe constituted an effective waiver by 048835 of its entitlement to enforce the terms of the Supply Agreement. They argue that 048835's continuation with the Supply Agreement over its five-year term, coupled with its efforts to negotiate a 5-year extension of same, without taking a formal position with respect to the year-over-year shortfalls, effectively negated its ability to later commence action to pursue recovery of damages in respect of same. The Moving Parties note that no formal demand was made until May 4, 2016 (paragraph 25) and that there is no written record of Mr. Yaffe's 2012-2013 conversation with Mr. Fielding regarding the shortfalls.

[56] I will dispense with this argument quickly. Section 13 of the Supply Agreement provided as follows:

> **"No Implied Waiver**

> 13 The failure of any party at any time to require performance by the other party of any provision of this agreement shall in no way affect the right to require performance at anytime thereafter, nor shall the waiver of either party of a breach of any provision of this agreement constitute a waiver of any succeeding breach of the same or any other provision."



[57] Pursuant to Section 13 the failure by one party to the Supply Agreement to insist upon strict performance of some obligation thereunder is not to be construed as implied waiver. Case law is clear, parties to a contract are free to agree that conduct that would otherwise support a claim for waiver does not give rise to same – see **772067 Ontario Limited v. Victoria Strong Manufacturing**, 2017 ONSC 2719. Moreover, the law with respect to implied waiver is also clear. The intention to relinquish the right in question must be unequivocal and conscious. In this regard, the Ontario Court of Appeal noted as follows in **Technicore Underground Inc. v. Toronto**, 2012 ONCA 597:

> "[63] The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 409. In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party."

[58] In this case, we have no evidence of any intention on the part of 048835 to abandon its right to enforce the terms of the Supply Agreement. The record before me reflects only silence which is not, in and of itself, sufficient to support a finding of an unequivocal intention on the part of 048835 to waive what on its face appears to be a significant and consequential term of the Supply Agreement. Further, we have the

uncontradicted statement of Mr. Yaffe that he raised the issue of the shortfalls with Mr. Fielding in 2012-2013. These realities, coupled with the clear language of Section 13 of the Supply Agreement, dictate that the Moving Parties cannot succeed on their second ground. I now move on to the third ground raised by the Moving Parties.



**Limitation of Actions**

[59] Finally, the Moving Parties argue that 048835 has no entitlement to enforce any breaches under the Supply Agreement prior to June 23, 2014 by operation of Section 5(1)(a) of the **Act.**

[60] Section 5 of the **Act** stipulates as follows:

> "5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered....."

As previously noted, the management of 048835 was aware, following the expiration of each year during the term of the Supply Agreement, that they had not received the minimum 4000 tons contracted for thereunder for that year (paragraph 54). On the basis of Section 5(1)(a), the Moving Parties argue that, as 048835 was aware of the shortfalls in all prior periods by March 2014, its claim for damages under the Action must be limited to the short falls that occurred in the March 1, 2014 – February 28, 2015 and March 1, 2015 – February 28, 2016 years.

[61] In the recent decision of the Court of Appeal in **Province of New Brunswick v. Grant Thornton, et al.**, 2020 NBCA 18, former Chief Justice Drapeau noted in paragraph 99:

> ".... For s. 5(1)(a) to be in play, the defendant must establish the plaintiff knew or ought reasonably to have known the facts that gave rise or "gave

> birth" to the cause of action or claim more than two years before the action was commenced."

He described the applicable standard in paragraph 7 of the decision as follows:

> ".... the two-year limitation period.... does not begin to run until the claimant has discovered he or she has a claim. This means the two-year limitation period begins to run the day after the plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy...."



[62] Further, caselaw is clear, where a party to a contract fails to perform a periodic performance obligation thereunder, each individual failure to perform constitutes a new breach which triggers the potential application of a separate limitation period – see **Pickering Square Inc. v. Trillium College Inc.**, 2016 ONCA 179, **Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.**, 2017 ABQB 491, **Nygard International Partnership v. Hudson's Bay Company**, 2018 ONSC 5143, **1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.**, 2015 ONSC 2664, **Sungard Availability Services (Canada) Ltd. v. ICON Funding ULC**, 2011 ONSC 7367 and **Canadian Natural Resources Ltd. v. Jensen Resources Ltd.**, 2013 ABCA 399.

[63] This jurisprudence, coupled with the direction from our Court of Appeal in **Grant Thornton**, tell us that, if the claim of 048835 under the Action was grounded solely in breach of 4000-ton minimum supply commitment during each year of the term of the Supply Agreement, the arguments of the Moving Parties would prevail. The record before the Court is clear; 048835 was aware in March 2014 there had been a significant shortfall in the minimum supply commitment under the Supply Agreement in each of the first three years of the term thereof. In other words, to employ the language from **Grant Thornton**, 048835 was aware of facts that conferred a legally enforceable right to a remedy in respect of a breach that had occurred in each such year.

[64] However, the grounds for the Action set out in 048835's Statement of Claim are framed more broadly. Paragraphs 5-10 of the Statement of Claim reads as follows:

"5. By way of a Supply Agreement dated February 28, 2011 (the "Agreement"), it was agreed by the Plaintiff and the Defendant that the Defendant would supply all loose cardboard being collected in segregated loads from the operations of Dominion Refuse collectors and from the operations of the Defendants and any affiliates or subsidiaries of the Defendant and its partners and that the Plaintiff would buy this product at the agreed price.

6. It was a term of the Agreement that the purchase price of the product would be the prevailing OBM yellow sheet price converted to Canadian dollars, in short tons, at a rate of New England high minus $80.00.

7. It was agreed by the Plaintiff and the Defendant that the term of the Agreement would be for a period of five years commencing on the date that the Agreement was executed.

8. It was agreed that the Plaintiff would be the exclusive recycler of corrugated loose cardboard for the Defendant in the southern part of the Province of New Brunswick. The Defendant agreed that during the term of the Agreement that it would not in any manner whatsoever carry on or be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit any of their names to be used or employed by any person engaged in or concerned with or interested in any business the same or similar to or competitive with the business being carried on by the Plaintiff within the Saint John service area of the Defendant.

9. The Defendant agreed to supply and sell a minimum of 4,000 tons of product per year to the Plaintiff.

10. In breach of this Agreement, the Plaintiff had a shortfall in the product supplied to the Plaintiff in the amount of 9,463.92 tons."

[65] As set out in the above passage, the Statement of Claim identifies the Supply Agreement, defines it and then details its operative terms in paragraphs 5-9. Paragraph 10 then sets up a claim for damages that are quantified on the basis of the identified annual shortfalls. The appearance of the upper-case previously-defined term "Agreement" in the phrase "In breach of this Agreement" in paragraph 10 suggests it was intended to refer globally to the operative terms of the Supply Agreement identified

in paragraphs 5-9. In other words, it constitutes a claim for damages for breach of the Supply Agreement which is then calculated based on the stated shortfalls.

[66] Counsel for the Moving Parties argued forcefully that the Statement of Claim should be treated solely as a claim for relief for breach of the minimum annual supply commitment. By reason of the foregoing observations, I am unable to accept this position. In arriving at this determination, I am also mindful of the direction from our Court of Appeal that, in the event of any ambiguity or uncertainty, limitation provisions are to be interpreted in a manner which permits otherwise valid claims to proceed. – see **Dupuis v. City of Moncton**, 2005 NBCA 47, at paragraph 20. It follows logically that the application of limitation provisions to a factual narrative before the Court should be interpreted in a similar manner. In other words, absent a clear record, a party should not be deprived of their "day in court" on the basis of a limitation argument.



[67] This becomes relevant because the record reflects that, in the course of a December 20, 2017 discovery, Mr. Dubblestyne confirmed that the Partnership breached the exclusivity provisions set out in Section 8 of the Supply Agreement during the term thereof (December 6, 2018 Affidavit of Mr. Yaffe, Exhibit "O"). There is no record of 048835 having been aware of such breach prior to December 20, 2017. So where does that leave us?

[68] I accept that the Action constitutes a claim for damages for breach of the Supply Agreement, including the minimum 4000-ton annual supply commitment and the exclusivity provisions. The fact that the damages claimed were limited to the amount of the shortfall – they could potentially be higher / lower depending upon the quantum of cardboard available – does not detract from that reality. However, consistent with my comments in paragraph 34, I remain at a loss to understand why counsel for 048835 did not seek leave to amend his pleadings to clarify this reality at the December 2018 hearing at the same time as counsel for Fero Waste was seeking leave to amend its

Statement of Defense and Cross-Claim. This issue was specifically discussed by the parties with the Court at that time.

[69] Regardless, the record reflects that 048335 had no knowledge of the breach of the exclusivity provisions until December 20, 2017. Hence, we have long-standing knowledge of the breach of the minimum supply commitment, but no knowledge of the breach of the exclusivity provisions until after the Action was commenced. Exclusivity provisions are key terms in any supply agreement – there may be practical reasons why a minimum supply commitment is not respected, including force majeure, impossibility, lack of supply, etc., however, breaches of exclusivity provisions generally result from deliberate choice

[70] Viewed through the lens of the "discoverability test", it is readily apparent that there were material facts (breach of the exclusivity provisions) that confer a legally enforceable right to a remedy on 048835 unknown to it pre-December 20, 2017. This reality cannot operate to save a claim for breach of the minimum supply commitment that is otherwise statute-barred by operation of the Act. However, it is logical that the expiration of a limitation period for one cause of action cannot operate as a bar for a separate cause arising out of the same facts. Consequently, 048835 is entitled to proceed with the Action in relation to the alleged breach of the exclusivity provisions and in respect of the shortfalls that occurred in the March 1, 2014 – February 28, 2015 and March 1, 2015 – February 28, 2016 years. However, its claim for damages for breach of the minimum supply commitment in each of the first three years of the term of the Supply Agreement (the cumulative period March 1, 2011 – February 28, 2014) is statute-barred by operation of Section 5(1)(a) of the Act.

[71] In closing, I must comment briefly on Section 6 of the Act. Counsel for 048835 suggested that the "continuous act or omission" language of that Section could operate to extend the limitation period otherwise of application pursuant to Section 5(1)(a). A review of the Ontario Court of Appeal's Decision in **Pickering Square** (paragraph 62)

and Justice Christie's decision in **Vallis v. The Estate of Adrian Gratwick**, 2018 NBQB 81, make it clear that Section 6 is not applicable to the circumstances of this case. The breach of the minimum supply commitment was a discrete event specific to each year in question. In other words, the default came into existence on February 28, 2019 of that year and could not thereafter be cured because it was time specific. In these circumstances, it cannot be regarded as ongoing or continuous and Section 6 of the Act has no application thereto.



**Disposition**

[72] By reason of the foregoing, the Motions are hereby dismissed in all respects, save and except that 048835's claim for damages for breach of the minimum supply commitment in each of the first three years of the term of the Supply Agreement is hereby declared to be statute-barred. This proceeding has been lengthy and has generated an extensive record. All parties achieved some success, but 048835 has been most successful. However, as noted, its decisions throughout the course of this matter have served to both lengthen and complicate the issues before the Court. Taking all of this into account, costs of $500.00 are ordered to be paid by each of the Moving Parties to 048835.

Mr. Justice Darrell J. Stephenson
Court of Queen's Bench – Trial Division

# Tab 2

2020 CarswellNB 526
New Brunswick Court of Appeal

Fero Waste & Recycling Inc. v. 048835 N.B. Inc.

2020 CarswellNB 526, 2020 CarswellNB 527, 330 A.C.W.S. (3d) 182

# FERO WASTE & RECYCLING INC. (INTENDED APPELLANT) and 048835 N.B. INC., a corporation doing business under the name of SAINT JOHN RECYCLING (INTENDED RESPONDENT) and FERODOMINION, a partnership, 655228 N.B. INC. and 655227 N.B. INC. (INTENDED RESPONDENTS)

FERODOMINION, a partnership, 655228 N.B. INC. and 655227 N.B. INC. (INTENDED APPELLANTS) and FERO WASTE & RECYCLING INC. (INTENDED APPELLANT) and 048835 N.B. INC., a corporation doing business under the name of SAINT JOHN RECYCLING (INTENDED RESPONDENT)

French J.A.

Heard: September 14, 2020
Judgment: November 12, 2020
Docket: 65-20-CA, 66-20-CA

Proceedings: refusing leave to appeal *Saint John Recycling v. FERODOMINION, ET AL.* (2020), 2020 NBBR 127, 2020 CarswellNB 446, 2020 CarswellNB 373, 2020 NBQB 127, Darrell J. Stephenson J. (N.B. Q.B.)

Counsel: Stephen J. Hutchison, Q.C., for Fero Waste & Recycling Inc.
Donald V. Keenan, for 048835 N.B. Inc., Saint John Recycling
M. Morley Rinzler, for FeroDominion and 655228 N.B. Inc.
Ryan James MacDonald, for 655227 N.B. Inc.

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

**Headnote**

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — Miscellaneous

Plaintiff and defendant partnership, which was made up of other corporate defendants, entered into supply agreement in February 2011 for five-year term — Supply agreement provided that partnership would not, during term of agreement, sell to any other party other than plaintiff, and that partnership agreed to supply and sell minimum of 4,000 tons of product to plaintiff per year — Plaintiff maintained that there was shortfall each year during term of supply agreement, and

commenced action for damages against partnership for breach of supply agreement in June 2016 — Defendants claimed that plaintiff had no entitlement to enforce any breaches under supply agreement prior to June 2014 by operation of s. 5(1)(a) of Limitation of Actions Act — Defendants brought motions for summary judgment to dismiss plaintiff's action — Motions granted in part — Plaintiff was entitled to proceed with action in relation to alleged breach of exclusivity provisions and in respect of shortfalls that occurred after March 2014 — Plaintiff's other claims for breach of minimum supply commitment in first three years of supply agreement were statute-barred — Record was clear that plaintiff had known in March 2014 that there had been significant shortfall in minimum supply commitment under supply agreement, but had not known of breach of exclusivity provisions until December 2017 — Expiration of limitation period for one cause of action could not operate as bar for separate cause that arose out of same facts — Motions for leave to appeal dismissed.

Civil practice and procedure --- Parties — Standing

Plaintiff and defendant partnership, which was made up of other corporate defendants, entered into supply agreement in February 2011 for five-year term — Supply agreement provided that partnership would not, during term of agreement, sell to any other party other than plaintiff, and that partnership agreed to supply and sell minimum of 4,000 tons of product to plaintiff per year — On day after term of supply agreement expired, plaintiff closed on transaction to sell all assets used in its recycling business to third party S Inc. — Plaintiff maintained that there was shortfall each year during term of supply agreement, and commenced action for damages against partnership for breach of supply agreement in June 2016 — Defendants claimed that plaintiff had no title or interest in supply agreement on date that action was commenced and therefore possessed no standing to commence action — Shareholder for defendants provided evidence indicating that defendants had sold assets of partnership, including supply agreement and certain other assets, to third party R Inc. in early 2012 — Defendants brought motions for summary judgment to dismiss plaintiff's action — Motions granted in part on other grounds — Plaintiff had necessary standing to bring action — Parties had never intended for supply agreement to be part of S Inc. transaction, and there was no record of any third party relying on S Inc. agreement as executed or taking action on basis that S Inc. had become owner of supply agreement or any residual right thereunder — Supply agreement had terminated day before S Inc. transaction closed, meaning that regardless of which entity held residual right of recovery under supply agreement, partnership had no ongoing performance obligations in relation to it — There was no change in reality of S Inc. transaction and defendants could not claim status of impacted third-parties — Motions for leave to appeal dismissed.

Contracts --- Performance or breach — Time of performance — Extension and waiver

Plaintiff and defendant partnership, which was made up of other corporate defendants, entered into supply agreement in February 2011 for five-year term — Supply agreement provided that partnership would not, during term of agreement, sell to any other party other than plaintiff, and that partnership agreed to supply and sell minimum of 4,000 tons of product to plaintiff per year — Plaintiff maintained that there was shortfall in product each year of term of supply agreement,

and commenced action for damages against partnership for breach of supply agreement in June 2016 — Defendants claimed that plaintiff had waived its rights and was no longer able to enforce supply agreement — Defendants brought motions for summary judgment to dismiss plaintiff's action — Motions granted in part on other grounds — Section 13 of supply agreement stated that failure of one party to require performance by other party would in no way affect right to require performance at any time thereafter — Law with respect to implied waiver was clear that intention to relinquish right in question had to be unequivocal and conscious — There was no evidence of any intention on plaintiff's part to abandon its right to enforce terms of supply agreement — Motions for leave to appeal dismissed.

MOTIONS for leave to appeal from judgment reported at *Saint John Recycling v. FERODOMINION, ET AL.* (2020), 2020 NBQB 127, 2020 CarswellNB 373, 2020 NBBR 127, 2020 CarswellNB 446 (N.B. Q.B.).

***French J.A.:***

1 The motions for leave to appeal are dismissed. Reasons to follow.

*Motions dismissed.*

2020 CarswellNB 650
New Brunswick Court of Appeal

Fero Waste & Recycling Inc. v. 048835 N.B. Inc.

2020 CarswellNB 650, 2020 CarswellNB 651, 331 A.C.W.S. (3d) 486

# FERO WASTE & RECYCLING INC. (INTENDED APPELLANT) and 048835 N.B. INC., a corporation doing business under the name of SAINT JOHN RECYCLING (INTENDED RESPONDENT) and FERODOMINION, a partnership, 655228 N.B. INC. and 655227 N.B. INC. (INTENDED RESPONDENTS)

FERODOMINION, a partnership, 655228 N.B. INC. and 655227 N.B. INC. (INTENDED APPELLANTS) and FERO WASTE & RECYCLING INC. (INTENDED APPELLANT) and 048835 N.B. INC., a corporation doing business under the name of SAINT JOHN RECYCLING (INTENDED RESPONDENT)

French J.A.

Heard: September 14, 2020
Judgment: November 12, 2020
Docket: 65-20-CA, 66-20-CA

Proceedings: reasons in full to *Fero Waste & Recycling Inc. v. 048835 N.B. Inc.* (2020), 2020 CarswellNB 527, 2020 CarswellNB 526, French J.A. (N.B. C.A.); refusing leave to appeal *Saint John Recycling v. FERODOMINION, ET AL.* (2020), 2020 NBBR 127, 2020 CarswellNB 446, 2020 CarswellNB 373, 2020 NBQB 127, Darrell J. Stephenson J. (N.B. Q.B.)

Counsel: Stephen J. Hutchison, Q.C., for Fero Waste & Recycling Inc.
Donald V. Keenan, for 048835 N.B. Inc., Saint John Recycling
M. Morley Rinzler, for FeroDominion and 655228 N.B. Inc.
Ryan James MacDonald, for 655227 N.B. Inc.

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

**Headnote**

Contracts --- Rectification or reformation — Equitable jurisdiction of court

Plaintiff and defendant partnership, which was made up of other corporate defendants, entered into supply agreement in February 2011 for five-year term — Supply agreement provided that partnership would not, during term of agreement, sell to any other party other than plaintiff, and that partnership agreed to supply and sell minimum of 4,000 tons of product to plaintiff per year — Plaintiff maintained that there was shortfall in product each year of term of supply agreement, and

commenced action for damages against partnership for breach of supply agreement in June 2016 — Defendants claimed that plaintiff had waived its rights and was no longer able to enforce supply agreement — Defendants brought partially successful motions for summary judgment to dismiss plaintiff's action — Motion judge found that rectification was justifiable on record, but did not make rectification order as there was no proper request made — Defendants brought motions for leave to appeal — Motions dismissed — There was no reason to doubt motion judge's disposition based on his finding respecting entitlement to rectification — Motion judge's determination that plaintiff was entitled to rectification was itself sufficient to either deny or at least adjourn claim that trial was unnecessary — At minimum, motion judge's determination recognized that there was mistake which plaintiff had ability to remedy and secure right to pursue action at trial.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — Miscellaneous

Plaintiff and defendant partnership, which was made up of other corporate defendants, entered into supply agreement in February 2011 for five-year term — Supply agreement provided that partnership would not, during term of agreement, sell to any other party other than plaintiff, and that partnership agreed to supply and sell minimum of 4,000 tons of product to plaintiff per year — Plaintiff maintained that there was shortfall each year during term of supply agreement, and commenced action for damages against partnership for breach of supply agreement in June 2016 — Defendants claimed that plaintiff had no entitlement to enforce any breaches under supply agreement prior to June 2014 by operation of s. 5(1)(a) of Limitation of Actions Act — Defendants brought partially successful motions for summary judgment to dismiss plaintiff's action — Motion judge found that plaintiff was entitled to proceed with action in relation to alleged breach of exclusivity provisions and in respect of shortfalls that occurred after March 2014, but that other claims for breach of minimum supply commitment in first three years of supply agreement were statute-barred — Motion judge found that record was clear that plaintiff had known in March 2014 that there had been significant shortfall in minimum supply commitment under supply agreement, but had not known of breach of exclusivity provisions until December 2017 — Motion judge found that expiration of limitation period for one cause of action could not operate as bar for separate cause that arose out of same facts — Defendants brought motions for leave to appeal — Motions dismissed — There was no doubt as to correctness of motion judge's interpretation of Statement of Claim — Motion judge's reasons were accepted.

**Table of Authorities**

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

*AMEC Americas Ltd. v. HB Construction Co.* (2015), 2015 CarswellNB 316, 2015 CarswellNB 317, (sub nom. *HB Construction Co. v. Potash Corp. of Saskatchewan Inc.*) 1141 A.P.R. 137, (sub nom. *HB Construction Co. v. Potash Corp. of Saskatchewan Inc.*) 438 N.B.R. (2d) 137 (N.B. C.A.) — considered

*CUPE, Local 821 v. Vitalité Health Network* (2015), 2015 NBCA 3, 2015 CarswellNB 27, 2015 CarswellNB 28, (sub nom. *Canadian Union of Public Employees, Local 821 v. Vitalité Health Network (Zone 1B))* 1119 A.P.R. 158, (sub nom. *Canadian Union of Public*

*Employees, Local 821 v. Vitalité Health Network (Zone 1B))* 429 N.B.R. (2d) 158 (N.B. C.A.) — considered

*Canada (Attorney General) v. Fairmont Hotels Inc.* (2016), 2016 SCC 56, 2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 404 D.L.R. (4th) 201, [2017] 1 C.T.C. 149, 58 B.L.R. (5th) 171, 2016 D.T.C. 5135, [2016] 2 S.C.R. 720 (S.C.C.) — considered

*Debreceni et al v. Outlet Co.* (1986), 784 F.2d 13 (U.S. C.A. 1st Cir.) — considered

*Hart Stores Inc. v. 3409 Rue Principale Inc.* (2020), 2020 NBCA 49, 2020 CarswellNB 326, 2020 CarswellNB 327, 18 R.P.R. (6th) 1 (N.B. C.A.) — considered

*Juliar v. Canada (Attorney General)* (1999), 1999 CarswellOnt 2970, 99 D.T.C. 5743, 46 O.R. (3d) 104, 49 B.L.R. (2d) 243, [2000] 2 C.T.C. 464, 103 O.T.C. 294 (Ont. S.C.J. [Commercial List]) — followed

*Juliar v. Canada (Attorney General)* (2000), 2000 CarswellOnt 3518, (sub nom. *Attorney General of Canada v. Juliar)* 2000 D.T.C. 6589, (sub nom. *Canada (Attorney General) v. Juliar)* 50 O.R. (3d) 728, 8 B.L.R. (3d) 167, 136 O.A.C. 301, [2001] 4 C.T.C. 45 (Ont. C.A.) — referred to

*Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 (Eng. V.-C.) — considered

*Persimmon Homes Ltd. v. Woodford Land Ltd.* (2011), [2011] EWHC 3109 (Eng. Ch. Div.) — considered

*Shewchuk v. Blackmont Capital Inc.* (2016), 2016 ONCA 912, 2016 CarswellOnt 18794, 35 C.C.E.L. (4th) 1, 404 D.L.R. (4th) 512 (Ont. C.A.) — considered

*Viacom International Inc. v. Tandem Productions Inc.* (1974), 368 F. Supp. 1264 (U.S. Dist. Ct. S.D. N.Y.) — considered

**Statutes considered:**

*Limitation of Actions Act*, S.N.B. 2009, c. L-8.5

Generally — referred to

s. 5(1) — considered

**Rules considered:**

*Rules of Court*, N.B. Reg. 82-73

R. 1.02.1 [en. N.B. Reg. 2013-1] — considered

R. 1.03(2) — considered

R. 22 — considered

R. 62.03(4) — considered

REASONS IN FULL to judgment reported at *Fero Waste & Recycling Inc. v. 048835 N.B. Inc.* (2020), 2020 CarswellNB 526, 2020 CarswellNB 527 (N.B. C.A.), dismissing motions for leave to appeal decision denying defendants' motions for summary judgment.

***French J.A.:***

 

## I. Introduction

1 The defendants to an action seek leave to appeal the decision denying their motions for summary judgment. Both motions seek an order dismissing the action in its entirety, under Rule 22 of the *Rules of Court*.

2 In the underlying action, the plaintiff, 048835 N.B. Inc. (carrying on business as Saint John Recycling), claims the defendants failed to meet their contractual obligation to supply cardboard, for use in its recycling business, during every year of a 5-year Supply Agreement, which ran from February 28, 2011 to February 28, 2016.

3 At issue in the motions for leave is the judge's denial of the defendants' claim that there is no genuine issue requiring a trial of the action because:

> 1. Saint John Recycling did not have the right to commence the action in June 2016, since, before it had done so, on February 29, 2016, it sold the bulk of the assets used in its recycling business, including the right to commence the action for breach of the Supply Agreement, to a non-party to the litigation; and
>
> 2. alternatively, all claims relating to breaches that occurred prior to June 23, 2014 are barred by s. 5(1) of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5.

4 The two motions for summary judgment were filed in September 2018. The defendants claimed the Asset Purchase Agreement between Saint John Recycling and the non-party purchaser, Shred Guard Inc., transferred to Shred Guard the right to sue for breach of the, by then, expired Supply Agreement.

5 In its response, Saint John Recycling denied the defendants' interpretation of the Asset Purchase Agreement. It maintained its residual interest in the Supply Agreement (the chose in action) was not assigned to Shred Guard, claiming it was one of the "Excluded Assets" under the agreement. Shred Guard supported this interpretation of the Asset Purchase Agreement and indicated that acquiring an interest in the expired Supply Agreement was not part of their agreement.

6 The initial hearing of the motions (in December 2018) was adjourned until May 2019. In the interim, Saint John Recycling and the Shred Guard executed an Addendum to the Asset Purchase Agreement; it was made effective as of February 29, 2016, the date of the Asset Purchase Agreement. It provides:

> For clarity, *and without limiting the generality of the definition of Excluded Assets*, the chose in action arising from the Supply Agreement dated February 28, 2011 made between the Vendor and FeroDominion, a partnership between Fero Waste & Recycling Inc. and 655227

N.B. Inc. and 655228 N.B. Inc. is specifically included as an Excluded Asset under the Agreement.

[Emphasis added.]

7 The hearing was again adjourned to permit examination for discovery on the Addendum. It continued in December 2019, and again in February 2020.

8 During these appearances, the parties' submissions regarding the right to pursue the action evolved; they included whether: (1) the Asset Purchase Agreement assigned the chose in action regarding the Supply Agreement to Shred Guard; (2) any error in the Asset Purchase Agreement could be rectified by court order; and/or (3) the Addendum could retroactively "clarify" the Asset Purchase Agreement, notwithstanding the defendants' intervening interest in its original, unclarified/unamended version.

9 The motion judge rejected the defendants' request for an order dismissing the action based on the claim Saint John Recycling lacked the capacity to bring the action. He:

1. interpreted the Asset Purchase Agreement as transferring the right to sue for breach of the Supply Agreement to Shred Guard, albeit unintentionally;

2. found that: (i) the chose in action was not part of the assets to be transferred under the parties' agreement; (ii) the error in the Asset Purchase Agreement could be rectified by court order to make it accord with that agreement, based on the test set out for rectification in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720 (S.C.C.); but (iii) the absence of a proper proceeding to claim rectification precluded the making of such an order; and

3. decided the Addendum Agreement was effective to validate, retroactively, that the Asset Purchase Agreement accorded with the parties' actual agreement — that chose in action was not one of the assets to be transferred.

10 While the availability of rectification in the circumstances had been an object of the parties' submissions, and was addressed by the judge, Saint John Recycling had not brought a discrete proceeding to request rectification. The judge explained that the closest thing to a direct request was found in Saint John Recycling's post-hearing submission. It noted that, if the court did not accept its interpretation of the Asset Purchase Agreement, either as originally drafted or as clarified by the Addendum, the court had "all the facts needed to grant a rectification order."

11 In their motions for leave to appeal, the defendants maintain the judge erred in law, in relation to Saint John Recycling's right to pursue the action, by both: (1) deciding the Addendum permitted the parties to effectively self-rectify the Asset Purchase Agreement, retroactively, despite their intervening interest; and (2) concluding that, on the record, rectification was available to correct

 

an error in the Asset Purchase Agreement, and an order could have issued but for the lack of a proper request.

12 There is no challenge to the motion judge's finding that Saint John Recycling and Shred Guard intentionally signed and closed the Asset Purchase Agreement after the Supply Agreement had expired, and that the ongoing obligations of the defendants to supply, and of Saint John Recycling to buy, had ended. His determination that Saint John Recycling did not intend to sell, and Shred Guard did not intend to acquire, the right to sue for breach of the Supply Agreement is not challenged either. It is not disputed that their post-contract/subsequent conduct is consistent with Shred Guard having no interest in the chose in action.

13 I dismissed the motions for leave, with reasons to follow. These are my reasons. In summary, while the intersection between the legal principles relating to court-ordered rectification and the ability of contracting parties to establish the effective date for their obligations, including retroactively, is novel and of sufficient importance to weigh heavily in favour of granting leave, I do not doubt the correctness of the judge's decision to deny summary judgment on the basis that there was no need for a trial since Saint John Recycling lacked, irreparably, the ability to maintain the action. In these circumstances, leave to appeal would not promote the just, most expeditious, least expensive and most proportionate determination of this litigation on the merits.

14 What follows also sets out my reasons for dismissing the motions for leave to appeal the judge's decision to partially deny summary judgment based on the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5. He dismissed the action, as it relates to breaches of the minimum supply obligation during the first three years of the Supply Agreement, but he refused to do so in relation to the alleged breaches of the obligation to sell exclusively to Saint John Recycling.

## II. Background

15 The three defendants in this proceeding, Fero Waste & Recycling Inc., 655227 N.B. Inc. and 655228 N.B. Inc. (collectively, the "Defendants"), were the partners of FeroDominion when the Supply Agreement was formed in 2011. There were soon changes that are worth noting, even though they do not directly affect the issues in these motions. In January 2012, Fero Waste & Recycling Inc. ceased to be a partner, and FeroDominion became A.P.D.R. Enterprises, a partnership of 655227 N.B. Inc. and 645615 New Brunswick (2011) Ltd. (a successor to 655228 N.B. Inc. by amalgamation). In addition, it appears that, later in 2012, the partnership sold the refuse business to Royal Environmental Inc.

### *A. The Supply Agreement*

16 On February 28, 2011, FeroDominion acquired the refuse business of Dominion Refuse Collectors. The Supply Agreement was born out of this transaction.

 

17 Until Dominion Refuse Collectors was acquired by FeroDominion, Dominion Refuse Collectors and Saint John Recycling were related enterprises. During the time they were related, Dominion Refuse Collectors supplied Saint John Recycling with cardboard for use in its recycling business. The principals of Saint John Recycling and Dominion Refuse Collectors made efforts to sell both businesses together; however, they were not successful.

18 When FeroDominion agreed to buy only the business of Dominion Refuse Collectors, it was a condition of the agreement that FeroDominion enter into a separate 5-year contract for the continuation of the supply of cardboard to Saint John Recycling.

19 The Supply Agreement between FeroDominion, as supplier, and Saint John Recycling, as buyer, was entered into on February 28, 2011 for a term that ended on February 28, 2016.

20 At the hearing of the Defendants' motions, the parties offered somewhat conflicting evidence regarding the circumstances leading to para. 8 of the Supply Agreement. It sets out the Defendants' performance obligation, which forms the basis of Saint John Recycling's action:

> The Seller shall not during the term of this agreement, sell to any other party other than the Buyer the Product or any other product which is the same or similar to the Product and is being recycled for a substantially similar purpose as the Product. The Seller hereby agrees to supply and sell a minimum of 4,000 tonnes of Product per year to the Buyer.
>
> [Emphasis added.]

21 Early in the term of the Supply Agreement, Saint John Recycling sought an extension of the agreement; it was not successful. Near the end of the agreement's term, Saint John Recycling pursued the sale of its business/assets.

22 Before it entered into the agreement with Shred Guard for the sale of the bulk of its assets, Saint John Recycling advised the Defendants (or their successors, which were supplying cardboard under the Supply Agreement) that it intended to seek recovery of its losses arising from the breach of the Supply Agreement.

### *B. The sale to Shred Guard and the Asset Purchase Agreement*

23 An uncontested finding of the motion judge was that, prior to the formation of the Asset Purchase Agreement, Shred Guard knew of the Supply Agreement, and that it was to expire before the transaction would close. As was explained at discovery, Saint John Recycling "had an obligation to finish [the Supply Agreement [...]. And [...] could sell the assets after it was finished." The judge noted the parties intentionally timed the closing to occur after the Supply Agreement expired, and there would be no ongoing performance obligations under that agreement.

24 The Asset Purchase Agreement defines "Purchased Assets" as "all of the assets and property owned and *used* by the Vendor *or held* by it *for use in, or in respect of the operation of, the Business*, including, without limitation *other than the Excluded Assets*, the following [...]" (emphasis added). The list that follows regarding Purchased Assets does not expressly refer to a "chose in action" as a distinct genre of property.

25 The definition of "Excluded Assets" is:

> "Excluded Assets" — means the following property and assets of the Vendor pertaining to the Business:
>
> i. All cash, bank balances [...];
>
> ii. All the corporate, financial and other records [...] not pertaining to the Business;
>
> iii. Accounts Receivable;
>
> iv. Any real property of the Vendor;
>
> v. The post office box maintained [...]; and
>
> vi. The computer and filing cabinets [...].
>
> [Emphasis added.]

26 "Accounts Receivables" is defined as "*all accounts receivable*, trade notes, notes receivable, book debts, unbilled receivables *and other debts due or accruing due to the Vendor in connection with the Business as at the close of business on the Closing Date*" (emphasis added).

27 Before the motion judge, the Defendants maintained the chose in action was caught by the definition of Purchased Assets. Saint John Recycling and Shred Guard maintained any amount recoverable from the Defendants for breach of the Supply Agreement was a debt and caught by the underlined words in the expanded definition of Accounts Receivables. The record does not indicate there was any assertion that the chose in action regarding the expired Supply Agreement could not be viewed as "held [...] for use in, or in respect of the operation of, the Business."

### *C. The action for breach of the Supply Agreement*

28 On May 4, 2016, Saint John Recycling demanded payment of $757,103 for breach of the Supply Agreement. This was the amount of revenue claimed to have been lost from the failure to receive the minimum amount of 4,000 tons of cardboard per year.

29 In June 2016, Saint John Recycling commenced its action. In or shortly after August 2016, each of the Defendants filed a Statement of Defence.

 

30 In September 2018, after the Defendants had learned of the Asset Purchase Agreement with Shred Guard, they brought their motions for summary judgment.

31 In its reply to the Defendants' motions, Saint John Recycling advanced the following position:

> The claim for the shortfall in the supply of cardboard pursuant to the supply agreement was excluded from the sale of assets by defining Accounts Receivable to include unbilled receivables and other debts and or accruing to the vendor or in connection with the business as at the close of business on the closing date.
>
> [Emphasis added.]

32 It also filed a supporting affidavit from a representative of Shred Guard:

> 4. It was agreed between the parties that [Saint John Recycling] would retain its accounts receivable which included "unbilled receivables and other debts or accruing to [Saint John Recycling] in connection with the Business.
>
> 5. Included within the unbilled receivables and other debts due or accruing to [Saint John Recycling] in connection with the Business is anything owing to [Saint John Recycling] pursuant to a Supply Agreement between [Saint John Recycling] and FeroDominion, a partnership of [...].
>
> [Emphasis added.]

33 As noted and reproduced above, following an adjournment, Saint John Recycling and Shred Guard executed an Addendum to the Asset Purchase Agreement.

## III. Analysis

34 The Defendants maintain their case for leave to appeal is compelling, since, they assert, all factors identified in Rule 62.03(4) exist. This Rule guides the exercise of the Court's discretion when considering whether to grant leave:

> (4) In considering whether or not to grant leave to appeal, the judge hearing the motion ***may consider*** the following:
>
> (a) whether there is a ***conflicting decision*** by another judge or court upon a question involved in the proposed appeal;
>
> (b) whether he or she ***doubts the correctness*** of the order or decision in question; or
>
> (c) whether he or she considers that the proposed appeal involves matters of ***sufficient importance***.

  

[Emphasis added.]

(4) Pour décider s'il accordera ou non l'autorisation d'appel, le juge qui entend la motion peut prendre en considération ce qui suit:

a) l'existence d'une ***décision contraire*** d'un autre juge ou d'un tribunal sur une question soulevée dans le projet d'appel;

b) le ***bien-fondé*** de l'ordonnance ou de la décision en question;

c) le fait que le projet d'appel soulève des questions d'une ***importance suffisante***.

[Les caractères gras et l'italique sont de moi.]

35 While the existence of one, or all, of the factors may weigh in favour of granting leave, this does not itself establish entitlement to leave. As explained by Richard J.A. (as he then was) in *AMEC Americas Ltd. v. HB Construction Co.* (2015), 438 N.B.R. (2d) 137, [2015] N.B.J. No. 169 (N.B. C.A.) (QL):

> The wording of Rule 62.03(4) makes it clear that the determination whether or not to grant leave to appeal is an exercise of a discretionary power. Before the rule was amended to its current form, it used to provide that leave to appeal "shall not be granted" unless one of three preconditions were satisfied. Even then, caselaw established that even if one of these were satisfied, or, for that matter, even if all three were satisfied, the motion judge retained a residual discretion not to grant leave [...] The current wording of the Rule, however, eliminates the need to satisfy any precondition, and makes it abundantly clear that what were once preconditions are now considerations to be weighed in the exercise of the discretionary power to grant leave to appeal. [para. 13]

36 The discretion to grant leave to appeal ought also to be exercised by having regard to Rules 1.02.1 and 1.03(2); that is, with an eye to the just, least expensive, most expeditious and most proportionate determination of the matter on the merits (see *CUPE, Local 821 v. Vitalité Health Network*, 2015 NBCA 3, 429 N.B.R. (2d) 158 (N.B. C.A.), at paras. 55-57).

37 I will first address my reasons for dismissing the motions for leave in relation to the judge's rejection of the Defendants' claim that Saint John Recycling did not possess the right to pursue the action for breach of the Supply Agreement. I will then address his decision to partially reject the Defendants' request to dismiss the claims arising from the first three years of the Supply Agreement, based on the *Limitation of Actions Act*.

### *A. The Right to Commence the Action*

38 The motion judge's decision turned on his concluding the Addendum was effective to cure, retroactively, what he accepted was a mistake in the Asset Purchase Agreement that rendered it inconsistent with the parties' agreement.

39 However, before addressing the Addendum, he sets out his rationale for deciding the lack of a proper request for rectification precluded such an order, notwithstanding his determination that the evidence established Saint John Recycling was entitled to rectification of the Asset Purchase Agreement.

40 In relation to the judge's determinations regarding both the Addendum and rectification, the Defendants submit he misapplied the principles applicable to rectification set out by the Supreme Court in *Canada (Attorney General) v. Fairmont Hotels Inc.*.

41 Like the motion judge, I will address the issue of court-ordered rectification before the issue of the Addendum. A review of the issues related to the former aids in an appreciation of the Defendant's challenge to the latter.

*(1) The judge's determination that rectification is available*

42 While the defendants do not dispute that the evidence permitted the motion judge to find there was no intent to transfer the chose in action regarding the Supply Agreement to Shred Guard, they emphatically maintain the evidence respecting their discussions regarding the Supply Agreement lacked the specificity to permit the judge to conclude they had an agreement with the level of certainty and clarity required to satisfy the rigorous criteria for rectification set out in *Fairmont Hotels*. The judge expressly addressed this issue.

43 In *Fairmont Hotels*, the Supreme Court confirmed its earlier decisions regarding rectification. Most significantly, it put to rest any notion that rectification could be grounded in a bare common intention to achieve an inchoate goal or outcome. Specifically, Brown J., writing for the majority, rejected the expansive approach applied in the lower courts, which followed *Juliar v. Canada (Attorney General)*, [1999] O.J. No. 3554 (Ont. S.C.J. [Commercial List]) (QL) , aff'd [2000] O.J. No. 3706 (Ont. C.A.) (QL). As Brown J. said: "*Juliar* is irreconcilable with this Court's jurisprudence and with the narrowly confined circumstances to which this Court has restricted the availability of rectification" (para. 16) (see also "*Narrowing the Doctrine of Rectification in Canadian Law*" (2018) Canadian Business Law Journal, vol. 611, pp. 248-271).

44 As is not uncommon in such decisions, Brown J.'s review of the general principles of rectification began with a reference to *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 (Eng. V.-C.), at p. 375: "Courts of Equity do not rectify contracts; they may and do rectify instruments" (para. 13). Explaining that rectification is only available where the evidence establishes an agreement whose terms are "definite and ascertainable," Brown J. said:

  

> To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud. [para. 38]
>
> [Emphasis added.]

45 The Defendants maintain the absence of evidence of specific discussions or an express agreement to exclude the Supply Agreement, precluded the judge from finding there was "definite and ascertainable" agreement, as described in *Fairmont Hotels*. They submit he could not find there had been such an agreement in relation to the assets to be sold, based simply on his finding that the parties' agreement did not extend to the Supply Agreement.

46 I was not persuaded that I should doubt the correctness of the judge's determination rectification was justifiable on the record, including his conclusion that the Defendants' "third-party" interests were not such that they stood in the way of a rectification order.

47 This latter determination was not challenged in the motion for leave to appeal. However, the issue of third-party interests is relevant to rectification and it was central to the motion judge's determination regarding the ability of the Addendum to remedy the Asset Purchase Agreement.

48 The motion judge set out the principles applicable to third-party interests in relation to rectification by referring to the minority opinion in *Fairmont Hotels*. These well-established principles were not addressed in the majority opinion. As Abella J. explained:

> Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*, [1954] O.W.N. 822 (C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (H.C.J.), at p. 766, aff'd (1990), 72 O.R. (2d) 703 (C.A.): "[...] the proper test is whether the third party relied on the document as executed and took action based on that document". (See also McCamus, at p. 595; Spry, at pp. 630-31; *Kolias v. Owners: Condominium Plan 309 CDC* (2008), 440

 

A.R. 389 (C.A.); *Carlson, Carlson and Hettrick v. Big Bud Tractor of Canada Ltd.* (1981), 7 Sask. R. 337 (C.A.), at paras. 24-26.)

[para. 67]

49 In concluding the Defendants' interests were not a bar to the availability of rectification of the Asset Purchase Agreement, the motion judge said:

> Counsel for Fero Waste argued forcefully that the rights of the Partnership would be prejudiced if I did not hold 048835 and Shred Guard to the terms of the Shred Guard Agreement, because I would be depriving the Moving Parties of a defense. In my assessment, that is an overly broad categorization of what constitutes an impacted third-party right in the context of rectification.
>
> To begin, the Supply Agreement terminated the day before the Shred Guard Transaction closed so there was no continuing nexus between that transaction and the rights and obligations of the parties under the Supply Agreement. In other words, regardless of which entity (Shred Guard or 048835) held the residual right of recovery under the Supply Agreement, the Partnership had no further performance obligations thereunder on the effective date of the Shred Guard Transaction. Secondly, the record reflects no involvement by the Moving Parties with the Shred Guard Transaction or course of conduct undertaken by them in consequence thereof. The Moving Parties certainly have a right to defend the Action, but to claim a vested right to a specific defence grounded on poor legal drafting in a transaction in which they had no involvement, and did nothing in reliance upon, goes well beyond the scope of protected third-party rights. To employ the language from paragraph 67 of the Fairmont decision, the Moving Parties did not rely on the Supply Agreement as executed or take any action on the basis of same — in fact, they were not fully aware of this issue until I directed disclosure of the Shred Guard Agreement during the December 17, 2018 appearance. [paras. 28-29]
>
> [Some emphasis mine.]

*(2) The judge's determination regarding the Addendum Agreement*

50 According to the Defendants, the judge's determination regarding the Addendum impermissibly allowed Saint John Recycling and Shred Guard to self-rectify retroactively. While acknowledging parties are free to agree upon an effective date for their obligations that precedes the contract's formation, they maintain the law does not permit parties to retroactively change an existing agreement against the intervening interests of third parties, absent a court-ordered rectification. They argue the judge's line of reasoning does an end-run around rectification, as restrictively circumscribed by *Fairmont Hotels*, and the notion that only a court order for rectification can give a truly retrospective effect to a prior written document, as identified in

 

*Persimmon Homes Ltd. v. Woodford Land Ltd.*, [2011] EWHC 3109 (Eng. Ch. Div.). In *Persimmon Homes*, the court stated:

> Against this background, it is worth pausing to enquire why (as both parties agree) claims for rectification of the Agreement fall outside the scope of clause 18. I accept the submission of Mr McGhee QC for Woodford that the reason for this lies in the nature of the remedy sought. Rectification is a remedy that only the court can grant, and it is always discretionary in nature. Importantly, too, a decree of rectification has retrospective effect, with the consequence that the document in question "is to be read as if it had been originally drawn in its rectified form": see *Craddock Bros v. Hunt*, [1923] 2 Ch. 136 at 151 per Lord Sterndale MR and *Snell's Equity*, 32nd edition, para 16-027. This is a consequence that cannot be brought about by agreement between the parties or by the determination of an expert. It is something which it lies exclusively within the jurisdiction of the court to accomplish. [para. 21]
>
> [Emphasis added.]

51 The motion judge explicitly recognized and sought to reconcile, on the one hand, the equitable remedy of rectification and that "only the court can direct that a document be treated for all purposes as having been originally prepared in its rectified form," and, on the other, the "principle that parties are, subject to [certain] constraints, contractually free to regulate their dealings from whatever date they chose" (para. 39).

52 He noted the parties were unable to provide any Canadian authority on point, and reference was made to an article by Gerard McMeel, Q.C., titled "*Contracts: Rectification and Other Ways to Correct Mistakes*" (Thomson Reuters, Practical Law UK, 2019), and another by Jeffrey Kwall titled "*Backdating*" (Loyola University, Chicago USA, 2008). He also considered (mentioned in the Kwall article) *Debreceni et al v. Outlet Co.*, 784 F.2d 13 (U.S. C.A. 1st Cir. 1986); and *Viacom International Inc. v. Tandem Productions Inc.*, 368 F. Supp. 1264 (U.S. Dist. Ct. S.D. N.Y. 1974).

53 In "*Contracts: Rectification and Other Ways to Correct Mistakes*," McMeel canvasses three ways to correct a mistake in the written document to have it accord with the parties agreement: (1) construction of the document; (2) rectification; and (3) agreement between the parties. Indeed, where the goal is to correct a mistake in a document, construction/interpretation of the document and, alternatively, rectification, are typically pleaded together. Obviously, if the circumstances permit the resolution of the error by construction, a rectification order is unnecessary.

54 The judge concluded, "parties can only retroactively re-order their affairs contractually when no third-party rights are compromised."

55 Having made this determination, he then assessed whether the Defendants' interest was of the type that would "deprive [Saint John Recycling] and Shred Guard of the capacity to contractually

regulate the terms of the Shred Guard Transaction in the fashion which was always intended effective February 29, 2016." He concluded:

> [...] I have concluded that the reality is the Shred Guard Addendum validates the Shred Guard Transaction, as originally conceived and acted on by the parties thereto, must take precedence over the fact that giving retro-active effect to same will deprive the [Defendants] of the ability to erect an opportunistic defense grounded on poor legal drafting in a transaction to which they had no nexus and did nothing in reliance thereon. In these circumstances, to employ the language from the McMeel and Kwall articles previously referenced (paragraphs 36 and 39), there was no change in the reality of the Shred Guard Transaction and the [Defendants] cannot claim the status of impacted third-parties. [...] [para. 51]
>
> [Emphasis added.]

*(3) Exercise of discretion against granting leave in relation to the decision regarding the right to pursue the action*

56 As the judge's analysis regarding the Addendum highlights, little has been written that confronts together the ability of contracting parties to establish their obligations from whatever date they chose (subject to certain limitations) and the implication of the limits to the remedy of rectification, particularly as expressed in *Persimmon Homes*.

57 However, as mentioned earlier, I concluded I should deny leave, principally because I do not doubt the correctness of the decision *to dismiss the request for summary judgment*. I do not accept the notion that the motion judge erred by failing to conclude a trial was unnecessary because Saint John Recycling did not have the right to commence the action. Had that been the case, it was a defect that was the result of a mistake which could be remedied on the record before the judge.

58 Regardless of the correctness of his decision regarding the Addendum, and without expressing an opinion on it, there is no reason to doubt the judge's disposition based on his finding respecting entitlement to rectification. As well, he made findings of fact that are both unassailable and undisputed and support a construction of the Asset Purchase Agreement that is consistent with the position initially advanced by Saint John Recycling and Shred Guard. All of these issues may reasonably be expected to be raised on appeal, by Notice of Contention, if leave were granted.

59 As explained earlier, the judge's findings of fact and analysis do not leave me with a doubt about the correctness of his determination that rectification of the Asset Purchase Agreement was justifiable. He decided not to make the order in the absence of a proper request. Even if he ought not to have made the *order* for that reason, there is no dispute that the availability of rectification was clearly a live issue and was addressed by the parties, as well, of course, the judge. He may have decided it was unnecessary to consider the significance of his determination further, given his conclusion on the efficacy of the Addendum. However, in my opinion, his determination that

Saint John Recycling was entitled to rectification was, itself, sufficient to either deny or, at least, adjourn the claim that a trial was unnecessary. At a minimum, the judge's determination recognized there was a mistake, which Saint John Recycling had the ability to remedy and secure the right to pursue the action to trial.

60 The assessment of the issues on an appeal includes those that arise from the rejection of Saint John Recycling's initial position — that the Asset Purchase Agreement, in its original form, cannot be interpreted as assigning the chose in action respecting the Supply Agreement. While not as strong as the issue of rectification, it cannot be said that construction of the Asset Purchase Agreement provides no basis for grounding the dismissal of the request for summary judgment.

61 It is not surprising that, upon becoming aware of the Asset Purchase Agreement, the Defendants advanced the view that the Agreement transferred the chose in action to Shred Guard. Indeed, viewed alone, on its face, it transfers "all of the assets and property owned and used by the Vendor or held by it for use in, or in respect of the operation of, the Business," other than those assets that are specifically excluded. From the record, it seems that early in the appearances before the court, opposition to such an interpretation was limited. Clearly, the subjective intentions of the parties were of no assistance. Consistent with this, and the subsequent focus on the new Addendum Agreement, little is said in the decision about the interpretative analysis, other than it was obvious the chose in action is not excluded under the expanded definition of Accounts Receivable. However, in the end, the motion judge made significant factual findings regarding the time the Asset Purchase Agreement was formed, most of which would form part of the surrounding circumstances.

62 It goes without saying that the objective of contractual interpretation is the identification of the intent of the parties at the time they entered into the contract. This exercise requires reading the contract as a whole, in the context of the surrounding circumstances, and recognizing both that the interpretation of a provision must be grounded in the text and that the surrounding circumstances cannot overwhelm or deviate from the words of the agreement.

63 If there is still ambiguity, post-contract/subsequent conduct may be available to assist in the interpretation of the agreement (see *Hart Stores Inc. v. 3409 Rue Principale Inc.*, 2020 NBCA 49, [2020] N.B.J. No. 167 (N.B. C.A.)); *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, [2016] O.J. No. 6190 (Ont. C.A.) (QL)). Here the findings of the judge are also significant. He noted that, after closing, the parties acted in relation to the Supply Agreement as though Shred Guard had no interest. This evidence includes Saint John Recycling's demand for payment and pursuit of the action, as well as the absence of any evidence that Shred Guard was supplied with a copy of the agreement, or with any of the particulars thereof, such as performance history or amounts due or payable. He found:

 

> As noted, I am satisfied that it was never the intention of the parties that the Supply Agreement, or any right of recovery thereunder, be part of the Shred Guard Transaction. Mr. Northrup (on behalf of Shred Guard) and Mr. Yaffe (on behalf of 048835) conducted themselves at all times in a manner consistent with 048835's continued ownership of any interests under the Supply Agreement. Further, there is no record of any third-party taking any action on the basis that, effective February 29, 2019, Shred Guard because the owner of any residual interest or right of recovery under the Supply Agreement. Indeed, as noted, the internal communications between Messrs. Dubblestyne, Pollard and Fielding reflect that, in mid-February 2016, the Partnership (Fero Waste) was anticipating a claim from 048835 for breach of the Supply Agreement. [para. 27]

64 All this said, if leave were granted, the issue of construction of the Asset Purchase Agreement cannot be excluded as a basis upon which the judge's decision to deny summary judgment could be upheld.

65 While the defendants argued that granting leave would promote the just, most expeditious, least expensive, and proportionate determination of the action on its merits, I did not agree. In my view, that result was achieved by exercising my discretion to deny leave regarding this issue.

***B. Limitation of actions***

66 The Defendants sought to have the motion judge dismiss all claims for breach of the Supply Agreement that occurred before June 23, 2014, pursuant to s. 5(1) of the *Limitation of Actions Act*. The judge dismissed the claim for breach of the obligation to supply a minimum of 4,000 tons of cardboard per year in each of the first three years of the agreement. However. he did not dismiss the claim against the Defendants for breach of another obligation under the Supply Agreement, that is, the prohibition on selling cardboard to any other party, often called the exclusivity obligation/ provision. For ease of reference, I reproduce it again:

> The Seller shall not during the term of this agreement, sell to any other party other than the Buyer the Product or any other product which is the same or similar to the Product and is being recycled for a substantially similar purpose as the Product. The Seller hereby agrees to supply and sell a minimum of 4,000 tons of Product per year to the Buyer.
>
> [Emphasis added.]

67 The judge's decision was grounded in his determination that Saint John Recycling did not discover the breach of the exclusivity obligation until December 20, 2017, when it was admitted, at discovery, that the Defendants had breached the obligation by selling cardboard to other purchasers.

 

68 In the motions for leave, the Defendants' challenge to the judge's decision is grounded in their assertion the Statement of Claim does not properly plead a claim for breach of this obligation. They submit that, since the amount demanded in the Statement of Claim was equal to the damages for breach of the minimum supply obligation, no claim for damages is advanced for breach of the exclusivity obligation.

69 The judge rejected such arguments. He decided the Statement of Claim "constitutes a claim for damages for breach of the Supply Agreement, including the minimum 4000-ton annual supply commitment *and the exclusivity provisions*" (emphasis added). This said, he noted it would have been preferable if Saint John Recycling had amended its claim, as had been discussed at one of the hearings.

70 I do not doubt the correctness of the judge's interpretation of the Statement of Claim, for the reasons given by him, and exercised my discretion to deny leave in relation to this decision.

## IV. Disposition and costs

71 For these reasons, I dismissed the motions for leave to appeal. I would order the Defendants pay one set of costs of $1,000.

*Order accordingly.*

# Tab 3

2004 SKCA 130
Saskatchewan Court of Appeal

McLean v. BSI Business Services Inc.

2004 CarswellSask 676, 2004 SKCA 130, [2004] S.J. No. 614, 134 A.C.W.S. (3d) 814

# BSI Business Services Inc.. Donald Gordon Fettes and Linda Fettes (Defendants / Appellants) and Sterling G. McLean and Richards and Associates, Social Development Consultants Ltd. ((Plaintiffs / Respondents)

Gerwing J.A., Jackson J.A., and Vancise J.A.

Heard: October 13, 2004
Judgment: October 13, 2004
Docket: 837

Proceedings: affirming *McLean v. BSI Business Services Inc.* (2003), 2003 SKQB 433, 2003 CarswellSask 711 (Sask. Q.B.)

Counsel: Michael Megaw for Appellants, BSI
Sterling McLean for himself
E.F.A. Merchant, Q.C. for Respondent, Richards & Associates

Subject: Contracts

**Headnote**

Contracts --- Formation of contract — Consensus ad idem — Agreements subject to contract
Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness
Contracts --- Construction and interpretation — Resolving ambiguities — Conduct of parties

**Table of Authorities**

**Tariffs considered:**

*Court of Appeal Rules*, Sask. C.A. Rules
Tariff of Costs, Sched. I "A", column 5 — referred to

*Vancise J.A.*:

1 Bob Richards is the sole shareholder of Richards and Associates Social Development Consultants Ltd., which operated Myrcall, a telephone answering service, for various clients in Regina. In 1990, Richards sold Myrcall to BSI Business Services for the purchase price of $162,000 payable by $50,000 down and the balance of the purchase price of $112,000 was to be paid over five years.

2 The purchase price was subject to adjustment pursuant to clause 3.03 of the contract. The agreement also provided that the sale included Myrcall's existing client base, the attendant contracts, as well as the trade name Myrcall. The effective date of the sale was August 1, 1990. Richards assigned its interest in the contract to Percival Mercury Sales Ltd., in the amount of $1,500 with the residual amount assigned to Sterling G. McLean.

3 In June of 1992, BSI calculated the adjustment of the purchase price. This calculation which was purported to be in accordance with clause 3.03 of the agreement did not include the accounts receivable of Myrcall at the time of sale. The accounts receivable were credited to Richards by addition to the sum total derived from the formula. Richards did not agree with the recalculation and refused to accept payments based upon the recalculated amount and commenced an action to enforce the contract.

**The Decision of the Court of Queen's Bench**

4 Mr. Justice Matheson decided that the accounts receivable of Myrcall were purchased by BSI despite the fact they were not specifically mentioned in the contract. He then determined that the accounts receivable were intended to have been included in the definition of "revenues" under clause 3.03 of the agreement, with the result that BSI should have calculated the adjustment with the accounts receivable they received included within the formula. The amount of the accounts receivable that should have been included within the calculation totalled $3,327.09, being the amount BSI actually collected and credited to their accounts to the relevant time frame.

5 Justice Matheson recalculated the purchase price according to the formula, including the accounts receivable, and determined that the revised purchase price was $138,081.08. Judgment issued against BSI for the unpaid balance of this account.

6 In addition, Justice Matheson determined that McLean was entitled to the first $5,000 of the judgment with the remainder going to Richards.

**Issue**

7 The sole issue is whether the trial judge erred in determining the accounts receivable of Myrcall received by BSI were the property of BSI and were to be included in the calculation of the revised purchase price under clause 3.03 of the agreement.

**Disposition**

8 We are all of the opinion that Mr. Justice Matheson was correct in his determination that the accounts receivable of Myrcall were the property of BSI and were to be included in the calculation of the revised purchase price under clause 3.03 of the agreement.

9 The agreement between the parties defines "purchased assets" and "excluded assets." Sub-clause 5 of the excluded assets provides that included within the definition are "all other assets of the vendor other than the purchase assets." The definition of purchased assets includes, in part, the material contracts and "all other assets necessary to the operation of the business whether or not such assets are recorded on the books of account of the vendor or the business at the closing date . . . ."

10 The term "revenues" as it appears in clause 3.03 is undefined, however, a reading of the clause outlines that the following are to be excluded from "revenues": cancellation of rental agreement leases, new rental agreements/leases in the first three months; prepaid accounts that relate to that period of time *after* the first three months; "extraordinary" income received within the first three months.

11 Schedule G to the contract is a customer list and *includes* the accounts receivable of the customers purchased by BSI. [emphasis added]

12 The accounts receivable are not dealt with specifically anywhere in the agreement. The sole question is whether or not it was intended by the parties that the accounts receivable be included as revenues within clause 3.03. In our opinion, the necessary implication that must be made is that they were to be included as revenue. Purchased assets include the material contracts and the customers listed in Schedule G include those customers who had outstanding accounts. Those contracts were included in the term material contracts and were thus purchased from BSI. The accounts receivable represent debt that is evidenced by the underlying contractual obligation. There is no question that after the date of the sale the only party who could legally enforce the payment of the outstanding accounts was BSI.

13 In addition, the conduct of the parties confirms the interpretation of the contract as found by Matheson J. It is clear on BSI's own evidence stated at the trial that it collected $3,327.09 of the accounts receivable of Myrcall and credited this money to its own accounts.

14 Matheson J. considered all of the evidence and determined that the accounts receivable collected by BSI were the property of BSI and should have been included in the revenues for the calculation of the purchase price adjustment. He committed no error in so finding and the appeal is therefore dismissed.

15 Mr. McLean took no position with respect to the appeal. Accordingly, he is not seeking any costs.

16 The respondent shall have costs against the appellants in the usual way on double Column V.

 

End of Document 

# Tab 4

2011 ABCA 366
Alberta Court of Appeal

Humphries v. Lufkin Industries Canada Ltd.

2011 CarswellAlta 2341, 2011 ABCA 366, [2012] A.W.L.D. 2258, 212 A.C.W.S. (3d) 393, 68 Alta. L.R. (5th) 175

# Christopher Michael Humphries and 1263715 Alberta Ltd. (Respondents / Plaintiffs / Defendants by Counterclaim) and Lufkin Industries Canada Ltd. (Appellant / Defendant / Plaintiff by Counterclaim)

Jean Côté, Constance Hunt, J.D. Bruce McDonald JJ.A.

Heard: November 7, 2011
Judgment: December 15, 2011
Docket: Calgary Appeal 1101-0118-AC

Counsel: R.B. Miskuski for Respondents / Plaintiffs / Defendants by Counterclaim
B. Thiessen, C. Marchant for Appellant / Defendant / Plaintiff by Counterclaim

Subject: Contracts; Corporate and Commercial; Employment; Public

**Headnote**

Contracts --- Construction and interpretation — General principles

Plaintiff sold his business of repair and servicing oilfield pumpjacks to defendant and became its employee — Plaintiff was dismissed 5 1/2 years later — Plaintiff brought action for wrongful dismissal — Judge allowed plaintiff's interlocutory motion for return of set of looseleaf binders he began compiling before sale containing information on old makes and models of pumpjack — Defendant appealed — Appeal allowed — Judge erred in finding that binders were property of plaintiff — Contract for sale of business when read as whole and in purposive manner was clearly intended to transfer all business assets to defendant — Binders contained information necessary to conduct of business — Binders fell within definition of "purchased assets" as one or more of "tangibles", "goodwill", or "intellectual property rights" — It was also clear that parties dealt with binders as defendant's property during time plaintiff was employed by it.

**Table of Authorities**

**Cases considered:**

*Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.* (2008), 62 C.C.L.I. (4th) 175, 2008 CarswellAlta 619, 2008 ABCA 177, [2008] 7 W.W.R. 102, 88 Alta. L.R. (4th) 225, 67 R.P.R. (4th) 17, 432 A.R. 173, 424 W.A.C. 173 (Alta. C.A.) — referred to

*Bank of British Columbia v. Turbo Resources Ltd.* (1983), 148 D.L.R. (3d) 598, 1983 CarswellAlta 112, 27 Alta. L.R. (2d) 17, 46 A.R. 22, 23 B.L.R. 152 (Alta. C.A.) — referred to
*Bearspaw Petroleum Ltd. v. Encana Corp.* (2011), 2011 ABCA 7, 2011 CarswellAlta 24, 78 B.L.R. (4th) 1, 39 Alta. L.R. (5th) 302, 505 A.R. 54, 522 W.A.C. 54 (Alta. C.A.) — referred to
*BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254, [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10 (S.C.C.) — referred to
*Canada Foundry Co. v. Edmonton Portland Cement Co.* (1918), [1918] 3 W.W.R. 866, 43 D.L.R. 583, 1918 CarswellAlta 157 (Alberta P.C.) — referred to
*Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), (sub nom. *Exportations Consolidated-Bathurst Ltée c. Mutual Boiler & Machinery Insurance Co.*) [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 1979 CarswellQue 157, 1979 CarswellQue 157F, 32 N.R. 488, [1980] I.L.R. 1-1176 (S.C.C.) — referred to
*Diegel v. Diegel* (2008), 2008 ABCA 389, 2008 CarswellAlta 1763, 100 Alta. L.R. (4th) 1, 60 R.F.L. (6th) 18, 303 D.L.R. (4th) 704 (Alta. C.A.) — referred to
*Edmonton (City) v. Ungarian* (2007), 83 Alta. L.R. (4th) 270, 2007 ABQB 705, 2007 CarswellAlta 1560, 39 M.P.L.R. (4th) 186, 431 A.R. 71 (Alta. Q.B.) — referred to
*Fenrich v. Wawanesa Mutual Insurance Co.* (2005), 46 Alta. L.R. (4th) 207, 27 C.C.L.I. (4th) 204, 371 A.R. 53, 354 W.A.C. 53, 2005 ABCA 199, 2005 CarswellAlta 887, [2005] I.L.R. I-4424, 256 D.L.R. (4th) 395, [2006] 2 W.W.R. 17 (Alta. C.A.) — referred to
*Forbes v. Git* (1921), [1922] 1 W.W.R. 250, 61 D.L.R. 353, [1922] 1 A.C. 256, 1921 CarswellNat 48 (Canada P.C.) — referred to
*Islands Trust v. Pinchin Holdings Ltd.* (1981), 1981 CarswellBC 318, 130 D.L.R. (3d) 69, 32 B.C.L.R. 209 (B.C. C.A.) — referred to
*Lakewood 1986 Development Ltd. Partnership v. Fletcher Challenge Petroleum Inc.* (1994), 25 Alta. L.R. (3d) 326, 163 A.R. 115, 1994 CarswellAlta 274 (Alta. Q.B.) — referred to
*Magnan v. Brandt Tractor Ltd.* (2008), 2008 C.L.L.C. 210-047, 96 Alta. L.R. (4th) 247, 2008 CarswellAlta 1414, 2008 ABCA 345, 438 W.A.C. 35, 440 A.R. 35 (Alta. C.A.) — referred to
*McDonald v. Fellows* (1979), 17 A.R. 330, 105 D.L.R. (3d) 434, 1979 CarswellAlta 242, [1979] 6 W.W.R. 544, 9 R.P.R. 168 (Alta. C.A.) — referred to
*P. (M.N.) (Next Friend of) v. Whitecourt General Hospital* (2006), [2006] 12 W.W.R. 397, 397 A.R. 333, 384 W.A.C. 333, 2006 ABCA 245, 2006 CarswellAlta 1071, 64 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to
*Pacific Western Airlines Ltd., Re* (1977), (sub nom. *Alberta v. Canadian Transport Commission)* 75 D.L.R. (3d) 257, 2 A.R. 539, 2 Alta. L.R. (2d) 72, 14 N.R. 21, 1977 CarswellNat 538, 1977 CarswellNat 656, (sub nom. *Alberta v. Canadian Transport Commission)* [1978] 1 S.C.R. 61 (S.C.C.) — referred to

*Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 223 A.R. 180, 183 W.A.C. 180, 67 Alta. L.R. (3d) 104, 1998 ABCA 333, 1998 CarswellAlta 940, [1999] 5 W.W.R. 726 (Alta. C.A.) — referred to

*Pando Compania Naviera SA v. Filmo SAS* (1975), [1975] 2 All E.R. 515, [1975] Q.B. 742 (Eng. Q.B.) — referred to

*Peter Pond Holdings Ltd. v. Shragge* (2003), 346 A.R. 135, 320 W.A.C. 135, 2003 ABCA 290, 2003 CarswellAlta 1445, 22 Alta. L.R. (4th) 41 (Alta. C.A.) — referred to

*Peter Pond Holdings Ltd. v. Shragge* (2004), 2004 CarswellAlta 505, 2004 CarswellAlta 506, 330 N.R. 194 (note), [2005] G.S.T.C. 33, 363 A.R. 397 (note), 343 W.A.C. 397 (note) (S.C.C.) — referred to

*Poulos v. Caravelle Homes Ltd.* (1997), 1997 CarswellAlta 38, 196 A.R. 138, 141 W.A.C. 138, 49 Alta. L.R. (3d) 385 (Alta. C.A.) — referred to

*R. v. Wis Development Corp.* (1984), 1984 CarswellAlta 63, 1984 CarswellAlta 414, [1984] 1 S.C.R. 485, 9 D.L.R. (4th) 661, 53 N.R. 134, 31 Alta. L.R. (2d) 289, 53 A.R. 58, 12 C.C.C. (3d) 129, 40 C.R. (3d) 97 (S.C.C.) — referred to

*Spartacus Holdings Ltd. v. Building 400 Ltd.* (2011), 2011 CarswellAlta 46, 2011 ABCA 18, 100 R.P.R. (4th) 1 (Alta. C.A.) — referred to

APPEAL by defendant from interlocutory order that it return certain property to plaintiffs.

***Per curiam*:**

**A. Issues**

1 The main issue on this appeal is how to interpret and apply a written contract for the sale of a business.

2 There are some lurking procedural issues.

**B. Facts**

3 When young, Mr. Humphries worked for a few years for other companies repairing and servicing oilfield pumpjacks. Then he went into business with a company (Black Widow) he co-owned with another man, who soon died. Three years after the business was established, well after that death, Black Widow sold its business to Lufkin for $377,000 cash, Mr. Humphries being its only officer and director. He became the manager of one service centre of Lufkin.

4 About 5-1/2 years later, Lufkin temporarily suspended him with pay and excluded him from the premises. After about two weeks' investigation, it summarily dismissed him.

5 He sued for wrongful dismissal and defamation, and for return of chattels alleged to be personal. Lufkin counterclaimed against him and a company which it learned that Mr. Humphries

 

owned (the other respondent). The counterclaim is for repayment of monies allegedly stolen, or obtained by fraud, from Lufkin, his former employer. (It also claims disgorgement of profits received contrary to Lufkin's written conflict of interest policies.)

6 About a year later, counsel told the chambers judge that Mr. Humphries' wrongful dismissal suit had not reached the examination for discovery stage. Negotiations were underway. Mr. Humphries had found a new job within 3 months of being dismissed. Counsel and the chambers judge implied that the suit was either uneconomical, or maybe that the claim and counterclaim were a wash. (See transcript, pp 11-12.)

7 Five months after being fired, Mr. Humphries issued a notice of motion in his wrongful dismissal suit. The motion asked that he be given either a set of looseleaf binders, or photocopies of their contents.

8 A chambers judge ordered that the binders be given to Mr. Humphries. The judge's reasons were brief and oral.

9 The looseleaf binders in question had been used by the vendor company, Black Widow Oilfield Services Ltd. throughout its three-year life. The binders' contents had been compiled by Mr. Humphries. Some of their contents were photocopies, but most were originals. Some were handwritten, but most were printed material.

10 What were the contents? They largely came from manufacturers and distributors of pumpjacks and their parts. The vast majority of those companies were no longer in business after the early 1980s (Humphries' Queen's Bench brief, para 16 and his Court of Appeal factum, para 3). That was long before the sale of the Black Widow assets and business to Lufkin. The contents included advertisements, manuals, and servicing information.

11 The binders were important because so many makes and models of pumpjack were used in Alberta, and even identifying makes and models could be a challenge; so an old advertisement with a picture could help a lot (Humphries' affidavit, paras 3-5, and his Court of Appeal factum, paras 3-4). The binders were even more important because the majority of the manufacturers no longer existed. Thus it was practically impossible to get this material anywhere else (affidavit, para 3). Mr. Humphries stated more than once how much certainty and reassurance these materials gave a repair technician, and how his co-workers used and relied on them. And he swore how useful they would be to Lufkin's competitor where he now works.

### C. General Principles of Interpreting Contracts

12 Interpretation of a contract is a question of law (once the wording and the facts have been ascertained). So there is no appellate deference on that topic: *Spartacus Holdings Ltd. v. Building 400 Ltd.*, 2011 ABCA 18, 100 R.P.R. (4th) 1 (Alta. C.A.) at para 7; *Diegel v. Diegel*, 2008 ABCA

389, 100 Alta. L.R. (4th) 1 (Alta. C.A.) at para 20; *Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.*, 2008 ABCA 177, 432 A.R. 173 (Alta. C.A.) at para 9; *Fenrich v. Wawanesa Mutual Insurance Co.*, 2005 ABCA 199, 371 A.R. 53 (Alta. C.A.) at para 6.

13 What the Supreme Court of Canada calls the "cardinal" principle of interpretation was not mentioned by the judge or counsel. It is that a contract must be read and interpreted as a whole, fitting all its parts together, and trying hard to bring them into harmony. See Fridman, *Law of Contract* 457 (5th ed 2006); Burrows, *Interpretation of Documents* 46-47, 48, 62-63, 84-85 (2d ed 1946); *Canada Foundry Co. v. Edmonton Portland Cement Co.*, [1918] 3 W.W.R. 866, 43 D.L.R. 583 (Alberta P.C.)); *Forbes v. Git* (1921), [1922] 1 A.C. 256, [1922] 1 W.W.R. 250 (Canada P.C.), 253); *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), 23-24, 147 N.R. 81 (S.C.C.) (para 9).

14 The express terms of this contract expand that principle: the agreement was to include its schedules (cls 1.1(c), 1.9, cf 1.6).

15 A second general principle of interpretation operates here. A contract must be interpreted in a positive and purposive manner, trying to make it work. The parties' purpose here was to make a workable commercial deal between oilfield servicing companies. The court must presume that these business people intended that the contract work in substance and frankly, beyond the nominal or technical. The court must not be too quick to find gaps or flaws in a commercial contract's wiring which prevent power from reaching all its operative parts. The parties are presumed not to have been wasting ink on an academic exercise. Therefore, where one possible interpretation will allow the contract to function and meet the commercial objective in view, and the other scarcely will, the former is to be chosen: Burrows, *op cit supra*, at 92-93; *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 32 N.R. 488 (S.C.C.), 497-99 (paras 12-13); *Bearspaw Petroleum Ltd. v. Encana Corp.*, 2011 ABCA 7, 39 Alta. L.R. (5th) 302 (Alta. C.A.) (para 24).

16 In particular, the court must read a contract with an eye to finding and understanding the scheme or arrangement which the contract uses. If there is real doubt as to the meaning of a phrase or clause in that contract, the court must prefer the meaning which advances that overall scheme.

17 Finding the scheme is not hard here. Counsel for Lufkin expressly argued this in the Court of Queen's Bench (transcript pp 7, 9). What is the contract's explicit guidance as to the aim and scheme? In particular, it shows that the aim was to buy *all* the assets of the business, not a few isolated items. The first recital says that the aim is to sell all the Purchased Assets (a defined term). The representations and warranties of the vendor make that comprehensiveness very clear. See cl 4.1, especially its paras (m) and (t):

(m) Entirety of Assets. The Tangibles, the Intellectual Property Rights and the Technology List, together with the Excluded Assets, comprise a true and complete listing of the assets and other property of the Vendor.

(t) Business/Part of a Business. The Purchased Assets constitute all or substantially all of the property or assets that reasonably can be regarded as being necessary for carrying on the Vendor's business.

In other words, except as expressly excluded, Black Widow sold all its business assets. Mr. Humphries was its sole director, sole officer, and only surviving shareholder.

18 There is evidence here to similar effect. Mr. Humphries swore that the written contract accurately reflected the asset sale (p 12, ll 6-9), and that this service and repair business would be impossible without specifications of the sort in the binders (affidavit, para 3), and the binders' contents helped Mr. Humphries excel at his job (p 7, ll 1-7).

19 Though direct evidence of intent or discussions is inadmissible, the background commercial setting for the contract is relevant and admissible: *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 46 A.R. 22 (Alta. C.A.), 29-30 (paras 30-32); *Lakewood 1986 Development Ltd. Partnership v. Fletcher Challenge Petroleum Inc.* (1994), 163 A.R. 115 (Alta. Q.B.), 120-21 (paras 16-17) (citing authorities); *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 223 A.R. 180 (Alta. C.A.), 188-89 (para 36).

20 It may seem a little curious that cl 4.1(m) does not mention Goodwill. But by its very nature, goodwill is very hard to list in detail. And listing details is the only point of that paragraph. Much of what comes under Goodwill would be intangible, i.e. not a physical object. And that omission in no way affects the very broad scope of cl 4.1(t).

21 The idea that this contract should be construed in a narrow or picky manner is also negated by its cl 4.1(cc). That is an express representation and warranty that no material fact in the contract is misstated, omitted, or misleading. Nor does the vendor know anything else not disclosed which would have a material adverse effect, it says.

22 More proof that the contract is comprehensive is found in three other express agreements:

- the written contract constitutes the entire agreement (cl 9.5);
- it supersedes any other agreements or representations or implied terms (cl 9.5); and
- it can be amended only in writing (cl 9.10).

We repeat that all these provisions must be interpreted so they interlock and work together.

 

## D. Excluded Assets

23 The binders would not be part of the assets sold if they were listed as Excluded Assets. But both counsel properly agree that they are not among the Excluded Assets.

24 Excluded Assets are set by Schedule 1.1(s), which only lists cash, accounts receivable, miscellaneous insignificant or obsolete parts, and the vendor's bookkeeping records pertaining to taxes, receivables, and payroll.

25 Mr. Humphries and the chambers judge would have to postulate that through some serious slip the binders are nowhere in the contract: neither in the "sold" category, nor the "unsold" category. (We return to that in Part G below.)

26 Yet the contract expressly said that it covered all assets except those explicitly listed as excluded: see Part C above.

## E. Purchased Assets

### *1. Introduction*

27 That intent to sell and buy all the Purchased Assets is carried out by cls 2.1 and 2.3(f).

28 "Purchased Assets" are defined by cl 1.1, paras (y) and (kk) as including, *but not being limited to*, the following items:

- Tangibles
- Goodwill
- Warranties and Guarantees
- Intellectual Property Rights
- Technology List

All but the last of those five items are defined. The evidence confirms that the final contract deliberately includes no Technology List.

29 Since the contract said that all the business assets were sold, it may well suffice that the binders were business assets not reserved from the sale as Excluded Assets. The chambers judge challenged counsel to find in the contract a precise mention of these binders or of some category including them, beyond doubt.

30 With respect, that is backwards. The phrases "Goodwill" and "Intellectual Property Rights" are defined as "including" various items, and cl 1.1(y) defines that last word as meaning "including without limitation". That forbids treating the lists as exhaustive, or treating the defined terms as being as narrow as the specific lists in the definitions. The defined terms cover all their ordinary meaning as well, as the common law presumes that they do: see Burrows, *op cit supra*, 106-07.

31 We doubt that the binders in question fall within "warranties and guarantees". But they likely fall within any of the three other categories of assets sold and purchased, as described below.

### *2. Tangibles*

32 Tangibles are as set out in Schedule 1.1(qq). Two items listed there apply to the binders. The first is "accessories for and associated with the Purchased Assets" (para 2). The vendor's whole business was repairing and servicing pumpjacks, and the binders described the various pumpjacks used in Alberta and gave information about manufacturer, parts, and servicing. The second part of that Schedule applicable is "all of the Vendor's repair or replacement parts, supplies and packaging items *and similar items* with respect to the Vendor's business, in each case wherever the same may be located" (para 3, emphasis added). That would clearly include not just pumps or parts, but also the manufacturers' instructions or manuals for them. And that is the bulk of these binders' contents. If there is any doubt, and these items do not exactly fit, then they are "similar items". Had the information from the manufacturers been stored with their respective spare parts, no one would have doubted that the information was accessory.

33 Lufkin specifically argued that point in its brief for Queen's Bench chambers (paras 16 and 42), and during oral argument it was discussed by Lufkin's counsel and by the chambers judge.

### *3. Goodwill*

34 Another Purchased Asset is Goodwill. By cl 1.1(u), it expressly includes "knowledge which is of a commercial nature to the success of the Vendor's business." That phrase does not scan readily, but the meaning is clear. For this business, the information in the binders about a host of different and often-defunct manufacturers, and their still-used types and models of pumps, is plainly "knowledge which is of a commercial nature", and it is plainly connected with "the success of the Vendor's business", which was pumpjack repair and servicing. That suffices. The affidavit of Mr. Humphries is indeed at pains to emphasize that need and connection.

35 Goodwill was fully orally argued before us. As it was only touched on in Lufkin's original factum, we asked for further written factums on this topic.

36 Mr. Humphries' second factum raises one new argument. It contends that the word "commercial" is confined to selling to the public, and argues that this knowledge cannot suffice

 

because it was not sold to the public. But goodwill commonly also extends to relations with suppliers of goods, services, finance, and premises. In any event, the whole purpose of the definition in the contract was to expand the ordinary meaning of the word "goodwill".

37 Besides, the respondent's argument implicitly assumes that "commercial" means only that which itself is sold. Though that is one of several old meanings of the word, today it is far from the only one. It is very often used to refer to business or profit-making in general: 3 *Oxford Eng Dictionary* 552-53 (Nos 1b, 5) (2d ed 1989). See for instance the definitions of "commercial speech", "commercial enterprise", "commercial law", and "commercial use", in Dukelow's *Dictionary of Canadian Law* (4th ed 2011), and see *R. v. Wis Development Corp.*, [1984] 1 S.C.R. 485 (S.C.C.), 491, (1984), 53 N.R. 134 (S.C.C.) (para 14); *Edmonton (City) v. Ungarian*, 2007 ABQB 705, 431 A.R. 71 (Alta. Q.B.) (personal uses of commercial-type vehicle). See also *Pacific Western Airlines Ltd., Re* (1977), [1978] 1 S.C.R. 61, 14 N.R. 21 (S.C.C.), 40, (1977), 2 A.R. 539 (S.C.C.), 558 (paras 35-36); Ballentine's *Law Dictionary, verbis* "commerce" and "commercial" (3d ed 1969); *Pando Compania Naviera SA v. Filmo SAS*, [1975] 2 All E.R. 515, [1975] Q.B. 742 (Eng. Q.B.).

38 If a bylaw zoned land for "commercial purposes only", would anyone think that nothing could be done there except to buy and sell merchandise? Would travel agents, technical consultants, small repair and service shops, barbers, and photocopying and quick print shops, all be excluded? Could a car dealer sell vehicles there, and sell gasoline and oil, but not service or repair even the vehicles it had sold? Camera shops often repair cameras. Repair establishments of all kinds commonly sell parts. See *Islands Trust v. Pinchin Holdings Ltd.* (1981), 130 D.L.R. (3d) 69 (B.C. C.A.), 75-76, and *Wawanesa Mut Ins Co v Kelly* [1980] ILR 748 (para 1-1203), at p 753 (NS CA).

### *4. Intellectual Property Rights*

39 The third item in the definition of Purchased Assets is Intellectual Property Rights. It has a long definition (cl 1.1(cc)), not all of which is relevant. But parts of it cover the binders in question:

> means ... any ... common law rights of the Vendor in any jurisdiction, ... provided under ... any ... common law principle applicable hereto which may provide a right in ... know-how generally, ..., or ... the expression of such ... know-how ...

40 How could one repair a pump (short of a great deal of highly-uneconomical trial and error and manufacturing one's own parts), without knowing the different makes and models of pumps, and the various other tips found in the binders? We cannot see how.

41 Perhaps know-how may not exist where the information is widely-disseminated and available (though the definition in Dukelow's *Dictionary of Canadian Law*, 4th ed does not thus restrict it). But there was no dissemination or availability here. Most of the pump manufacturers were defunct, indeed defunct before the internet became popular. One cannot buy this information; can

one borrow it? It would be unsafe to assume that public libraries in the smaller cities and towns in question here stock lists of old parts and repairs, and old manuals, for obscure machinery.

42 In the Court of Queen's Bench, Mr. Humphries' argument on this topic was that cl 4.1(r) takes away what para (cc) gives. However, cl 4.1 (r) is not on point. It is not about what is or is not sold. It merely warrants and represents that no Intellectual Property Rights are needed to run the vendor's business, except for the Black Widow name and logos. In other words, it is not illegal to run the business because it infringes or would infringe someone else's patent, trademark or copyright. That cannot be a warranty that the business involves no know-how; almost all businesses involve know-how, especially businesses in a specialized technological field.

43 In any event, as we saw above in Part C, the various parts of a contract must be reconciled with each other, and the court should be slow to find that one contradicts or emasculates another.

44 Mr. Humphries also argued that the breakdown of price does not mention intellectual property. That point was properly not pressed. It does not affect what is or is not sold, and price apportionments are often for tax purposes.

45 Intellectual Property Rights were argued in the Court of Queen's Bench: see Mr. Humphries' oral argument and Lufkin's oral argument (pp 7,8), and Lufkin's brief (paras 34 ff.). Indeed counsel for Mr. Humphries even seemed to give conditional admissions on that topic (transcript, pp 2,4). (The chambers judge may have thought that his suggestions to counsel had knocked Intellectual Property off the table, but it was not abandoned.)

**F. Contra Proferentem**

46 The chambers judge placed weight on the *contra proferentem* doctrine. Listening to the electronic recording of his oral decision clearly shows that that is what he said where the transcript says "indiscernible". Just how much weight the chambers judge placed on this doctrine is disputed, and it may not have been the only (or even the decisive) factor.

47 But neither counsel had argued *contra proferentem*, whether orally or in a written brief. Counsel for Mr. Humphries had briefly stated orally that Lufkin's lawyers had drafted the contract in question, but that is all. Both counsel disclaimed the topic before us. Mr. Humphries' Court of Appeal factum does not argue the doctrine, and indeed its paras 12, 19, 24, 25 and 29 repudiate it. The appellant's factum complains of this unexpected ground (paras 17, 29, 30).

48 Lufkin argues that even that allegation about drafting the contract was unsworn, inadmissible, and factually incorrect or incomplete; so he tenders fresh evidence. We need not go into that, because neither counsel now wishes us to put any weight on the *contra proferentem* doctrine.

49 It is generally inappropriate for a judge to decide a case on a basis not pleaded or argued by the parties: *McDonald v. Fellows*, [1979] 6 W.W.R. 544, 17 A.R. 330 (Alta. C.A.) (paras 7-12); *Poulos v. Caravelle Homes Ltd.* (1997), 196 A.R. 138, 49 Alta. L.R. (3d) 385 (Alta. C.A.); *P. (M.N.) (Next Friend of) v. Whitecourt General Hospital*, 2006 ABCA 245, 397 A.R. 333 (Alta. C.A.) at paras 7-10; *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345, 440 A.R. 35 (Alta. C.A.) at para 25; *Peter Pond Holdings Ltd. v. Shragge*, 2003 ABCA 290, 346 A.R. 135, 22 Alta. L.R. (4th) 41 (Alta. C.A.), (2004), 330 N.R. 194 (note) (S.C.C.).

50 It may be objected that this was a new argument only, not a new issue. But neither counsel had a chance to argue for or against *contra proferentem*, still less to lead any evidence about it, and they seem not to agree on the facts.

51 And the reasons for decision in the Court of Queen's Bench were oral and brief. If there had not been reliance on *contra proferentem*, likely the reasons would have said more about the topics which were open, and how to interpret the contract. The other relevant topics are discussed in our reasons here, and indeed were discussed in the parties' written and oral argument to the chambers judge.

## G. Were the Binders Black Widow's Property?

### *1. Introduction*

52 In oral argument on appeal, counsel for Mr. Humphries suggested that the binders were always the personal asset of Mr. Humphries. So he said that the sale contract by Mr. Humphries company, Black Widow, could not give Lufkin any rights to the binders.

53 This topic was not explicitly covered in Mr. Humphries' original Court of Appeal factum, though it was hinted at in the facts in paras 1, 2, and 36. It was briefly in Mr. Humphries' oral and written argument and discussion in the Court of Queen's Bench. It is not in Mr. Humphries' affidavit, though it was pled. Counsel for Mr. Humphries argued this orally before us. We did allow a further factum on this (and one other topic).

54 The chambers judge very briefly stated that the binders were Mr. Humphries' property. However, his reasons only discussed whether the binders were included in the sale. They did not discuss whether they belonged to Mr. Humphries or to his old company Black Widow, which sold its assets. So there appears to have been an unexplained leap to a conclusion in the Court of Queen's Bench. And yet many things contradict this alternative argument.

### *2. Purpose of Collection*

55 Mr. Humphries supported his motion for delivery of the binders by swearing that the binders were unique and useful in repairing a host of different types of obsolete pumpjacks still in service

(affidavit, paras 3-5). But that evidence worked against this new argument that Black Widow had no interest in them. Lufkin argued this at length in its Court of Queen's Bench brief (paras 32-33, 37, 38).

56 Mr. Humphries hinted once or twice (in cross-examination only) that the binders were almost a spare-time hobby, collecting nostalgia items. It is unfortunate that counsel for Lufkin called this unargued hobby notion "absurd", because before she explained why, the chambers judge intervened and disagreed because of his own hobby. Of course Lufkin did not have to prove absurdity; something far less strong would have sufficed.

57 One must note Mr. Humphries' relevant dates and age, and when the issuing manufacturers went out of business. The suggestion of a man in his 20s collecting old pump nostalgia items purely as his hobby with no business aim or practical use, would be somewhat unusual. The idea that a teenager was collecting repair items or brochures would also be unusual. These old items existed somewhere for almost a decade before the earliest age (around age 21) that Mr. Humphries' evidence mentions his being an employed pumpjack repairman.

58 Mr. Humphries swore that he spent time assembling and adding to the information in those binders (cross-examination of Mr. Humphries, p 4, l 7 to p 5, l 17). That included time while employed by Lufkin (cross-examination on affidavit, p 7, l 26 to p 8, l 11; p 13, l 14 to p 14, l 26).

***3. Possession and Use***

59 Mr. Humphries brought the binders to Lufkin's premises and left them in Lufkin's possession at its premises for 5-1/2 years after the sale (Humphries' affidavit, para 7). Mr. Humphries also let the various other employees of Lufkin freely use the binders for the same 5-1/2 years. All that is weighty evidence of ownership.

60 Lufkin *itself* by its *other* employees added to the binders while Mr. Humphries was an employee. In his cross-examination, Mr. Humphries was also asked whether someone "else add[ed] to the pump jack binders in the time ... you were at Lufkin — okay. Yes?" And he answered "Yes" (transcript, p 41, ll 4-8). Those new portions of the binders could not belong to Mr. Humphries. Evidently all concerned thought at the time that the binders belonged to Lufkin.

***4. Agency Relation***

61 Mr. Humphries accepted and carried out a senior management office with Lufkin for the same 5-1/2 years.

62 In that office, Mr. Humphries kept adding to and updating the binders. When any expense was involved, he had one of his companies send an invoice to Lufkin for the expense. Lufkin always honored those invoices and reimbursed Mr. Humphries for those expenses. Much of this

 

work was updating the binders; that makes it plainer that the owner of the binders should pay the expenses, not the non-owner. How it would be proper for the owner of the binders to seek and get payment for adding to or updating them, from a non-owner employer, escapes us.

63 The chambers judge tried to allow for this topic by wording his order so that the purchases reimbursed by Lufkin could be removed from the binders before they were returned. (He did not allow for the other issue above (end of subpart 3) about additions by other employees of Lufkin.) But that misses the point. No one suggested that there were two separate collections belonging to different people. Each side claimed to own all the binders and all their contents. The whole point was that Mr. Humphries represented to Lufkin that the binders belonged to Lufkin. And Lufkin changed its position in consequence by paying for additions and letting other employees build the binders into their routine.

64 This argument was expressly made to the chambers judge.

### *5. Signing Written Contract*

65 The representations in cl 4.1 of the sale contract are relied on in Lufkin's factum (para 6; cf supplemental factum, para 15). Lufkin's brief in the Court of Queen's Bench also does so (para 13). Mr. Humphries signed the contract as the sole officer of his company, Black Widow. He was its controlling mind and sole director, and was of course intimately familiar with the sale and the sale contract. Mr. Humphries is now trying to take a position contrary to all the representations, covenants, and conveyances in the sale contract which he signed.

66 What if Mr. Humphries were right, and the binders never belonged to Black Widow? Then he caused that company to make a large number of serious written representations in cl 4.1 which on their face are very hard to reconcile with the evidence.

67 Any suggestion that the controlling mind of a company who knows the facts intimately, and who causes his company to give express representations, and indeed signs the representations for the company, is not himself representing those facts, would be very technical. How can someone who well knows the facts not be part of a factual representation? "I made the express representations, but not myself, only on behalf of someone else" is not convincing.

68 At the very least, Mr. Humphries should be estopped by his formal representations.

69 Furthermore, he has sought what must be an injunction to get back the binders *in specie*. This is an equitable remedy, and does not go as of right even on proof of breach of contract by the person to be enjoined. He who seeks equity (in future) must do equity, and he who comes to equity must have clean hands (from the past). Those are well-known maxims of equity: *Snell's Equity*, Chap 3, paras 5-09 to 5-15 (31st ed 2005). Breach of a covenant by the party seeking the injunction violates the second of these maxims, and even more does a misrepresentation (Snell,

 

*op cit supra*, at para 5-15). We do not put those forward as absolute bars, but they are a relevant consideration, and they echo some of the principles of interpretation of contracts discussed above.

70 In the contract, especially notable are a number of other parts of cl 4.1, which represent (and warrant) many things: see its paras (b), (c)(iii), (o), (k), (l), and (cc). It is not necessary to spell out their details here. Also relevant are cl 9.13 and the definition in cl 1.1(o), and Schedule 1.1 (qq) (end of its para 3).

## H. Conclusion

71 The appeal is allowed with costs, and the order of March 17, 2011 is set aside. Mr. Humphries and his new company must at once return the binders and their contents intact to counsel for Lufkin.

*Appeal allowed.*

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# Tab 5

2016 ONCA 912
Ontario Court of Appeal

Shewchuk v. Blackmont Capital Inc.

2016 CarswellOnt 18794, 2016 ONCA 912, [2016] O.J. No. 6190,
272 A.C.W.S. (3d) 753, 35 C.C.E.L. (4th) 1, 404 D.L.R. (4th) 512

# Robert B. Shewchuk (Plaintiff / Appellant) and Blackmont Capital Inc. (Defendant / Respondent)

George R. Strathy C.J.O., K.M. Weiler, David Watt JJ.A.

Heard: September 9, 2016
Judgment: December 2, 2016
Docket: CA C60982

Proceedings: affirming *Shewchuk v. Blackmont Capital Inc.* (2015), 27 C.C.E.L. (4th) 196, 2015 CarswellOnt 12601, 2015 ONSC 5079, S.A.Q. Akhtar J. (Ont. S.C.J.); additional reasons at *Shewchuk v. Blackmont Capital Inc.* (2015), 27 C.C.E.L. (4th) 252, 2015 CarswellOnt 19635, 2015 ONSC 7861, S.A.Q. Akhtar J. (Ont. S.C.J.)

Counsel: Joseph Groia, Kevin Richard, for Appellant
Nigel Campbell, Doug McLeod, for Respondent

Subject: Civil Practice and Procedure; Contracts; Public; Restitution; Employment

**Headnote**

Labour and employment law --- Employment law — Interpretation of employment contract — Miscellaneous

Plaintiff stockbroker worked as investment advisor for defendant company in its retail group — Defendant entered into agreement with plaintiff — Plaintiff claimed agreement entitled him to certain compensation for any deal sourced by him, including those involving capital markets, while defendant alleged agreement involved retail group and had no application to capital markets transactions — Plaintiff brought action, which was dismissed — Trial judge found parties' agreement was ambiguous and considered factual circumstances surrounding contract to interpret it and resolve ambiguity, including consideration of parties' conduct after formation of contract — Plaintiff appealed — Appeal dismissed — As contract was ambiguous, trial judge properly considered parties' subsequent conduct to assess their evidence about intended scope of contract — Plaintiff identified no palpable and overriding error in trial judge's factual findings about parties' subsequent conduct or extricable error of law in his interpretation of contract — Evidence was overwhelmingly consistent with interpretation of agreement as being inapplicable to capital

markets transactions and with trial judge's conclusion that factual matrix of contract pointed to agreement with retail group, not capital markets.

Contracts --- Construction and interpretation — Resolving ambiguities — Conduct of parties

Plaintiff stockbroker worked as investment advisor for defendant company in its retail group — Defendant entered into agreement with plaintiff — Plaintiff claimed agreement entitled him to certain compensation for any deal sourced by him, including those involving capital markets, while defendant alleged agreement involved retail group and had no application to capital markets transactions — Plaintiff brought action, which was dismissed — Trial judge found parties' agreement was ambiguous and considered factual circumstances surrounding contract to interpret it and resolve ambiguity, including consideration of parties' conduct after formation of contract — Plaintiff appealed — Appeal dismissed — Trial judge's interpretation of contract could not be reviewed on correctness standard absent any extricable error of law — Evidence of subsequent conduct should be admitted only if contract remains ambiguous after considering its text and its factual matrix — As contract was ambiguous, trial judge properly considered parties' subsequent conduct to assess their evidence about intended scope of contract — Trial judge properly used evidence of parties' subsequent conduct to resolve any residual ambiguity in agreement, except for his reference to subsequent conduct forming part of factual matrix — Subsequent conduct must be distinguished from factual matrix, which only encompasses circumstances at time contract was made — Plaintiff identified no palpable and overriding error in trial judge's factual findings about parties' subsequent conduct or extricable error of law in his interpretation of contract — Evidence was overwhelmingly consistent with interpretation of agreement as being inapplicable to capital markets transactions and with trial judge's conclusion that factual matrix of contract pointed to agreement with retail group, not capital markets.

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*Chippewas of Mnjikaning First Nation v. Ontario* (2010), 2010 ONCA 47, 2010 CarswellOnt 273, (sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* [2010] 2 C.N.L.R. 18, 265 O.A.C. 247 (Ont. C.A.) — considered

*Chippewas of Mnjikaning First Nation v. Ontario* (2010), 2010 CarswellOnt 4919, 2010 CarswellOnt 4920, (sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 409 N.R. 396 (note), (sub nom. *Chippewas v. Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 276 O.A.C. 398 (note) (S.C.C.) — referred to

*Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 63 D.L.R. (4th) 703, 36 O.A.C. 204, 9 R.P.R. (2d) 1, 70 O.R. (2d) 737, 1989 CarswellOnt 623 (Ont. C.A.) — referred to

*Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1990), 68 D.L.R. (4th) vii (note), 113 N.R. 400 (note), 39 O.A.C. 160 (note), 73 O.R. (2d) x (S.C.C.) — referred to

*Creston Moly Corp. v. Sattva Capital Corp.* (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

*Danforth-Woodbine Theatre Ltd. v. Loblaws Inc.* (1999), 1999 CarswellOnt 1783, 25 R.P.R. (3d) 137, 97 O.T.C. 241 (Ont. Gen. Div.) — considered

*Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 2000 NFCA 21, 2000 CarswellNfld 315, [2000] G.S.T.C. 106, 5 C.L.R. (3d) 55 (Nfld. C.A.) — referred to

*Eli Lilly & Co. v. Novopharm Ltd.* (1998), 1998 CarswellNat 1061, 1998 CarswellNat 1062, 161 D.L.R. (4th) 1, 227 N.R. 201, [1998] 2 S.C.R. 129, 152 F.T.R. 160 (note), 80 C.P.R. (3d) 321 (S.C.C.) — referred to

*Fontaine v. Canada (Attorney General)* (2016), 2016 ONCA 241, 2016 CarswellOnt 4938, (sub nom. *Fontaine Estate v. Canada (Attorney General))* 346 O.A.C. 321, 130 O.R. (3d) 1, 397 D.L.R. (4th) 243 (Ont. C.A.) — referred to

*Hobbs v. Esquimalt & Nanaimo Railway* (1899), 29 S.C.R. 450, 1899 CarswellBC 23 (S.C.C.) — considered

*James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* (1970), [1970] A.C. 583, [1970] 1 Lloyd's Rep. 269, [1970] 1 All E.R. 796 (U.K. H.L.) — considered

*King v. Operating Engineers Training Institute of Manitoba Inc.* (2011), 2011 MBCA 80, 2011 CarswellMan 485, 270 Man. R. (2d) 63, 524 W.A.C. 63, [2012] 3 W.W.R. 269, 341 D.L.R. (4th) 520 (Man. C.A.) — referred to

*L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1973] 2 All E.R. 39, (sub nom. *Wickman Machine Tool Sales Ltd. v. L.Schuler A.G.)* [1974] A.C. 235 (U.K. H.L.) — considered

*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1 (S.C.C.) — referred to

*Lewis v. Union of B.C. Performers* (1996), 11 E.T.R. (2d) 137, 18 B.C.L.R. (3d) 382, [1996] 6 W.W.R. 588, 70 B.C.A.C. 99, 115 W.A.C. 99, 1996 CarswellBC 160 (B.C. C.A.) — referred to

*Lewis v. Union of B.C. Performers* (1996), 22 B.C.L.R. (3d) xxxiv (note), 83 B.C.A.C. 238 (note), 136 W.A.C. 238 (note) (S.C.C.) — referred to

*Manitoba Development Corp. v. Columbia Forest Products Ltd.* (1973), [1974] 2 W.W.R. 237, 43 D.L.R. (3d) 107, 1973 CarswellMan 94 (Man. C.A.) — referred to

*Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 2000 CarswellOnt 4362, 51 O.R. (3d) 97, 138 O.A.C. 201, 43 C.P.C. (5th) 65 (Ont. C.A.) — referred to

*Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38, 149 A.R. 187, 63 W.A.C. 187, 13 B.L.R. (2d) 310, 1994 CarswellAlta 89 (Alta. C.A.) — considered

*Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 46 R.P.R. (2d) 153, 125 D.L.R. (4th) 193, 24 O.R. (3d) 97, 82 O.A.C. 25, 21 B.L.R. (2d) 165, 1995 CarswellOnt 541 (Ont. C.A.) — referred to

*Plan Group v. Bell Canada* (2009), 2009 ONCA 548, 2009 CarswellOnt 3807, 81 C.L.R. (3d) 9, (sub nom. *Bell Canada v. The Plan Group)* 96 O.R. (3d) 81, 252 O.A.C. 71, 62 B.L.R. (4th) 157 (Ont. C.A.) — followed

*R. v. Rybak* (2008), 2008 ONCA 354, 2008 CarswellOnt 2512, 90 O.R. (3d) 81, 236 O.A.C. 166, 233 C.C.C. (3d) 58, 171 C.R.R. (2d) 306 (Ont. C.A.) — referred to

*R. v. Rybak* (2009), 2009 CarswellOnt 161, 2009 CarswellOnt 162, 180 C.R.R. 376 (note), 237 C.C.C. (3d) vi, 394 N.R. 395 (note), 259 O.A.C. 397 (note) (S.C.C.) — referred to

*R. v. Vant* (2015), 2015 ONCA 481, 2015 CarswellOnt 9645, 324 C.C.C. (3d) 109, 338 O.A.C. 83 (Ont. C.A.) — referred to

*Scurry-Rainbow Oil Ltd. v. Kasha* (1996), 39 Alta. L.R. (3d) 153, 135 D.L.R. (4th) 1, 184 A.R. 177, 122 W.A.C. 177, 1996 CarswellAlta 402, 1996 ABCA 206 (Alta. C.A.) — referred to

*Scurry-Rainbow Oil Ltd. v. Kasha* (1997), 209 A.R. 400 (note), 160 W.A.C. 400 (note), 215 N.R. 158 (note) (S.C.C.) — referred to

*Seven Oaks Inn Partnership v. Directcash Management Inc.* (2014), 2014 SKCA 106, 2014 CarswellSask 636, 446 Sask. R. 89, 621 W.A.C. 89, [2015] 5 W.W.R. 129 (Sask. C.A.) — referred to

*Soboczynski v. Beauchamp* (2015), 2015 ONCA 282, 2015 CarswellOnt 5577, 52 R.P.R. (5th) 175, 125 O.R. (3d) 241, 385 D.L.R. (4th) 148, 333 O.A.C. 353, 42 B.L.R. (5th) 171 (Ont. C.A.) — referred to

*Soboczynski v. Beauchamp* (2015), 2015 CarswellOnt 17704, 2015 CarswellOnt 17705 (S.C.C.) — referred to

*Three Hats Productions Inc. v. RCA Inc.* (1987), 1987 CarswellOnt 3295 (Ont. H.C.) — referred to

*Union Natural Gas Co. v. Chatham Gas Co.* (1918), 56 S.C.R. 253, 40 D.L.R. 485, 1918 CarswellOnt 4 (S.C.C.) — referred to
*Van Gastel v. Methner* (1979), 1979 CarswellOnt 2446 (Ont. H.C.) — referred to
*Water Street Pictures Ltd. v. Forefront Releasing Inc.* (2006), 2006 BCCA 459, 2006 CarswellBC 2476, 26 E.T.R. (3d) 197, [2006] 11 W.W.R. 381, 57 B.C.L.R. (4th) 212, 231 B.C.A.C. 189, 381 W.A.C. 189 (B.C. C.A.) — referred to
*Whiteside v. Celestica International Inc.* (2014), 2014 ONCA 420, 321 O.A.C. 132, 2014 CarswellOnt 15804 (Ont. C.A.) — referred to
*3869130 Canada Inc. v. I.C.B. Distribution Inc.* (2008), 2008 ONCA 396, 2008 CarswellOnt 2802, 66 C.C.E.L. (3d) 89, 45 B.L.R. (4th) 1, 239 O.A.C. 137 (Ont. C.A.) — referred to

APPEAL by plaintiff from judgment reported at *Shewchuk v. Blackmont Capital Inc.* (2015), 2015 ONSC 5079, 2015 CarswellOnt 12601, 27 C.C.E.L. (4th) 196 (Ont. S.C.J.), dismissing plaintiff's action alleging breach of contract and other claims.

***George R. Strathy C.J.O.:***

## A. INTRODUCTION

1 The trial judge found that the parties' contract was ambiguous. He considered the factual circumstances surrounding the contract to interpret it and to resolve the ambiguity. The main question on this appeal is whether he erred in also considering the parties' *subsequent* conduct — that is, their conduct after the formation of the contract.

2 For the reasons that follow, I would dismiss the appeal. Because the contract was ambiguous, the trial judge properly considered the parties' subsequent conduct to assess their evidence about the intended scope of their contract. The appellant has not identified either a palpable and overriding error in the trial judge's factual findings about the parties' subsequent conduct or an extricable error of law in his interpretation of the contract.

## B. THE FACTS

### *The parties*

3 The appellant, a successful stockbroker, was employed by the respondent [1] as an investment advisor ("IA") in its Calgary office. He was a member of the respondent's Retail Group brokers, whose clients were primarily individual investors. The respondent also had a Capital Markets group, based in Toronto, which procured financing for banks, public companies, and other institutional clients.

### *The IA Compensation Plan*

 

4 Each IA, like the appellant, had a Compensation Plan, which set out their commission scale. As a top-producing IA, the appellant was compensated at the highest level: 52 percent of the fees the respondent earned from a retail transaction.

5 The IA Compensation Plan identified several "Special Payout Items," including "Capital Markets Referrals." If an IA referred business to the Capital Markets group, he or she could earn a referral fee of "up to 15% of the net revenue" generated by the transaction. The amount of the fee was discretionary and was determined by executives of the Retail Group and Capital Markets, depending on the "value added" of the IA's relationship with the client, having regard to any pre-existing relationship between the respondent and the client.

6 The appellant and other IAs were dissatisfied with their compensation for transactions they referred to Capital Markets. The appellant, who was particularly vocal, initiated discussions for a new contract for himself, making it clear that he would leave the company if his concerns were not resolved to his satisfaction. His negotiations with the Calgary branch manager of the Retail Group culminated in the execution of a letter agreement dated April 11, 2006 (the "April 11 Agreement").

***The April 11 Agreement***

7 The April 11 Agreement was, in essence, an amendment to the IA Compensation Plan. It had two financial components. First, it granted the appellant 100,000 deferred stock units in the respondent's parent corporation, each of which entitled him to acquire one share. This was in addition to the stock units to which he was entitled as an IA upon meeting his investment targets in a given year. Second, it provided for compensation in addition to what he received under the IA Compensation Plan. Paragraph 3 of the April 11 Agreement provided as follows:

> 3. With respect to the broker warrants[2] attributable to you for the transactions listed in Schedule "A" attached hereto and for all transactions (whether you are paid in the form of broker warrants, cash or fully paid shares) that are sourced directly by you following March 1, 2006, Blackmont shall pay to you an additional 10% over and above that which is payable under [the IA Agreement] (the "Finder's Fee").

8 Schedule A to the agreement listed thirteen "Qualified options eligible for [a] 10% Finders Fee" and six "non-qualified options." It provided that "[a] Finders Fee of 10% will apply to . . . new positions garnered which could come in the form of traditional Broker B-Warrants, free trading shares, restricted shares or cash. These new positions will be added to Schedule A as they arise." The qualified options listed in Schedule A were related to Retail Group transactions.

9 The April 11 Agreement was expressed to be in full and final satisfaction of all compensation-related disputes between the appellant and the respondent. Paragraphs 2 and 10 provided that the IA Agreement would continue to govern the relationship:

 

> 2. Except as outlined further below, payouts on broker warrants will be subject to Blackmont's standard [IA Compensation Plan] (the "Broker Warrant Payments").
>
> . . .
>
> 10. Other than as specifically stated above, all other terms of your employment remain unchanged and shall continue to be subject to [the IA Agreement] in existence at the relevant time.

10 The April 11 Agreement was expressed to be confidential and would be terminated if the appellant breached confidentiality, in which case his compensation would revert to the standard IA Compensation Plan. The appellant acknowledged that the confidentiality provision meant that he could not disclose the existence of the April 11 Agreement to Capital Markets personnel.

***The disputed transactions***

11 In his statement of claim, the appellant asserted, among other things, that he was entitled to a 52 percent commission under the IA Compensation Plan, as well as a further 10 percent commission under the April 11 Agreement, on four Capital Markets transactions in which the respondent was a member of the underwriting syndicate or a participant in the financing. He claimed to have directly sourced these transactions for the respondent through his connections with the clients.

12 The central issue at trial was whether the April 11 Agreement applied to Capital Markets transactions, as the appellant asserts.

***The subsequent conduct***

13 I will discuss the parties' subsequent conduct in more detail below. Briefly, however, the trial judge heard evidence of what the respondent characterized as ongoing attempts by the appellant to negotiate compensation for deals he introduced to Capital Markets. The respondent argued that this conduct was inconsistent with the appellant's assertion that the April 11 Agreement applied to Capital Markets transactions.

## C. THE TRIAL JUDGE'S REASONS

14 The trial judge identified the primary issue as whether the disputed transactions fell within the scope of the April 11 Agreement. This depended on whether the April 11 Agreement was applicable only to retail transactions or whether it also applied to transactions involving Capital Markets. Each party argued that, properly interpreted, the agreement was unambiguous in its favour. The trial judge found that the agreement was ambiguous. The ambiguity could only be

resolved, he said, by looking at the surrounding circumstances, including the parties' conduct after the formation of the April 11 Agreement.

15 In response to the respondent's submission that the parties' conduct *subsequent* to the making of the contract could only be considered in the event of ambiguity, the trial judge expressed the view, at para. 82, that "if subsequent conduct demonstrates the mutual and objective intentions of the words in the contract, it is as valuable as any conduct pre-existing the making of the contract."

16 The judge referred to *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), noting the role of the surrounding circumstances in determining the intentions of the parties at the time of formation of the contract. He proceeded to consider the events leading up to the execution of the April 11 Agreement, including:

- the Retail Group's historical grievances concerning remuneration of IAs who introduced transactions to Capital Markets;
- the fact that Capital Markets personnel were not involved in the negotiation and execution of the April 11 Agreement; and
- the fact that the April 11 Agreement was to be kept confidential by the appellant and not disclosed to Capital Markets.

17 He also noted the unlikelihood that the appellant would be entitled to a fixed commission on "bought deals,"[3] as the appellant would bear none of the risk of these deals. And he noted the absence of any express provision in the April 11 Agreement that would supersede the Capital Markets Referrals provision in the IA Agreement.

18 The trial judge also considered events occurring *after* the execution of the April 11 Agreement, including:

- a proposal made by the appellant on November 5, 2006, for the division of compensation and a 15 percent Finder's Fee on deals he brought to Capital Markets;
- a meeting in November, 2006, in which the appellant attempted to negotiate an agreement with Capital Markets;
- the appellant's attempts to negotiate fees on particular Capital Markets transactions — fees that differed from and were less favourable to him than the fees he claimed were payable under the April 11 Agreement; and
- other attempts by the appellant and his associate, Mr. Harris Watson, to negotiate an agreement with Capital Markets for a share of revenues from transactions arising out of the appellant's relationship with clients.

19 The trial judge found that this course of conduct supported the inference that the April 11 Agreement was not intended to apply to transactions involving Capital Markets. He found it significant that in the course of these negotiations, the appellant did not take the position that he was entitled to share in the fruits of Capital Markets transactions by virtue of the April 11 Agreement.

20 He also found it significant that Capital Markets representatives were not involved in the negotiation of the April 11 Agreement; it was not signed by representatives of Capital Markets; and there were no terms dealing with transactions that included participation by Capital Markets. The appellant was expressly forbidden from even mentioning the existence of the agreement to Capital Markets. According to the trial judge, it would be unreasonable to expect that Capital Markets would agree to share the fees that it earned without any knowledge of or participation in the formation of the agreement.

21 The trial judge found that the IA Compensation Plan permitted the appellant to make agreements with Capital Markets on joint ventures in which he would participate. He had done so after the execution of the April 11 Agreement without ever suggesting that he was entitled to a share in the revenues from them as of right pursuant to the agreement.

22 In the course of analyzing the parties' conduct after they signed the April 11 Agreement, the trial judge made adverse credibility findings against the appellant and Mr. Watson, who each testified that the agreement was intended to apply to Capital Markets transactions and fully resolve the appellant's compensation dispute with the respondent.

23 The trial judge concluded that the April 11 Agreement was intended to heal the rifts between the appellant and the respondent, but that it did not override the IA Compensation Plan. Rather, the April 11 Agreement coexisted with the IA Compensation Plan.

## D. THE PARTIES' SUBMISSIONS

24 I will discuss the parties' submissions on appeal in the Analysis section below. They focus on three principal questions.

25 *First: The Standard of Review.* The appellant submits that, notwithstanding the Supreme Court of Canada's decision in *Sattva*, the trial judge's interpretation of the April 11 Agreement is reviewable on a correctness standard, because this is a case in which the factual matrix of the contract is relatively unimportant in the interpretive exercise. The respondent says that *Sattva* applies and that the trial judge's decision is reviewable on a standard of palpable and overriding error.

26 *Second: Ambiguity.* The appellant submits the contract was unambiguous. He argues that Paragraph 3 of the April 11 Agreement, when read together with Paragraphs 2 and 10, clearly

 

superseded the Capital Markets Referrals provision of the IA Compensation Plan. Its result was to guarantee the appellant a referral fee of 10 percent over and above what would have been payable under the IA Compensation Plan for transactions he referred to Capital Markets. The respondent says the trial judge did not err by concluding that the contract was ambiguous. Although at trial each party argued that the contract was unambiguous, the trial judge correctly noted their respective arguments advanced different and incompatible interpretations.

27 *Third: Subsequent Conduct.* The appellant submits the trial judge committed a legal error by placing undue weight on the parties' conduct subsequent to the formation of the April 11 Agreement. He says that subsequent conduct is not part of the factual matrix. It is admissible only in the event of ambiguity and it has a limited role to play in the interpretive exercise. The respondent submits that evidence of subsequent conduct was properly admitted in view of the ambiguity of the contract. Although the respondent agrees that such evidence must be approached with some caution, it maintains that the trial judge did not err in using it the way he did.

28 At the end of these reasons, I will briefly mention two additional grounds of appeal raised by the appellant.

## E. ANALYSIS

### *The standard of review*

29 I reject the appellant's submission that this court's decision in *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), remains applicable in light of *Sattva* and that the trial judge's interpretation of the contract can be reviewed on a correctness standard in the absence of an extricable error of law.

30 The Supreme Court made clear in *Sattva*, at para. 55, that a question of contractual interpretation is "inherently fact specific" and that, usually, appellate courts should show deference to first-instance fact finders (at para. 52). A less deferential standard should be applied only if the appellant demonstrates an extricable question of law within what was initially characterized as a question of mixed fact and law (at para. 53). See also *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1 (Ont. C.A.), at para. 96; and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, 54 B.L.R. (5th) 1 (S.C.C.), at para. 21.

31 The appellant's reliance on this court's decision in *Bell Canada* is misplaced. In that case, the majority described the exercise of contract interpretation as "a legal exercise" (at paras. 25, 30). This approach has been expressly overtaken by *Sattva* (at paras. 49, 50, 55).

32 Finally, in *Bell Canada* the majority held, at para. 26, that even where a question of contractual interpretation is one of mixed fact and law, an appellate court must determine whether the question is primarily legal or primarily factual to select the appropriate standard of review.

 

In *Sattva*, however, there is no mention of such a spectrum-based approach to the questions of mixed fact and law raised in contractual interpretation. Instead, as stated above, an appellate court must identify an extricable question of law within what was initially characterized as a question of mixed fact and law before a correctness standard applies.

***Ambiguity***

33 The appellant submits the trial judge made an extricable error in finding ambiguity in the April 11 Agreement. He says that the language of "all transactions" in Paragraph 3, quoted above, means precisely what it says and necessarily includes both Retail Group and Capital Markets transactions. He relies on *Hobbs v. Esquimalt & Nanaimo Railway* (1899), 29 S.C.R. 450 (S.C.C.), where the Supreme Court of Canada held that a sale of "land" included the transfer of rights to the minerals contained therein. If the vendor had meant to reserve the mineral rights by using the word "land" in the agreement of purchase and sale, he should have said so. Similarly, the appellant asserts that if the respondent wanted to exclude Capital Markets from "all transactions," it should have said so. The effect, he says, is that the discretionary payment for Capital Markets referrals in the IA Agreement is replaced by a fixed 10 percent payment under the April 11 Agreement.

34 Leaving aside the fact that the approach to contractual interpretation in *Hobbs* has been overtaken by a century of jurisprudence, culminating in *Sattva*, the appellant concedes that the trial judge was required to consider the IA Compensation Plan in interpreting the April 11 Agreement, which expressly referred to the plan and confirmed its ongoing application. Paragraphs 2 and 10 of the April 11 Agreement provided that the IA Compensation Plan, which included the discretionary Finder's Fee provision, would continue, except as specifically set out in the April 11 Agreement. The trial judge found at para. 83 that the provision in the April 11 Agreement giving the appellant a 10 percent Finder's Fee on "all transactions" collided "head on" with the Capital Markets referral provision of the IA Compensation Plan, which made the IA's payment in the discretion of senior management of the Retail Group and Capital Markets, up to a ceiling of 15 percent.

35 I agree with the trial judge that the foregoing gave rise to an ambiguity, which he was required to resolve through the application of the rules of contract interpretation, having regard to the factual matrix surrounding the April 11 Agreement.

36 There was an additional source of ambiguity not considered by the trial judge. The wording of the April 11 Agreement that "Blackmont shall pay to you an additional 10% *over and above that which is payable* under Blackmont's standard investment advisor compensation plan" does not fit easily with the argument that it was intended to apply to Capital Markets referrals. Compensation for Capital Markets referrals in the IA Compensation Plan was entirely discretionary. It was possible for the appellant to receive no fee for a referral to Capital Markets, which, unlike his compensation for retail transactions, did not entitle the appellant to a fixed or minimum percentage for revenue. The use of the phrase "over and above that which is payable" makes sense in the

context of a fixed amount or percentage, but is awkward when applied to a purely discretionary amount.

*Subsequent Conduct*

37 Having found ambiguity in the contract, the trial judge considered what he described at para. 84 as the "surrounding circumstances of the April 11 Agreement and what happened afterwards in its implementation." He looked at the surrounding circumstances to see whether the parties intended the April 11 Agreement to apply to the disputed transactions involving Capital Markets. He looked to the parties' subsequent conduct, he said at para. 85, to determine "their intentions and understanding of the agreement."

38 I will conduct my analysis of this issue by addressing three questions:

> 1) When is evidence of the subsequent conduct of the parties admissible to interpret their contract?
>
> 2) How should courts assess the weight or cogency of that evidence?
>
> 3) Did the trial judge make appropriate use of the evidence of subsequent conduct?

**(1) The admissibility of evidence of subsequent conduct**

39 In *Sattva*, the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 55-56; and *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106, 446 Sask. R. 89 (Sask. C.A.), at para. 13.

40 The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.

41 In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts *at the time of the execution of the contract*, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties *at or before the date of contracting*" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone*

 

*Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55 (Nfld. C.A.), at para. 11; and *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 72.

42 There is an additional reason to distinguish subsequent conduct from the factual matrix — a reason rooted in the reliability of the evidence. In *Sattva*, the Supreme Court stated at para. 60 that consideration of the factual matrix enhances the finality and certainty of contractual interpretation. It sheds light on the meaning of a contract's written language by illuminating the facts known to the parties at the date of contracting. By contrast, as I will explain, evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language.

43 There are some dangers associated with reliance on evidence of subsequent conduct. One danger, recognized in England where such evidence is inadmissible, is that the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time. Thus, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583 (U.K. H.L.), Lord Reid observed, at p. 603:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reasons of subsequent events meant something different a month or a year later.

Indeed, in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 261, Lord Wilberforce described reliance on subsequent conduct as "nothing but the refuge of the desperate."

44 Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, "the fact that a party does not enforce his strict legal rights does not mean that he never had them." As a consequence of the potential ambiguity inherent in subsequent conduct, "some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it is unequivocal": see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 105.

45 A third danger is that over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract.

46 These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at

 

the outset of the interpretive exercise. Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.

47 This approach is consistent with the weight of authority: see *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 (S.C.C.), at p. 307; *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 70 O.R. (2d) 737 (Ont. C.A.), at p. 745, leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 48 (S.C.C.); *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), at p. 372; *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (Ont. C.A.), at p. 108; and Hall, at p. 103. The leading Canadian case is *Canadian National Railway v. Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C. C.A.), aff'd, [1979] 2 S.C.R. 668 (S.C.C.), in which Lambert J.A. stated, at p. 262:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one.
>
> . . .
>
> The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the agreement is made and, in Canada, evidence of subsequent conduct of the parties to the agreement.

48 Despite its dangers, evidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions *at the time they made their agreement*: see *Montreal Trust Co.*, at p. 108; *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 239 O.A.C. 137 (Ont. C.A.), at para. 55; *Whiteside v. Celestica International Inc.*, 2014 ONCA 420, 321 O.A.C. 132 (Ont. C.A.), at para. 58; and *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241 (Ont. C.A.), at para. 60 leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243 (S.C.C.).

49 Canadian courts have never adopted the absolute exclusionary rule prevailing in the United Kingdom: see *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.), at p. 199; *Manitoba Development Corp. v. Columbia Forest Products Ltd.* (1973), 43 D.L.R. (3d) 107 (Man. C.A.), at p. 114; *Van Gastel v. Methner*, [1979] O.J. No. 1032 (Ont. H.C.), at para. 13; and *Three Hats Productions Inc. v. RCA Inc.*, 1987 CarswellOnt 3295 (Ont. H.C.), at para. 36.

50 However, the lesson learned in Canada from the British position is that the parties' subsequent conduct is relevant only to inferentially establishing their intentions *at the time they executed their contract*. Like evidence of post-offence conduct in criminal matters, it is a kind of circumstantial evidence that "invokes a retrospectant chain of reasoning"; the trier of fact is invited to infer the parties' prior intentions from their later conduct: see *R. v. Rybak*, 2008 ONCA 354, 90 O.R. (3d) 81 (Ont. C.A.), at para. 142, leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 311 (S.C.C.); and *R. v. Vant*, 2015 ONCA 481, 324 C.C.C. (3d) 109 (Ont. C.A.), at para. 121. As Juriansz J. (as he then was) wrote in *Danforth-Woodbine Theatre Ltd. v. Loblaws Inc.*, [1999] O.J. No. 2059 (Ont. Gen. Div.), at para. 55:

> [W]here evidence of the conduct of the parties and their method of performance is admissible, it is not admitted so that the contract may be construed to be consonant with the parties' conduct, but rather, it is admitted because the parties' conduct and method of performance may be of assistance in determining what the signatories intended at the time they entered the contract.

**(2) The weight or cogency of evidence of subsequent conduct**

51 In *Canadian National Railways*, Lambert J.A. suggested, at p. 262, that, once admitted, the weight or cogency of evidence of post-contractual conduct may depend on the circumstances:

> However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight . . . In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so and it is to this danger that allusions are made throughout the recent English cases, particularly *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, and *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* In England the risks have been considered sufficiently grave that the possibility of illumination from the use of subsequent conduct has been ruled out. In Canada, they have not, but those risks must be carefully assessed in each individual case before determining to give weight to subsequent conduct. [Citations omitted.]

52 I agree. The inherent dangers of evidence of subsequent conduct mean that when it is admitted it must be used cautiously and its weight will vary from case to case: see *Danforth-Woodbine Theatre*, at para. 55; *Canada Square Corp.*, at pp. 260-261; and *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459, 57 B.C.L.R. (4th) 212 (B.C. C.A.), at para. 27. When ascertaining its cogency, a court should evaluate the extent to which its inherent dangers are mitigated in the circumstances of the case.

53 In the usual course, evidence of subsequent conduct will be more reliable if the acts it considers are the acts of both parties, are intentional, are consistent over time, and are acts of

 

individuals rather than agents of corporations: see *Canadian National Railways*, at p. 262. I agree with Kerans J.A. that "subsequent conduct by individual employees in a large corporation are not always reliable indicators of corporate policy, intention, or understanding": *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (Alta. C.A.), at para. 52.

54 Evidence of subsequent conduct will have greater weight if it is unequivocal in the sense of being consistent with only one of the two alternative interpretations of the contract that generated the ambiguity triggering its admissibility: *Lewis v. Union of B.C. Performers* (1996), 18 B.C.L.R. (3d) 382 (B.C. C.A.), at para. 14, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 182 (S.C.C.); and *Scurry-Rainbow Oil Ltd. v. Kasha*, 1996 ABCA 206, 39 Alta. L.R. (3d) 153 (Alta. C.A.), at para. 44, leave to appeal to S.C.C. refused, (1997), [1996] S.C.C.A. No. 391 (S.C.C.). For instance, in *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 ONCA 47, 265 O.A.C. 247 (Ont. C.A.), at para. 162, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 91 (S.C.C.), this court found that the parties' subsequent conduct was of assistance in determining which of two reasonable interpretations of a contract should be accepted because the conduct in question was "overwhelmingly consistent only with the trial judge's interpretation."

55 Evidence of subsequent conduct may also be given greater weight in proportion to the proximity of the subsequent conduct to the time of the contract's execution: see *Union Natural Gas Co. v. Chatham Gas Co.* (1918), 56 S.C.R. 253 (S.C.C.), at p. 271; and Hall, at pp. 105-106.

56 In summary, evidence of the parties' subsequent conduct is admissible to assist in contractual interpretation only if a court concludes, after considering the contract's written text and its factual matrix, that the contract is ambiguous. The court may then make retrospectant use of the evidence, giving it appropriate weight having regard to the extent to which its inherent dangers are mitigated in the circumstances of the case at hand, to infer the parties' intentions at the time of the contract's execution.

**(3) Did the trial judge properly use the evidence of subsequent conduct?**

57 With one qualification, it is my view that the trial judge properly used the evidence of the parties' subsequent conduct to resolve any residual ambiguity in the April 11 Agreement. The one qualification relates to the trial judge's reference to subsequent conduct forming part of the factual matrix. As I have noted, since the factual matrix only encompasses circumstances at the time the contract was made, subsequent conduct does not enter into that part of the analysis.

58 However, the trial judge did not consider the subsequent conduct as part of the factual matrix. He used it to test the appellant's contention that the parties intended the April 11 Agreement to apply to Capital Markets transactions and to test the credibility of the appellant's explanation of his subsequent conduct. He found that the appellant's repeated attempts to negotiate a revenue sharing agreement with Capital Markets after April 11, 2006 were at odds with his contention that the relationship with Capital Markets had been resolved by the April 11 Agreement. He found the

 

appellant's conduct was consistent with the respondent's interpretation of the contract and rejected as incredible the appellant's attempts to explain his conduct.

59 In my view, the trial judge did not err in giving undue weight to evidence of the appellant's subsequent conduct. His considered the evidence to be relevant to the parties intentions at the time of executing the April 11 Agreement. The evidence was primarily about the appellant's actions — the actions of an individual rather than corporate employees. The appellant's repeated attempts to negotiate a new agreement after April 11, 2006 and his repeated failure to refer to the April 11 Agreement in these negotiations were deliberate and consistent over time. His actions after the formation of the April 11 Agreement were unequivocal and were consistent with the conclusion that at the time of execution neither he nor the respondent viewed the agreement as applicable to Capital Markets. To echo the words of this court in *Chippewas of Mnjikang*, the evidence was overwhelmingly consistent with the interpretation of the Agreement as being inapplicable Capital Markets transactions. It was also consistent with the trial judge's conclusion that the factual matrix of the contract pointed to an agreement with the retail side of the business and not Capital Markets.

*Other grounds of appeal*

60 The appellant argues that the trial judge failed to give adequate consideration to the defendant's pleading, which did not specifically raise the applicability of the April 11 Agreement to Capital Markets transactions. The issue was, however, raised by the respondent well before trial and was the subject of evidence and full argument at trial. The trial judge did not err in considering this issue.

61 Nor would I give effect to the appellant's argument that the trial judge should not have considered the respondent's "corrected" answers to undertakings. In accordance with settled authority, to which he referred, he was entitled to examine both the original and the "corrected" answers and to determine what weight, if any, to give to one or the other: *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont. C.A.). Having done so, he concluded that the original answers contained errors that were made in good faith and that the corrected answers more accurately reflected the facts.

62 I would not give effect to the other grounds of appeal, which were not pressed either in the appellant's factum or in oral argument.

**F. ORDER**

63 For these reasons, I would dismiss the appeal, with costs to the respondent in the agreed amount of $55,000.00, inclusive of prejudgment interest and all applicable disbursements.

***K.M. Weiler J.A.:***

 

I agree.

***David Watt J.A.:***

I agree.

*Appeal dismissed.*

## Footnotes

1 During the material time, the respondent's name was Blackmont Capital Inc., but it is now owned by Richardson GMP. Richardson GMP defended the action at trial and responded to the appeal in this court.

2 Broker warrants were a form of compensation provided by clients to the respondent and shared with IAs as part of their compensation. A warrant gave the holder the right to purchase a share of the issuer at a specific price and for a specific time. The warrant could be exercised or "cashed out" within the exercise time.

3 A "bought deal" was a financial arrangement where the respondent, as an underwriter of an Initial Public Offering, agreed to finance the offering by purchasing securities from its client before the offering went public. If the offering was a success, and the shares were purchased in the market at or above the price at which the respondent bought them, it stood to make a substantial profit. If the IPO was not a success, the respondent bore the risk of substantial losses.

# Tab 6

1982 CarswellOnt 124
Supreme Court of Canada

Carman Construction Ltd. v. Canadian Pacific Railway

1982 CarswellOnt 124, 1982 CarswellOnt 729, 1982 J.E. 694,
[1982] 1 S.C.R. 958, [1982] S.C.J. No. 49, 136 D.L.R. (3d) 193,
14 A.C.W.S. (2d) 475, 18 B.L.R. 65, 42 N.R. 147, J.E. 82-694

# CARMAN CONSTRUCTION LTD. v. CANADIAN PACIFIC RAILWAY CO. et al.

Laskin C.J.C., Martland, Ritchie, Dickson, Beetz,
Estey, McIntyre, Chouinard and Lamer JJ.

Heard: November 12, 1981
Judgment: June 23, 1982

Counsel: *Ian Scott*, Q.C. and *S.M. Grant*, for appellant.
*Katharine F. Braid*, for respondents.

Subject: Corporate and Commercial; Evidence

**Headnote**

Evidence --- Parol evidence rule — Collateral agreements — Provision excluding collateral agreements

Contracts — Collateral warranty — No intention to warrant accuracy of oral representation by employee — Collateral warranty cannot be established where inconsistent with or contradicting written agreement.

Torts — Negligent misrepresentation — Disclaimer of responsibility communicated to other party excluding assumption of duty of care — Claim in negligence not arising in absence of duty of care.

The plaintiff carried on the business of heavy construction and excavation of rock. The defendant, a railway company, wished to widen a railway siding and invited tenders for the rock excavation. The plaintiff received a tender package containing an invitation to bid, printed instructions, a blank proposal form, a specimen form of contract and a site plan. The tender was to be submitted within three days. The tender package did not disclose the quantity of rock to be removed. A clause in the tender documents stated that each tenderer was to make himself personally acquainted with the location of the proposed work. The plaintiff made a visual examination of the site and took some random measurements. An officer of the plaintiff then attended at a local office of the defendant and discussed the tender with someone in the engineering department. That individual estimated that between 7,000 and 7,500 cubic yards of rock had to be excavated. The plaintiff prepared its bid on the assumption that 7,500 cubic yards of rock were to be removed. The bid was for a stated

"upset price" which indicated a fee for profit and provided that if the cost of the work plus the fee exceeded the "upset price", the defendant would be entitled only to payment of the "upset price". The plaintiff's bid was accepted by the defendant and a formal contract was executed. A clause (the "exemption clause") in that contract (which had been examined by the plaintiff as part of the tender package) stated that the contractor agreed that he had entered into the agreement based on his own knowledge respecting the nature and confirmation of the ground, the quantities of material to be removed and that the contractor did not rely upon any information given or statement made to him in relation to the work by the defendant. The plaintiff completed the work in accordance with the terms of the contract, which required the removal of 11,042.5 cubic yards of rock. The plaintiff submitted an additional claim to the defendant for the additional rock removed. The defendant refused to make this payment and the plaintiff brought an action for breach of collateral warranty and negligent misrepresentation.

The trial Judge dismissed the action, holding that, although the facts supported claims for breach of collateral warranty and negligent misrepresentation, the presence of the exemption clause precluded him from finding in favour of the plaintiff. The plaintiff appealed.

The majority of the Ontario Court of Appeal dismissed the appeal, holding that the plaintiff was aware of the contractual provisions before it approached the defendant's employee seeking information. The provisions, which were clear and unambiguous, were meant for the sole purpose of ensuring that prospective bidders relied on any information from defendant's employees at their own risk. One Judge dissented, stating that the oral representation by the defendant's employee amounted to a collateral warranty and constituted negligent misrepresentation. The plaintiff appealed.

**Held:**

The appeal was dismissed.

The existence of a collateral warranty must be established, as is the case in any other contract, by proof of an intention to contract. The person making the statement must be taken to have warranted its accuracy, i.e., promised to make it good. Here, there was no evidence to establish such an intention. There was no express warranty and, in view of the uncertainty as to source of the information, the Court could not find an implied warranty. Moreover, the existence in the contract of the exemption clause which stated that the plaintiff did not rely on any statements by the defendant precluded any finding of the existence of a collateral warranty. A collateral warranty cannot be established where it is inconsistent with or contradicts the written agreement.

Also, there was no negligent misrepresentation. The disclaimer of responsibility (the exemption clause which was communicated to the plaintiff) excluded the assumption of a duty of care on the part of the defendant towards the plaintiff. The defendant did not assume any duty of care and in the absence of such a duty, a claim in negligence will not arise.

**Table of Authorities**

**Cases considered:**

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

*Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801, [1976] 2 All E.R. 5, [1976] 2 Lloyd's Rep. 305 (C.A.) — *distinguished*

*Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, 66 W.W.R. 673, 2 D.L.R. (3d) 600 — *followed*

*Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575, 1 Lloyd's Rep. 485 (H.L.) — *considered*

*Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30, [1911-13] All E.R. Rep. 83 (H.L.) — *considered*

**Authorities considered:**

Anson, Law of Contract (25th ed., 1979), p. 126.

APPEAL from a decision of the Ontario Court of Appeal, reported at 33 O.R. (2d) 472, 124 D.L.R. (3d) 680, dismissing an appeal from a judgment, reported at 28 O.R. (2d) 232, 109 D.L.R. (3d) 288, dismissing an action for breach of collateral warranty and for negligent misrepresentation.

**The judgment of the Court was delivered by *Martland J.*:**

1 The appellant, Carman Construction Limited ("Carman"), carries on the business of heavy construction and, in particular, the excavation of rock. In August 1977, the respondent, Canadian Pacific Railway Company ("C.P.R."), wished to widen a railway siding beside a stretch of railway near Rutter, Ontario. Mr. Johnson, the division engineer of C.P.R. at Sudbury, was authorized by his superiors to invite tenders for the rock excavation. On September 6, 1977, Carman received from C.P.R. a tender package which contained a letter of invitation to bid, printed instructions to bidders, a blank proposal form, a specimen form of the contract ultimately to be entered into with the successful bidder and a site plan. Carman was one of four contractors to receive the package. The material required that the tender be submitted by 10 a.m. Friday, September 9, 1977. This was found by the trial Judge to be an unusually short period of time in which to prepare a bid.

2 The tender package did not disclose the quantity of rock to be removed. Mr. Fielding, vice president and general manager of Carman, testified that normally this information could be obtained in one of two ways; either the owner would supply the information when inviting tenders, or the contractor at its expense would engage a consulting engineer to carry out an investigation. In this case, however, Fielding maintained that there was not enough time to have a consulting firm undertake such an investigation. Fielding and a fellow employee of Carman visited the site on September 7, 1977, where they made a visual examination and took some random measurements. They observed that approximately 25 per cent of the length of the area to be excavated was covered with "overburden", i.e., the surface soil or rubble covering the rock.

3 In August of 1977 a technician employed by C.P.R. had carried out a survey of the proposed siding. His survey was based on a cross section then estimated to be 2500 feet in length, instead

 

of the 2950 feet to be contracted for. As a result of this survey, the quantity of rock to be removed was estimated at approximately 7,000 cubic yards.

4 On the afternoon of September 7, 1977, Fielding visited C.P.R. offices in Sudbury where he discussed the proposed tender with someone in the engineering department. Fielding testified that he told this individual that based on the information available, Carman was unable to submit a price. He was told that there were no soil reports or cross sections available. He then inquired whether C.P.R. had any volume figures, to which the individual in question volunteered a figure of 7,000 to 7,500 cubic yards. On cross-examination, Fielding admitted that he did not know the name of the person who gave him the information, what that person's position was, or what authority he had. However, the trial Judge felt satisfied that it was an employee of C.P.R. authorized to give out such information.

5 Carman prepared its bid on the assumption that 7,500 cubic yards of rock were to be removed. On September 9, 1977, Carman submitted its proposal. The contract was for an "upset" price of $109,260 for work and material, including a fee of approximately 20 per cent for profit in the amount of $18,200.

6 As part of its bid, Carman was required to submit a letter which, under the terms of the proposal, became part of the contract. The concluding paragraph of the letter reads as follows:

> We propose to commence work immediately after final acceptance of your department. We estimate 25 working days, depending on block time to drill, blast, and excavate approx. 7500 cu. yds. of rock.

There is no reference in any of the other documents to the quantity of rock to be removed.

7 Carman's tender was accepted by letter from C.P.R. dated September 30, 1977, and the formal contract was executed in October. The following clauses of the contract are relevant:

> 3.1 It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company.
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> . . . . .
>
> 5.1.2 The fee payable to the Contractor shall be Eighteen Thousand Two Hundred ($18,200) dollars.

5.1.3 The Contractor hereby guarantees that the cost of the work plus the fees shall not exceed One Hundred and Nine Thousand Two Hundred and Sixty ($109,260) dollars which amount is hereinafter referred to as the upset price.

Provided however:

(a) In the event that the cost of the work plus the fee is less than the upset price, the Contractor shall be entitled only to payment of such cost plus the fee.

(b) In the event that the cost of the work plus the fee exceeds the upset price the Contractor shall be entitled only to payment of the upset price.

8 In addition, a document entitled "General Conditions Covering Rock Excavation at Rutter Ontario", which formed part of the bidding documents, contained the following clause:

**4. Familiarity with Site**

Each tenderer must make himself personally acquainted with the location of the proposed work, and must inform himself by such means as he may prefer as to all conditions of the site and all other factors which may affect his tender and the performance of the work, and shall not claim at any time after tendering that there was any misunderstanding in regard to conditions at the site or of conditions imposed by the Agreement.

9 Fielding admitted that he had read the provisions of cl. 3.1, which appeared in the draft contract included in the tender package, and which later appeared in the executed contract, before Carman submitted its proposal to C.P.R. Work was commenced on October 17, 1977. On October 24, 1977, C.P.R. sent a letter to Carman indicating its intention to reduce the size of the cut from 26 feet to 23 feet, and to change the depth of the excavation below track level from 2.9 inches to 2.1 inches. The letter requested Carman to "forward a proposal in writing describing the changes, stating the reduction in the cost of the work and the change in completion date". No response was received. A second letter dated November 9, 1977, was sent to Carman.

10 In the meantime, Carman had progressed to a point where the overburden had been removed. On approximately October 29, 1977, a survey was made by an employee of Carman. This survey revealed that substantially more rock was required to be removed than the estimated 7,500 cubic yards. Carman sent the following letter to C.P.R. dated November 14, 1977:

As per your letter dated October 24, 1977 and the revised plan H-41-62 dated October 18, 1977, be advised that the original quantity of rock was estimated by your office between 7500-8000 cubic yards to be removed.

Before work was started we were advised that rock cut width was being reduced to dimensions as showing on plan H-41-62, October 18, 1977.

 

> We cross sectioned the original cut on October 29, 1977 and subsequent calculations have indicated a quantity of rock removed to be 7,587.66 cubic yards which is within the quantity estimated for bidding purposes. Therefore our original quoted price will remain unchanged.
>
> Due to severe adverse weather conditions and blocky ground our completion date is revised to December 3, 1977.

11 On November 22, 1977, a meeting was held of representatives of both companies. Carman explained the results of its survey which showed that the amount of rock required to be removed for the reduced cut would be approximately the same as that estimated for the original contract. Accordingly, Fielding proposed that the original price of $109,260 remain the same for the reduced cut. C.P.R. did not agree to this proposal and advised Carman by letter dated November 29, 1977, as follows:

> In view of your letter dated November 14, 1977 in which you advised constructing to the revised cross section as shown on Plan No. H-41-62, revised to October 18, 1977 would not result in any reduction in the cost of the work, please be advised that as was discussed with you on November 22, 1977 no change order will be issued and all work must be constructed in accordance with Plan No. H-41-62 dated September 6th, 1977 in accordance with the covering contract agreement.

Carman elected to continue to work under the terms of the original contract, and work was completed on December 23, 1977. The full amount of the contract price was paid. At the completion of the job, Carman conducted a further survey which revealed that 11,042.5 cubic yards of rock had been removed. On January 11, 1978, Carman submitted an additional claim to C.P.R. requesting payment of $32,282.08, the amount required to compensate it for labour and equipment. C.P.R. refused to make this payment and Carman brought an action claiming $32,282.08 plus 20 per cent for its "overrun" fee under the contract.

12 The case was tried in the Supreme Court of Ontario by Griffiths J. whose decision is reported at 28 O.R. (2d) 232, 109 D.L.R. (3d) 288. He dismissed the action. He was of the opinion that, subject to the provisions of the exemption clause, the ingredients were present to support a claim for breach of warranty of a collateral contract and for negligent misrepresentation. However, he concluded that the presence of cl. 3.1, an exemption clause, precluded him from finding in Carman's favour.

13 The appeal to the Ontario Court of Appeal was dismissed, Brooke J.A. dissenting. The decision is now reported at 33 O.R. (2d) 472, 124 D.L.R. (3d) 680. Wilson J.A. (as she then was), who delivered the reasons of the majority said [pp. 472-73 O.R.]:

> The majority of the Court sees no reason why in the circumstances of this case the defendant should be precluded from putting forward the non-reliance provisions in the tender documents. The plaintiff was aware of these provisions before it approached the defendant's employees seeking information as to the quantity of rock to be removed. It knew that this precise matter was dealt with in clear and unambiguous terms in the contract on which it was tendering. Indeed, the provisions were clearly meant for the sole purpose of ensuring that, if prospective bidders got any information on this subject from the defendant's employees, they would be relying upon it at their own risk. Likewise, the defendant knew that if its employees gave out any information or made an estimate in response to requests from prospective bidders, the risk of the information's being wrong was not on it but on the bidders who used it. This was the context in which they conducted their business.
>
> This is not, in the view of the majority, a case in which, after making a negligent misrepresentation to the plaintiff in order to induce it to enter into a contract, the terms of which were at the time of the misrepresentation unknown, the defendant thereafter inserts into the contract an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract on which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's employees. There is no basis in these circumstances for the exercise of the Court's equitable jurisdiction.

14 Brooke J.A. adopted the trial Judge's findings of breach of collateral warranty and negligent misrepresentation and went on to say [at p. 476]:

> The quantity of rock to be removed was a vital fact in issue in making the bid and the contract. In the circumstances, the clause relied upon by the company does not apply to the issue of quantity and the representation by the defendant's authorized representative amounts to a collateral warranty and the defendant is liable on its breach. Further, I agree with the learned trial Judge that in the circumstances this was a negligent misrepresentation. The clauses in the contract to which I have referred provide no defence.

15 At trial it was contended by Carman that its letter to C.P.R., which accompanied its bid, and which formed part of the contract which contained the sentence, "We estimate 25 working days, depending on block time to drill, blast and excavate approx. 7500 cu. yds. of rock", had the effect of making the contract into an agreement to excavate only a specific quantity of rock. This submission was rejected by the trial Judge and I agree with him. This argument was never mentioned in either judgment in the Court of Appeal and it was not pressed in this Court.

16 The submission of the appellant in this Court was that Carman is entitled to recover damages from C.P.R.:

 

17 (a) in contract, for breach of a collateral warranty; and

18 (b) in tort for negligent misrepresentation.

**Collateral Warranty**

19 A collateral warranty is a contract collateral to the primary agreement. Its existence must be established, as in the case of any other contract, by proof of an intention to contract. In Anson's Law of Contract (25th ed., 1979) the following passage appears at p. 126:

> But all of these factors are at best only secondary guides and they are subsidiary to the main test of *contractual intention*, that is, whether there is evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement. The question therefore is: On the totality of evidence, must the person making the statement be taken to have *warranted* its accuracy, i.e. promised to make it good? This overriding principle was laid down in *Heilbut, Symons & Co. v. Buckleton* ([1913] A.C. 30):
>
> > The respondent telephoned the appellants' agent and said "I understand you are bringing out a rubber company". The reply was "We are". The respondent asked for a prospectus, and was told there were none available. He then asked "if it was all right", and the agent replied "We are bringing it out". On the faith of this, the respondent bought shares which turned out to be of little value. The company was not accurately described as "a rubber company", although this assurance had not been given in bad faith. The respondent claimed damages for breach of contract.
>
> The House of Lords held that no breach of contract had been committed. There had been merely a representation and no warranty. There was no intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement.
>
> In his judgment in that case [*Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30, [1911-13] All E.R. Rep. 83 (H.L.)], Lord Moulton, at p. 47 [A.C.], said this:
>
> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100£., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral

 

> contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

20 This passage was accepted by this Court as a statement of the law in *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at 520, 66 W.W.R. 673, 2 D.L.R. (3d) 600.

21 In my opinion there is no evidence in the present case to establish an intention to warrant the accuracy of the statement made by the C.P.R. employee to Fielding, i.e., no promise to make it good.

22 The circumstances in which the statement concerning the volume of rock excavation was made to Fielding are described in his evidence, to which some reference had already been made. He visited the C.P.R. offices at Sudbury. The evidence shows that Mr. Johnson, the division engineer, was not present at that time. Fielding's recollection was that four C.P.R. employees were present, including Mr. Bonguard, who was Johnson's assistant. The others he described as "just office staff or working in the engineering department. Their classification I don't know".

23 Fielding testified that he asked for soil reports and cross sections. The following questions and answers then appear in the transcript:

> Q. Yes. Now, when you made that request, what, if anything, was said and by whom?
>
> A. Mr. Bonguard said that their cross-sections were not available and I then stated that if they were not available, we would not be able to submit a tender.
>
> Q. Yes?
>
> A. I then asked them if they had a volume themselves of rock excavation; that at that time he volunteered a figure of 7,000, 7,500 cubic yards of rock involved in the contract.

24 Subsequent evidence disclosed that Bonguard was absent on his holidays on the date in question. On cross-examination, Fielding said that he had assumed one of the men present was Bonguard, whom he did not know at that time. If the information did not emanate from Bonguard, he said, it must have been from one of the men in the engineering office.

25 There is no evidence from Fielding that any warranty of the accuracy of the information he received was given to him and Carman made no request for such warranty. Certainly there was no

 

express warranty and, in view of the uncertainty as to the source of the information, I do not see how there could be an implied warranty by C.P.R.

26 Even apart from the provisions of cl. 3.1 of the contract, I would have had difficulty in finding that the intent to make a collateral warranty had been proved. The existence of that clause, in the circumstances of this case, precludes any finding of the existence of a collateral warranty.

27 That clause provided that Carman did not rely upon any information or statement made to it in relation to the work by C.P.R. A copy of the proposed agreement had been received by Carman and Fielding had read cl. 3.1 prior to his visit to the C.P.R. offices at Sudbury. He was aware that if Carman tendered successfully and a contract was executed, it would contain cl. 3.1 As the majority of the Court of Appeal has said:

> The plaintiff was aware of these provisions before it approached the defendant's employees seeking information as to the quantity of rock to be removed. It knew that this precise matter was dealt with in clear and unambiguous terms in the contract on which it was tendering. Indeed, the provisions were clearly meant for the sole purpose of ensuring that, if prospective bidders got any information on this subject from the defendant's employees, they would be relying upon it at their own risk.

28 In the light of these circumstances, I do not see how it could be held that a collateral warranty existed as to the volume of rock to be removed.

29 There is an additional ground for denying the existence of a collateral warranty. Such a warranty, if it existed, would contradict the express terms of the contract as contained in cl. 3.1. This Court has held in *Hawrish v. Bank of Montreal*, supra, that a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement.

30 The *Hawrish* case was followed on this point by this Court recently in the case of *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 at 113, 10 B.L.R. 209, 33 C.B.R. (N.S.) 291, 32 N.R. 191, 110 D.L.R. (3d) 424.

31 The appellant relied heavily on the case of *Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801, [1976] 2 All E.R. 5, [1976] 2 Lloyd's Rep. 305 (C.A.). In that case Esso sued for possession of premises, rent in arrears and mesne profits under a lease by it to Mardon of a service station. Mardon counterclaimed for damages on the ground that Esso had induced him to enter into the lease by falsely representing the potential sales capacity of the service station. It was found as a fact that the estimates given to Mardon by Esso had been made negligently, that they had been given to him to induce him to enter into the lease and that he had been induced to do so because of the estimates. The Court of Appeal found, on the evidence, that there was a warranty that the forecast was sound.

32 Apart from a number of factual differences between that case and the present one, the essential difference is that in the *Esso* case the lease agreement did not contain any provision similar to cl. 3.1 of the agreement in this case.

33 For these reasons, it is my opinion that the claim of Carman for damages for breach of a collateral warranty fails.

**Negligent Misrepresentation**

34 The appellant also founded its claim on the basis of negligent misrepresentation as defined in the principles laid down by the House of Lords in *Hedley Bryne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575, 1 Lloyd's Rep. 485 (H.L.). Those principles are summarized in the headnote to the report of the case in the All England Reports, as follows:

> If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results. ...

35 The facts in that case were that the appellants were advertising agents who had placed forward advertising orders for a company, on terms by which the appellants were personally liable for the cost of the orders. They asked their bankers to inquire into the company's financial stability. The bankers made inquiry of the respondents, who were the company's bankers. The first request was by telephone. A note of the conversation made by the respondents and accepted as accurate said: "They wanted to know in confidence, and without responsibility on our part, the respectability and standing of Easipower Ltd."

36 At a later date, the bankers made a further similar inquiry, in writing, asking "whether you consider them trustworthy, in the way of business, to the extent of £100,000 per annum advertising contract". The respondents' reply was headed "CONFIDENTIAL" and said: "For your private use and without responsibility on the part of the bank or its officials." It stated, inter alia, that E... Ltd. was a "Respectably constituted company considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see."

37 The bank communicated these replies to its customers. The appellants relied on the information. They lost over $17,000 when Easipower went into liquidation. They sued the respondents for negligent misrepresentation.

38 The House of Lords decided that while the circumstances might have given rise to a duty of care, in the absence of the disclaimers, the disclaimer of responsibility precluded the implication of such duty.

39 In the course of his reasons, Lord Reid said at p. 486 of the Appeal Cases:

> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances required.

Lord Hodson said at p. 511:

> Was there, then, a special relationship here? I cannot exclude from consideration the actual terms in which the reference was given and I cannot see how the appellants can get over the difficulty which these words put in their way. They cannot say that the respondents are seeking, as it were, to contract out of their duty by the use of language which is insufficient for the purpose, if the truth of the matter is that the respondents never assumed a duty of care nor was such a duty imposed upon them.

At p. 533 Lord Devlin said:

> A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake.

Finally, Lord Pearce said, at p. 540:

> But in any event they clearly prevent a special relationship from arising. They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. If both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability, I do not find it possible to say that a liability was assumed.

40 In the *Hedley Bryne* case the decision was that the disclaimer of responsibility for the persons alleged to be liable for negligent misrepresentation, communicated to the other party,

excluded the assumption of a duty of care. I regard the wording of cl. 3.1 of the agreement as having the like effect. The judgment at trial dealt with the situation on the basis that negligent misrepresentation, had been established, but that cl. 3.1 was an exemption clause which exempted C.P.R. from liability. In the circumstances of this case, I would prefer to regard the clause as establishing that C.P.R. did not assume any duty of care, and a claim in negligence will not arise in the absence of a duty of care.

41 I reach this conclusion in the light of the facts to which I have already referred in dealing with the issue of collateral warranty. Carman was made aware, when Fielding received the tender documents, and read and understood cl. 3.1, that if it entered into an agreement with C.P.R. it was doing so on its own knowledge as to the quantities of material to be removed and that it would not rely upon any information or statement made to it by C.P.R. in relation to the work. Fielding was aware of this when he sought information from a C.P.R. employee. He knew that if information was obtained, Carman would be relying upon it at its own risk. In my opinion, on the facts of this case, a duty of care on the part of C.P.R. in respect of information provided by its employee never arose provided the information was given honestly. The trial Judge has found that the misrepresentation made to Carman was made innocently without intent to defraud.

42 There was a good deal of argument submitted with respect to contractual provisions exempting a tortfeasor from liability for negligence. As I have already indicated, I do not regard s. 3.1 as being a clause exempting from liability. It is what the Court of Appeal described as a non-reliance provision, the effect of which was to prevent liability arising on the part of C.P.R. in respect of statements made or information given by its employees.

43 In my opinion Carman's claim based on negligent misrepresentation was properly dismissed.

44 I would dismiss this appeal with costs.

*Appeal dismissed.*

# Tab 7

**Peter Haberman** *Appellant*

*v.*

**Mauricio Peixeiro and Fernanda Peixeiro** *Respondents*

INDEXED AS: PEIXEIRO *v.* HABERMAN

File No.: 24981.

Hearing and judgment: March 13, 1997.

Reasons delivered: September 26, 1997.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Limitation of actions — Motor vehicles — Torts — Discoverability — Plaintiffs commencing action against defendant more than three years after motor vehicle accident — Whether discoverability principle applies to postpone commencement of two-year limitation period — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 206(1) — Insurance Act, R.S.O. 1990, c. I.8, s. 266(1).*

Following a two-car accident in October 1990 in which the appellant and the respondent MP were the drivers, MP consulted his family doctor and was told that he had suffered soft tissue injuries in the form of a severe contusion to the right side of his back. X-rays were taken but disclosed nothing unusual. In January 1992, MP was involved in a second accident. His resultant injuries were again diagnosed as being soft tissue in nature. In June 1993, a CT scan was performed which revealed a disc protrusion in MP's spine. The respondents commenced an action against the appellant in July 1994 and a motion on a question of law was brought to determine whether the claim for the injuries of October 11, 1990 was statute-barred by s. 206(1) of the Ontario *Highway Traffic Act*, which provides for a limitation period of two years from the time "when the damages were sustained". The chambers judge held that the action was statute-barred. The Court of Appeal allowed the respondents' appeal.

*Held*: The appeal should be dismissed.

**Peter Haberman** *Appelant*

*c.*

**Mauricio Peixeiro et Fernanda Peixeiro** *Intimés*

RÉPERTORIÉ: PEIXEIRO *c.* HABERMAN

N° du greffe: 24981.

Audition et jugement: 13 mars 1997.

Motifs déposés: 26 septembre 1997.

Présents: Les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Prescription — Véhicules automobiles — Responsabilité délictuelle — Possibilité de découvrir le dommage — Action des demandeurs contre le défendeur plus de trois ans après l'accident de la route — La règle de la possibilité de découvrir le dommage s'applique-t-elle de façon à reporter le commencement du délai de prescription de deux ans? — Code de la route, L.R.O. 1990, ch. H.8, art. 206(1) — Loi sur les assurances, L.R.O. 1990, ch. I.8, art. 266(1).*

À la suite d'un accident survenu en octobre 1990 entre deux automobiles, dont les conducteurs étaient l'appelant et l'intimé MP, ce dernier a consulté son médecin de famille, qui lui a indiqué qu'il avait subi des blessures des tissus mous sous forme d'une contusion grave sur le côté droit du dos. Les radiographies prises n'ont rien révélé d'anormal. En janvier 1992, MP a été victime d'une seconde collision. À nouveau, on a diagnostiqué des blessures des tissus mous. En juin 1993, une scanographie a révélé une protrusion d'un disque intervertébral de MP. Les intimés ont intenté une action contre l'appelant en juillet 1994 et une motion a été présentée afin de faire trancher un point de droit, c'est-à-dire la question de savoir si l'action intentée contre celui-ci pour les blessures résultant de l'accident du 11 octobre 1990 était prescrite par application du par. 206(1) du *Code de la route* de l'Ontario, qui établit un délai de prescription de deux ans à compter de la date «où les dommages ont été subis». Le juge des requêtes a statué que l'action était prescrite. La Cour d'appel a accueilli l'appel des intimés.

*Arrêt*: Le pourvoi est rejeté.

While at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period, under Ontario's no-fault insurance scheme at the time of the accident the starting point is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266(1) of the *Insurance Act*. Section 266 effectively bars actions for recovery in tort unless a certain level of physical injury, permanent in nature and entailing serious impairment of an important bodily function, is met. The right of action referred to in s. 206(1) of the *Highway Traffic Act* must mean an action that is not excluded by s. 266(1) of the *Insurance Act*. This view is strengthened by s. 266(3), which allows for a pre-trial motion on the issue of the existenee of a cause of action. Under s. 206(1) of the *Highway Traffic Act*, there is no cause of action until the injury meets the statutory exceptions to liability immunity. The discoverability principle applies to avoid the injustice of preeluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). While the respondents knew of some injury, they did not know prior to June 1993 that the damage MP sustained as a result of the first accident was a herniated disc, and it cannot be said that they ought to have diseovered the serious nature of the damage earlier. As the action was started within two years of the time when they first learned that they had a cause of action, it is not statute-barred.

Bien que, en common law, l'ignorance ou la méprise quant à l'importance du dommage ne retarde pas le point de départ du délai de prescription, dans le cadre du régime d'indemnisation sans égard à la responsabilité en vigueur en Ontario au moment de l'accident, le délai de prescription commence à courir à compter du moment où l'on sait que les dommages subis comportent une «déficience grave et permanente» au sens du par. 266(1) de la *Loi sur les assurances*. L'article 266 exclut effectivement les actions en dommages-intérêts pour responsabilité délictuelle en l'absence d'une blessure d'ordre physique permanente causant une déficience grave d'une fonction corporelle importante. Le droit d'action envisagé au par. 206(1) du *Code de la route* doit viser les actions qui ne sont pas exclues par le par. 266(1) de la *Loi sur les assurances*. Cette opinion est renforcée par le par. 266(3), qui permet la présentation, avant le procès, d'une motion sur la question de l'existence d'une cause d'action. En vertu du par. 206(1) du *Code de la route*, il n'existe pas de cause d'action à moins que la blessure soit visée par l'une des exceptions à l'immunité contre la responsabilité civile qui sont prévues par la loi. La règle de la possibilité de découvrir le dommage s'applique pour prévenir l'injustice qu'entraînerait le fait d'empêcher une personne d'intenter une action avant qu'elle ne soit en mesure de le faire. Le délai prévu au par. 206(1) ne commence à courir qu'à compter du moment où il est raisonnablement possible de découvrir que la blessure atteint le seuil d'application du par. 266(1). Même si les intimés savaient qu'une blessure avait été subie, ils ne savaient toutefois pas, avant juin 1993, que la blessure causée à MP par le premier accident était une hernie discale, et il est impossible d'affirmer qu'ils auraient dû découvrir plus tôt la gravité du dommage. Puisque leur action a été intentée dans les deux ans de la date où ils ont appris qu'ils disposaient d'une cause d'aetion, elle n'est pas prescrite.

**Cases Cited**

**Referred to:** *Murphy v. Welsh*, [1993] 2 S.C.R. 1069; *Bair-Muirhead v. Muirhead* (1994), 20 O.R. (3d) 744; *Grossi v. Bates* (1995), 21 O.R. (3d) 564; *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758; *July v. Neal* (1986), 57 O.R. (2d) 129; *Meyer v. Bright* (1993), 15 O.R. (3d) 129; *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200.

**Jurisprudence**

**Arrêts mentionnés:** *Murphy c. Welsh*, [1993] 2 R.C.S. 1069; *Bair-Muirhead c. Muirhead* (1994), 20 O.R. (3d) 744; *Grossi c. Bates* (1995), 21 O.R. (3d) 564; *Cartledge c. E. Jopling & Sons Ltd.*, [1963] A.C. 758; *July c. Neal* (1986), 57 O.R. (2d) 129; *Meyer c. Bright* (1993), 15 O.R. (3d) 129; *Buffa c. Gauvin* (1994), 18 O.R. (3d) 725; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Sparham-Souter c. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858; *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200.

**Statutes and Regulations Cited**

*Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 206(1), (3).
*Insurance Act*, R.S.O. 1990, c. I.8, s. 266.
*Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2 (Bill 68).
*Limitations Act*, R.S.O. 1990, c. L.15, s. 47.

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Klar, Lewis. "No Fault Insurance for Auto Accident Victims: A Background Paper", prepared for the Canadian Bar Association, Alberta Branch, Fault/No Fault Insurance Task Force, April 1991.
O'Donnell, Allan. *Automobile Insurance in Ontario*. Toronto: Butterworths, 1991.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46, [1995] O.J. No. 2544(QL), allowing the respondents' appeal from a decision of Paisley J. of the Ontario Court (General Division) holding that the respondents' action against the appellant was statute-barred. Appeal dismissed.

*T. H. Rachlin, Q.C.*, and *Alan L. Rachlin*, for the appellant.

*Antonio F. Azevedo*, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

This appeal arises from a motion brought by the respondents Peixeiro to determine whether their action against the appellant Haberman was statute-barred. The appeal was heard and dismissed on March 13, 1997.

The question raised was whether the discoverability principle applied to postpone the commencement of the two-year limitation period contained in s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("*HTA*"). It stipulates that actions for "damages occasioned by a motor vehicle" must be com-

**Lois et règlements cités**

*Code de la route*, L.R.O. 1990, ch. H.8, art. 206(1), (3).
*Insurance Statute Law Amendment Act, 1990*, L.O. 1990, ch. 2 (projet de loi 68).
*Loi sur la prescription des actions*, L.R.O. 1990, ch. L.15, art. 47.
*Loi sur les assurances*, L.R.O. 1990, ch. I.8, art. 266.

**Doctrine citée**

Klar, Lewis. «No Fault Insurance for Auto Accident Victims: A Background Paper», prepared for the Canadian Bar Association, Alberta Branch, Fault/No Fault Insurance Task Force, April 1991.
O'Donnell, Allan. *Automobile Insurance in Ontario*. Toronto: Butterworths, 1991.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46, [1995] O.J. No. 2544(QL), qui a accueilli l'appel des intimés contre la décision du juge Paisley de la Cour de l'Ontario (Division générale) qui avait statué que leur action contre l'appelant était prescrite. Pourvoi rejeté.

*T. H. Rachlin, c.r.*, et *Alan L. Rachlin*, pour l'appelant.

*Antonio F. Azevedo*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

Le présent pourvoi découle d'une requête dans laquelle les intimés Peixeiro demandaient si leur action contre l'appelant Haberman était prescrite. Le pourvoi a été entendu et rejeté le 13 mars 1997. 1

Il s'agissait de déterminer si la règle de la possibilité de découvrir le dommage s'appliquait pour reporter le point de départ du délai de prescription prévu au par. 206(1) du *Code de la route*, L.R.O. 1990, ch. H.8, aux termes duquel l'action en dommages-intérêts pour des «dommages occasionnés 2

menced within two years of the time when the "damages were sustained". The respondents commenced their action against the appellant three years and nine months after the motor vehicle accident. In that action they claimed that Mr. Peixeiro's injuries met the requirement of the exception to the general liability immunity afforded to persons involved in a motor vehicle accident by s. 266(1) of the *Insurance Act*, R.S.O. 1990, c. I.8. This liability immunity is a key feature of the statutory no-fault automobile accident compensation scheme. It operates to effectively bar causes of action in tort in all but a few cases. The resolution of the issue in this appeal requires a consideration of the liability immunity and the no-fault scheme before consideration of the applicability of the discoverability principle.

## II. Statement of Facts

3 The application before the motions judge proceeded on agreed facts. A two-car accident occurred on October 11, 1990 at the intersection of Ossington Avenue and Harbord Street in the City of Toronto. The appellant Haberman and the respondent Mauricio Peixeiro were the drivers. Liability in the accident is disputed but it is agreed that Mr. Peixeiro knew he was injured.

4 Mr. Peixeiro consulted his family doctor and was told that he had suffered soft tissue injuries in the form of a severe contusion to the right side of his back. He was also referred to a specialist who recommended a course of physiotherapy. X-rays were taken at that time but disclosed nothing unusual. He was unable to work as a general contractor, from the date of the accident to November 1991, a period of over 13 months.

5 On January 7, 1992, Mr. Peixeiro was involved in a second two-car accident. Mr. Jose Silva was the other driver in this second accident.

par un véhicule automobile» se prescrit par deux ans à compter de la date où les «dommages ont été subis». Les intimés ont intenté leur action contre l'appelant trois ans et neuf mois après l'accident de la route. Dans cette action, ils faisaient valoir que les blessures subies par M. Peixeiro remplissaient les conditions d'application de l'exception à l'immunité générale établie par le par. 266(1) de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8. Cette immunité est un des aspects clés du régime législatif d'indemnisation sans égard à la responsabilité établi en faveur des personnes qui ont un accident de la route. Elle a pour effet d'exclure, à quelques exceptions près, toute cause d'action en responsabilité délictuelle. Pour trancher la question en litige dans le présent pourvoi, il faut d'abord analyser cette immunité ainsi que le régime d'indemnisation sans égard à la responsabilité avant de se demander si la règle de la possibilité de découvrir le dommage s'appliqne en l'espèce.

## II. Les faits

La demande présentée au juge des requêtes reposait sur des faits admis de part et d'autre. Une collision entre deux voitures s'est produite, le 11 octobre 1990, à l'intersection de l'avenue Ossington et de la rue Harbord à Toronto. Les deux voitures étaient respectivement conduites par l'appelant Haberman et par Mauricio Peixeiro. La question de savoir qui est responsable de l'accident est contestée, mais il est admis que M. Peixeiro savait qu'il était blessé.

Monsieur Peixeiro a consulté son médecin de famille, qui lui a indiqué qu'il avait subi des blessures des tissns mous sous forme d'une contusion grave sur le côté droit du dos. On lui a également demandé de voir un spécialiste, qui lui a recommandé un traitement de physiothérapie. Les radiographies prises à cette époque n'ont rien révélé d'anormal. À compter de la date de l'accident jusqu'en novembre 1991, soit pendant plus de 13 mois, il a été incapable d'exercer ses activités d'entrepreneur général.

Le 7 janvier 1992, M. Peixeiro a été victime d'un autre accident de la route, la voiture dans laquelle il se tronvait étant entrée en collision avec

Mr. Peixeiro's resultant injuries were again diagnosed as being soft tissue in nature. Mr. Peixeiro was unable to work from the date of the second accident until May 1992. He ceased employment again in August 1992 and has not returned to work.

une autre voiture conduite par M. Jose Silva. À nouveau, on a diagnostiqué chez M. Peixeiro des blessures des tissus mous. Ce dernier n'a pas été en mesure de travailler pendant la période allant de la date de ce second accident jusqu'en mai 1992. Il a de nouveau cessé de travailler en août 1992 et n'a pas repris le travail depuis.

On January 15, 1993, Mr. Peixeiro consulted his family physician. As a result, a CT scan was performed in June 1993. The scan revealed a disc protrusion in the respondent's spine at L5-S1. At that time, Mr. Peixeiro was not a good candidate for surgery. However, on December 8 when he developed paresis on his right leg, he was admitted to emergency. He underwent a hemilaminectomy and a discectomy to remove the herniated disc on December 22, 1993.

6 Le 15 janvier 1993, M. Peixeiro a consulté son médecin de famille. Par suite de cette visite, il a subi, en juin 1993, une scanographie qui a révélé une protrusion du disque intervertébral au niveau L5-S1. À ce moment-là, une intervention chirurgicale n'était pas recommandée dans son cas. Toutefois, le 8 décembre snivant, il a souffert d'une parésie de la jambe droite et a été admis au service des urgences à l'hôpital. Le 22 décembre 1993, il a subi une hémilaminectomie et une discectomie pour l'ablation du disque hernié.

On December 17, 1993, the respondents commenced an action against Mr. Silva. The respondents initially attempted to add the appellant as a defendant to the Silva action. By agreement, a separate action was commenced on July 27, 1994 against the appellant and a motion on a question of law was brought to determine whether the claim against him for the injuries of October 11, 1990 was statute-barred by s. 206(1) *HTA*.

7 Le 17 décembre 1993, les intimés ont intenté une action contre M. Silva et ont tenté, initialement, de faire inclure M. Haberman à titre de défendeur à cette action. Du consentement des parties, une action distincte a été intentée contre l'appelant, le 27 juillet 1994, et une requête a été présentée afin de faire trancher un point de droit, à savoir si l'action intentée contre celui-ci pour les blessnres résultant de l'accident du 11 octobre 1990 était prescrite par application du par. 206(1) dn *Code de la route*.

On November 1, 1994, the chambers judge Paisley J. held that the respondents' action against Haberman was statute-barred.

8 Le 1[er] novembre 1994, le juge des requêtes Paisley a conclu que l'action des intimés contre Haberman était prescrite.

The Court of Appeal for Ontario allowed the respondents' appeal on September 5, 1995: (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46, [1995] O.J. No. 2544 (QL).

9 Le 5 septembre 1995, la Cour d'appel de l'Ontario a accueilli l'appel formé par les requérants contre cette décision: (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46, [1995] O.J. No. 2544 (QL).

The parties agreed that the respondents first learned about a herniated disc in Mr. Peixeiro's back in June 1993.

10 Les parties conviennent que les intimés ont appris en juin 1993 que M. Peixeiro souffrait d'une hernie discale.

III. Relevant Statutory Provisions

11 *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 206(1)

**206.**—(1) Subject to subsections (2) and (3), no proceeding shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of two years from the time when the damages were sustained.

*Insurance Act*, R.S.O. 1990, c. I.8, s. 266

**266.**—(1) In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the *No-Fault Benefits Schedule* involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

(2) Subsection (1) does not relieve any person from liability other than the owner of the automobile, occupants of the automobile and persons present at the incident.

(3) In an action for loss or damage from bodily injury arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before or at trial, determine if the injured person has, as a result of the accident, died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

(4) Even though a defence motion under subsection (3) is denied, the defendant may, at trial, in the absence

III. Les dispositions législatives pertinentes

*Code de la route*, L.R.O. 1990, ch. H.8, par. 206(1)

**206** (1) Sous réserve des paragraphes (2) et (3), nulle poursuite en dommages-intérêts ne peut être intentée contre une personne pour des dommages occasionnés par un véhicule automobile après l'expiration d'un délai de deux ans à compter de la date où les dommages ont été subis.

*Loi sur les assurances*, L.R.O. 1990, ch. I.8, art. 266

**266** (1) À l'égard de pertes ou de dommages découlant directement ou indirectement de l'usage ou de la conduite d'une automobile après le 21 juin 1990 et malgré toute autre loi, le propriétaire d'une automobile, les personnes transportées dans une automobile ou les personnes présentes à l'incident ne sont pas tenus responsables dans une action intentée en Ontario pour pertes ou dommages résultant d'une lésion corporelle qui découle de l'usage ou de la conduite de l'automobile au Canada, aux États-Unis d'Amérique ou dans un autre ressort désigné dans l'*Annexe sur les indemnités d'assurance sans égard à la responsabilité*, à moins que, par suite d'un tel usage ou d'une telle conduite, la personne blessée ne soit morte ou n'ait subi, selon le cas:

a) un préjudice esthétique grave et permanent;

b) une déficience grave et permanente d'une fonction corporelle importante causée par une blessure permanente qui est d'ordre physique.

(2) Le paragraphe (1) n'a pas pour effet de dégager de la responsabilité des personnes autres que le propriétaire de l'automobile, les personnes transportées dans l'automobile et les personnes présentes à l'incident.

(3) Dans une action pour pertes et dommages résultant d'une lésion corporelle qui découle directement ou indirectement de l'usage ou de la conduite d'une automobile, un juge décide, sur motion présentée avant ou pendant le procès, si, par suite de l'accident, la personne blessée est morte ou a subi, selon le cas:

a) un préjudice esthétique grave et permanent;

b) une déficience grave et permanente d'une fonction corporelle importante causée par une blessure permanente qui est d'ordre physique.

(4) Même si une motion visée au paragraphe (3), présentée par la défense, est rejetée, le défendeur peut, au

of the jury, and following the hearing of evidence, raise the defence provided in subsection (1).

IV. Judicial History

A. *Ontario Court (General Division)*

The motions judge held that it was not open to the court to apply the discoverability principle and postpone the running of time in relation to s. 206(1) *HTA*, since that limitation period applies in all cases from the moment the physical injury is sustained. He distinguished *Murphy v. Welsh*, [1993] 2 S.C.R. 1069, on the basis the respondent here was not under a legal disability. The motions judge held that the respondents' action was statute-barred as it was brought more than two years after the date of the accident. A similar conclusion was reached in *Bair-Muirhead v. Muirhead* (1994), 20 O.R. (3d) 744 (Gen. Div.).

B. *Court of Appeal for Ontario* (1995), 25 O.R. (3d) 1

The Court of Appeal reversed the trial judge on the issue of the applicability of the discoverability principle to s. 206(1) *HTA*. Carthy J.A. held that the discoverability rule was not limited to narrow classes of actions but was a general rule. He assumed, as we do, for the purposes of the motion that the respondent Mr. Peixeiro had been reasonably diligent but incapable of identifying the cause of action. The Court of Appeal held that the balance between greater uncertainty, an increased burden of investigation and the continuance of potential claims against defendants remained "in favour of the discoverability rule" (p. 7).

The Court of Appeal stated that if the victim does not know that the injury meets the requirement of s. 266(1), then he or she is not capable of identifying the cause of action. It is no answer to say that the plaintiff could protect his or her posi-

procès, lorsque le jury n'est pas présent, et à la suite de l'audition des témoignages, invoquer la défense prévue au paragraphe (1).

IV. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)*

Le juge des requêtes a statué que la cour ne pouvait pas appliquer la règle de la possibilité de découvrir le dommage pour reporter le point de départ du délai de prescription prévu au par. 206(1) du *Code de la route*, puisque, dans tous les cas, ce délai commence à courir à compter du moment où la blessure est subie. Le juge a fait une distinction entre le cas qui nous intéresse et l'affaire *Murphy c. Welsh*, [1993] 2 R.C.S. 1069, en invoquant le fait que, en l'espèce, l'intimé n'était pas atteint d'une incapacité légale. Le juge des requêtes a conclu que l'action des intimés était prescrite puisqu'elle avait été intentée plus de deux ans après la date de l'accident. La même conclusion avait été tirée dans *Bair-Muirhead c. Muirhead* (1994), 20 O.R. (3d) 744 (Div. gén.). 12

B. *Cour d'appel de l'Ontario* (1995), 25 O.R. (3d) 1

La Cour d'appel a infirmé la décision du juge des requêtes sur la question de l'applicabilité de la règle de la possibilité de découvrir le dommage au par. 206(1) du *Code de la route*. Le juge Carthy a statué que cette règle était d'application générale et n'était pas limitée à certaines catégories restreintes d'actions. Pour les fins de la requête, il a présumé, comme nous le faisons, que M. Peixeiro avait été raisonablement diligent mais néanmoins incapable de découvrir la cause d'action. La Cour d'appel a jugé que, tout compte fait, malgré l'incertitude accrue, la charge d'investigation plus lourde et le maintien des actions potentielles contre les défendeurs, on doit pencher [TRADUCTION] «en faveur de l'application de la règle de la possibilité de découvrir le dommage» (p. 7). 13

La Cour d'appel a déclaré que, si la victime ne sait pas que sa blessure satisfait aux conditions du par. 266(1), elle n'est alors pas en mesure de reconnaître l'existence de la cause d'action. Il ne suffit pas de répondre que le demandeur pouvait 14

tion by starting an action notwithstanding the fact that there was no evidence of an injury that met the threshold in s. 266(1) of the *Insurance Act*. This procedure was obviated by s. 266(3), which provided for a pre-trial motion by the defence to strike the plaintiff's claims. See *Grossi v. Bates* (1995), 21 O.R. (3d) 564 (Div. Ct.).

protéger ses droits en intentant une action malgré le fait qu'il n'y avait aucune preuve de l'existence d'une blessure satisfaisant aux conditions du par. 266(1) de la *Loi sur les assurances*. Pareille procédure était exclue par le par. 266(3) qui permet à la défense de présenter, avant le procès, une motion demandant la radiation des réclamations du demandeur. Voir *Grossi c. Bates* (1995), 21 O.R. (3d) 564 (C. div.).

## V. Issues

15 There is one issue in this appeal. The question is whether the discoverability rule applies to the limitation period in s. 206(1) *HTA*. Included in a consideration of this question are issues related to the implementation of the province of Ontario's no-fault insurance scheme and rationales behind limitation periods such as s. 206(1) *HTA* as it existed in 1990.

## V. Les questions en litige

Il y a une seule question en litige dans le présent pourvoi, celle de savoir si la règle de la possibilité de découvrir le dommage s'applique au délai de prescription prévu au par. 206(1) du *Code de la route*. L'examen de cette question demande qu'on se penche sur certaines autres questions relatives à l'application du régime ontarien d'indemnisation sans égard à la responsabilité et sur les raisons d'être des délais de prescription tel celui prévu par le texte du par. 206(1) du *Code de la route* en vigueur en 1990.

## VI. Analysis

16 It was conceded by the respondents that Mr. Peixeiro suffered a back injury and was aware of it immediately after the first accident. It was of sufficient severity that he remained off work for a period of 13 months. After the second accident of January 1992, he only worked three months, between May 1992 and August 1992, and has not worked since.

## VI. L'analyse

Les intimés ont concédé que M. Peixeiro a subi une blessure au dos et qu'il s'en est immédiatement aperçu après le premier accident. Cette blessure était grave au point qu'il n'a pas travaillé pendant une période de 13 mois. Après le second accident, survenu en janvier 1992, il n'a travaillé que trois mois, pendant la période de mai à août 1992, et il n'a pas travaillé depuis.

17 While the respondents knew of some injury, they did not know within the limitation period that the damage Mr. Peixeiro sustained as a result of the first accident was a herniated disc. They did not know that it met the threshold for an action under s. 266(1) of the *Insurance Act*. He did not sue because he thought that his injuries were not serious enough to qualify for compensation in tort.

Même si les intimés savaient qu'une blessure avait été subie, ils ne savaient toutefois pas, durant le délai de prescription, que la blessure causée à M. Peixeiro par le premier accident était une hernie discale. Ils ne savaient pas que cette blessure satisfaisait aux conditions fixées par le par. 266(1) de la *Loi sur les assurances* pour intenter une action en justice. Monsieur Peixeiro n'a pas poursuivi en justice parce qu'il croyait que sa blessure n'était pas suffisamment grave pour lui donner droit à une indemnité fondée sur la responsabilité délictuelle.

It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

Il a été admis que, en common law, l'ignorance ou la méprise quant à l'importance du dommage ne retarde pas le point de départ du délai de prescription. Il ressort clairement de la jurisprudence qu'il n'est pas nécessaire que l'ampleur exacte de la perte subie par le demandeur soit connue pour donner naissance à la cause d'action. Une fois que celui-ci sait qu'il a subi un préjudice et qui en est l'auteur (voir *Cartledge c. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), à la p. 772, lord Reid, et *July c. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), la cause d'action a pris naissance. Il n'est pas nécessaire de connaître la nature du préjudice ni son étendue. Conclure autrement aurait pour effet d'introduire trop d'incertitude dans les affaires où toute l'étendue du préjudice ne peut être déterminée que longtemps après l'expiration du délai de prescription. 18

However, it was submitted that because of Ontario's no-fault insurance scheme at the time of the accident, the starting point of the running of time is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266 of the *Insurance Act*. The argument was that the intervention of the liability immunity, one of the mandatory features of Ontario's no-fault system, alters the time of accrual of the cause of action until the material fact of sufficient injury is reasonably discoverable.

Cependant, on a prétendu que, en raison du régime d'indemnisation sans égard à la responsabilité en vigueur en Ontario au moment de l'accident, le délai de prescription commence à courir à compter du moment où l'on sait que le préjudice subi comporte une «déficience grave et permanente» au sens de l'art. 266 de la *Loi sur les assurances*. Cette prétention était fondée sur l'argument que la disposition d'exonération de responsabilité, qui est l'un des éléments impératifs du régime ontarien d'assurance sans égard à la responsabilité, fait en sorte que la cause d'action ne prend naissance qu'au moment où le fait substantiel que constitue l'existence d'un dommage suffisant peut raisonnablement être découvert. 19

### A. *The No-Fault Scheme in Ontario*

### A. *Le régime ontarien d'indemnisation sans égard à la responsabilité*

Tort law provides fault-based compensation for car accidents. Fault as the basis of liability is grounded on the fundamental proposition that a person who is injured due to the fault of another person has the right to compensation from the wrongdoer. Tort law is based ou individual responsibility.

Selon les règles du droit de la responsabilité délictuelle, le droit à une indemnité en cas d'accident de la route repose sur l'existence d'une faute. Le principe de la faute comme source de responsabilité repose sur la proposition fondamentale que la personne qui subit un préjudice par suite de la faute d'autrui a le droit d'être indemnisée par l'auteur de cette faute. Le fondement du droit de la responsabilité délictuelle est la responsabilité individuelle. 20

21 As the number and severity of car accidents and injuries increased, liability insurance became commonplace and the compensation of victims became the main focus of tort law.

Avec l'accroissement du nombre et de la gravité des accidents de la ronte et des blessures en découlant, l'assurance-responsabilité s'est répandue et l'indemnisation des victimes est devenue l'objet principal du droit de la responsabilité délictuelle.

22 Guaranteed compensation of the victim is one of the goals of a no-fault system. One of the hallmarks of a no-fault system is the limitation or abolition of liability based on fault, i.e. tort liability. No-fault systems are a reflection of the conscience of the community. Professor Lewis Klar, in "No Fault Insurance for Auto Accident Victims: A Background Paper" prepared for the Canadian Bar Association, Alberta Branch, Fault/No Fault Insurance Task Force (1991) stated, at p. 11, that the goals of fault-based accident compensation and no-fault are fundamentally different:

Le fait de garantir l'indemnisation des victimes est l'un des buts du régime d'indemnisation sans égard à la responsabilité. L'un des traits marquants de ce régime est la limitation ou l'élimination de la responsabilité fondée sur la faute, c'est-à-dire la responsabilité délictuelle. Ces régimes d'indemnisation sont une manifestation de la conscience de la collectivité. Dans l'étude intitulée «No Fault Insurance for Auto Accident Victims: A Background Paper», qu'il a effectuée pour le groupe de travail de la section albertaine de l'Association du Barreau canadien sur les ramifications de l'assurance sans égard à la responsabilité (1991), le professeur Lewis Klar a affirmé, à la p. 11, que les objectifs du régime d'indemnisation fondée sur la faute et ceux des régimes d'indemnisation sans égard à la responsabilité sont fondamentalement différents:

> First, and foremost, it must always be remembered that the two types of compensation schemes attempt to achieve different goals. The full compensation, justice, accident deterrence, safety and education goals of tort are not the aims of no fault insurance. No fault insurance is predicated upon the desire to provide accident benefits to all victims, regardless of fault, efficiently and expeditiously. It does not seek to provide full compensation, to deal with the effects of wrongdoing, or to deter accidents. If these goals are to be accomplished, they must be accomplished outside of the no fault insurance scheme, through criminal laws, traffic regulations, and so forth.

> [TRADUCTION] D'abord et avant tout, il ne faut jamais perdre de vue que les deux régimes d'indemnisation visent des objectifs différents. Les objectifs de réparation intégrale, de justice, de prévention des accidents, de sécurité et d'éducation que visent les règles de la responsabilité délictuelle ne sont pas ceux de l'assurance sans égard à la responsabilité. Celle-ci découle de la volonté d'indemniser, de façon efficace et expéditive, toutes les victimes d'accident, indépendamment de leur responsabilité. Elle ne vise pas à accorder une réparation intégrale, à corriger les effets des agissements fautifs ou encore à prévenir les accidents. Si ces objectifs doivent être réalisés, ils doivent l'être en dehors du régime d'indemnisation sans égard à la responsabilité, au moyen des lois pénales, de la réglementation de la circulation et des autres mesures du genre.

23 The no-fault scheme in place at the time of the respondent's accident was the Ontario Motorist Protection Plan (OMPP) inaugurated on June 22, 1990 with the proclamation of the *Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2 (Bill 68).

Le régime d'indemnisation sans égard à la responsabilité qui existait à la date de l'accident de l'intimé était le Régime de protection des automobilistes de l'Ontario (RPAO), introduit le 22 juin 1990 par la proclamation de l'entrée en vigueur de la *Insurance Statute Law Amendment Act, 1990*, L.O. 1990, ch. 2 (projet de loi 68).

No-fault benefits were available as an alternative prior to June 22, 1990, to cover medical and rehabilitation expenses, loss of income payments, funeral expenses and death benefits. No-fault became mandatory and its complement of benefits more extensive with Bill 68. More significantly, for the purposes of this appeal, Bill 68 introduced a restriction on the right to sue in tort.

Avant le 22 juin 1990, il était possible, à titre de solution de rechange, d'obtenir des indemnités d'assurance sans égard à la responsabilité pour les frais médicaux, les frais de réadaptation fonctionnelle, les pertes de revenu, les frais funéraires et les indemnités de décès. Le projet de loi 68 a rendu obligatoire l'indemnisation sans égard à la responsabilité et élargi la gamme des indemnités versées. Fait plus important encore dans le contexte du présent pourvoi, le projet de loi 68 a restreint le droit de prendre action en responsabilité délictuelle. 24

The Ontario Court of Appeal had the following to say with respect to the legislative intent behind s. 266 of the *Insurance Act* in *Meyer v. Bright* (1993), 15 O.R. (3d) 129, at p. 134:

In our view, the Ontario legislature enacted s. 266 and other related amendments to the Act for the purpose of significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first-party benefits, regardless of fault, from his or her own insurer. The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault.

La Cour d'appel a dit ce qui suit, dans *Meyer c. Bright* (1993), 15 O.R. (3d) 129, à la p. 134, à propos de l'intention qu'avait le législateur lorsqu'il a édicté l'art. 266 de la *Loi sur les assurances*: 25

[TRADUCTION] À notre avis, le législateur ontarien a édicté l'art. 266 et apporté d'autres modifications connexes à la Loi dans le but de limiter considérablement le droit des victimes d'accidents de la circulation de poursuivre en responsabilité délictuelle les personnes fautives. Le régime d'indemnisation opère un échange de droits: la victime perd son droit de prendre action en justice à moins que son cas ne soit visé par les exceptions prévues par la loi, mais elle reçoit des indemnités plus généreuses de son assureur, indépendamment de la responsabilité. La législation vise à prévenir la hausse des primes d'assurance-automobile en éliminant certaines actions en responsabilité délictuelle. Dans le même temps, elle accorde, indépendamment de la responsabilité, des indemnités accrues aux victimes d'accident au titre des pertes de revenus, des frais médicaux et des frais de réadaptation.

Since 1990, the prohibition on suing unless the party qualifies under one of the exceptions has identified the Ontario plan as a "threshold" no-fault system. See Allan O'Donnell, *Automobile Insurance in Ontario* (1991), at p. 202:

In effect, the Ontario Legislature imposed a social contract on its citizens whereby in consideration of all injured persons receiving an indemnity for most economic losses, regardless of fault, and in consideration for saving on automobile insurance premiums, the great bulk of those injured could not sue.

Depuis 1990, l'interdiction qui est faite aux victimes de prendre action en justice, sauf si elles sont admises à le faire au titre d'une des exceptions prévues, a fait du régime ontarien d'indemnisation sans égard à la responsabilité un régime assorti d'un «seuil d'application». Voir Allan O'Donnell, *Automobile Insurance in Ontario* (1991), à la p. 202: 26

[TRADUCTION] En effet, le législateur ontarien a imposé aux citoyens un contrat social aux termes duquel, en contrepartie du paiement à toutes les personnes blessées d'indemnités pour la plupart des pertes financières, et ce sans égard à la responsabilité, et en contrepartie d'économies sur les primes d'assurance, la grande majorité de ces personnes ne peuvent prendre action en justice.

In very rough terms, only 8 per cent to 10 per cent of those injured will be able to meet the threshold test but since these cases will tend to be the most expensive ones in tort, about 60 per cent of the previous third-party liability bodily injury premium will be consumed in order to pay for such claims. The other 40 per cent of bodily injury dollars, when added to the previous existing No-Fault Benefits premium, will be spent on delivering No-Fault Benefits.

27 In *Meyer v. Bright*, at p. 136, the Ontario Court of Appeal characterized s. 266 as a general immunity and not a threshold:

> At the outset we wish to make a comment about the word "threshold", which has been widely used to describe the provisions of s. 266(1). We think the use of that word in such a fashion, while perhaps convenient or handy, is inaccurate and tends to lead one away from the real inquiry which should be made. Section 266(1) does not establish any general threshold which injured persons need pass before they are entitled to sue. Section 266(1) essentially does two things. First, it immunizes the owner and occupants of motor vehicles, and persons present at the incident, from actions in Ontario for loss or damage arising out of motor vehicle accidents which occur after June 21, 1990 in Canada, the United States and certain other jurisdictions. The second thing which s. 266(1) does is create an exception for certain injured persons. The real inquiry required by the legislation in each case is to determine whether "the injured person" falls within one or more of the statutory exceptions to the general immunity.

28 The Court of Appeal for Ontario set the following standards for allegations of injuries falling under s. 266(1)(b):

(1) Has the person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?

(2) Is the bodily function which is permanently impaired an important one?

(3) Is the impairment of the important bodily function serious?

Grosso modo, de 8 à 10 pour 100 seulement des personnes blessées seront en mesure de franchir le seuil d'application, mais comme ces cas représentent généralement les actions en responsabilité délictuelle les plus coûteuses, quelque 60 pour 100 du montant versé antérieurement à titre de prime d'assurance responsabilité civile servira à les couvrir. Les 40 pour 100 restants des dollars affectés à l'indemnisation des lésions corporelles, ajoutés aux primes existantes versées à l'égard des indemnités d'assurance sans égard à la responsabilité, seront consacrés au paiement de ces indemnités.

Dans *Meyer c. Bright*, précité, à la p. 136, la Cour d'appel de l'Ontario a qualifié l'art. 266 de disposition créant une immunité générale et non un seuil d'application:

> [TRADUCTION] Au départ, nous tenons à faire le commentaire suivant à propos du terme «seuil d'application», qui est largement utilisé pour décrire les dispositions du par. 266(1). Nous pensons que cette façon d'utiliser ce terme, quoique commode ou pratique, est impropre et tend à détourner du véritable examen qui doit être fait. Le paragraphe 266(1) n'établit pas quelque seuil général d'application que les personnes blessées doivent franchir avant d'avoir le droit de prendre action justice. Essentiellement, ce paragraphe accomplit deux choses. Premièrement, il protège les propriétaires d'automobiles, les personnes transportées dans une automobile et les personnes présentes à l'incident contre les actions intentées en Ontario pour pertes ou dommages découlant d'un accident de la route survenu après le 21 juin 1990, au Canada, aux États-Unis et dans certains autres ressorts. Deuxièmement, il crée une exception en faveur de certaines personnes blessées. Le véritable examen que requiert la loi dans chaque cas consiste à déterminer si «la personne blessée» est visée par une ou plusieurs des exceptions à l'immunité générale.

La Cour d'appel de l'Ontario a énoncé les critères suivants pour décider si les blessures alléguées sont visées à l'al. 266(1)b):

(1) L'intéressé souffre-t-il d'une déficience permanente d'une fonction corporelle causée par une blessure permanente qui est d'ordre physique?

(2) Est-ce que la fonction corporelle atteinte d'une déficience permanente est une fonction importante?

(3) La déficience causée à l'importante fonction corporelle est-elle grave?

Only if all three of the above questions are answered in the affirmative, they said, is the test met.

Le seuil d'application, d'affirmer la Cour d'appel, n'est franchi qu'en cas de réponse affirmative à ces trois questions.

By whatever name it is called, s. 266 effectively bars actions for recovery in tort unless a certain level of physical injury, permanent in nature and entailing serious impairment of an important bodily function, is met. Unlike schemes in Michigan, New York and Florida upon which the Ontario scheme was said to be modelled, the Ontario threshold bars all tort claims, pecuniary and non-pecuniary, if the injury fails to pass the threshold.

29 Quel que soit le terme utilisé pour le décrire, l'art. 266 exclut effectivement les actions en dommages-intérêts pour responsabilité délictuelle en l'absence d'une blessure d'ordre physique permanente causant une déficience grave d'une fonction corporelle importante. À l'opposé des régimes en vigueur dans les États du Michigan, de New York et de la Floride, dont serait inspiré le régime ontarien, en Ontario toutes les actions en responsabilité délictuelle, pour perte pécuniaire ou non, sont exclues si la blessure ne permet pas de franchir le seuil d'application.

What insight can we gain into the meaning of s. 206(1) *HTA*, given the exclusion of liability under s. 266 of the *Insurance Act*? An action governed by s. 206(1) fails if it does not qualify under the exception provided for in s. 266(1). The cause of action referred to in s. 206(3) does not accrue until the statutory requirement of s. 266(1) of the *Insurance Act* is met. Under the no-fault system in place at the time of the accident, the mere happening of an injury in a car accident does not found a cause of action. No cause of action exists until sufficient severity of injury exists. This view is strengthened by s. 266(3), which allows for a pre-trial motion on the issue of the existence of a cause of action. Under s. 266(3), a motion may be brought to determine whether there is a cause of action evident on the face of the record. The onus is on the plaintiff to prove that his injuries meet the requirements in s. 266(1)(b): *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725 (Gen. Div.), and *Meyer v. Bright*, *supra*, at p. 146.

30 Que pouvons-nous apprendre sur le sens du par. 206(1) du *Code de la route* eu égard à l'exclusion de responsabilité prévue à l'art. 266 de la *Loi sur les assurances*? L'action visée au par. 206(1) n'est pas recevable si elle ne relève pas de l'exception prévue au par. 266(1). La cause d'action prévue au par. 206(3) ne prend naissance qu'au moment où les exigences établies par le par. 266(1) de la *Loi sur les assurances* sont respectées. En vertu du régime d'indemnisation sans égard à la responsabilité qui existait au moment de l'accident, le simple fait de subir une blessure dans un accident ne constituait pas une cause d'action. Aucune cause d'action ne prend naissance tant qu'il n'existe pas une blessure suffisamment grave. Cette opinion est renforcée par le par. 266(3), qui permet la présentation, avant le procès, d'une motion sur la question de l'existence d'une cause d'action. Selon ce paragraphe, il est possible de présenter une motion pour faire décider s'il existe une cause d'action évidente à la lecture du dossier. C'est au demandeur qu'il incombe de prouver que ses blessures respectent les exigences prévues à l'al. 266(1)b): *Buffa c. Gauvin* (1994), 18 O.R. (3d) 725 (Div. gén.), et *Meyer c. Bright*, précité, à la p. 146.

In my view, the right of action contemplated in s. 206(1) *HTA* must refer to an action that is not excluded by s. 266 of the *Insurance Act*. It cannot be otherwise. Ontario's system of mandatory automobile insurance is not a pure no-fault system; it

31 À mon avis, le droit d'action envisagé au par. 206(1) du *Code de la route* doit viser les actions qui ne sont pas exclues par l'art. 266 de la *Loi sur les assurances*. Il ne saurait en être autrement. Le régime ontarien d'assurance-automobile

cannot be said that the legislature intended to preclude all causes of action arising from motor vehicle accidents.

32 In this case, had the respondents started an action prior to June 1993, they would not have had evidence of a sufficient serious physical injury. They would have failed the *Meyer v. Bright* test at the first step. It is unreasonable to suggest that the respondents, given the existing knowledge of the injury, should have proceeded. It would have been futile.

B. *Does the Discoverability Rule Apply?*

33 The cause of action under s. 206(1) does not arise unless the injury meets the statutory exceptions set out in the *Insurance Act*. The question which remains is whether the discoverability principle applies to postpone the running of time until the material facts underlying the cause of action, including extent of the injury, are known.

34 Short limitation periods indicate that the legislature put a premium on their function as a statute of repose. This is one of the three rationales which serve society and the courts' continued interest in maintaining the respect of these statutes. Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action: *Murphy v. Welsh*, *supra*; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. All the rationales were set out in *M. (K.) v. M. (H.)*, where this Court considered the *Limitations Act*, R.S.O. 1980, c. 240 (now R.S.O. 1990, c. L.15), in order to determine the time of accrual of the cause of action in a manner consistent with its purposes (at pp. 29-30):

obligatoire n'est pas un régime pur d'indemnisation sans égard à la responsabilité; on ne peut dire que le législateur entendait écarter toutes causes d'action découlant d'accidents de la route.

En l'espèce, si les intimés avaient intenté une action avant juin 1993, ils n'auraient pas eu de preuve d'une blessure d'ordre physique suffisamment grave. Ils auraient échoué dès le premier stade du test établi dans *Meyer c. Bright*. Il est déraisonnable de prétendre que les intimés, compte tenu de ce qu'ils savaient alors de la blessure, auraient dû prendre action en justice. Pareille action aurait été futile.

B. *La règle de la possibilité de découvrir le dommage s'applique-t-elle?*

La cause d'action prévue au par. 206(1) ne prend naissance que si la blessure est visée par les exceptions prévues à la *Loi sur les assurances*. Il reste à se demander si la règle de la possibilité de découvrir le dommage s'applique pour retarder le point de départ du délai de prescription jusqu'au moment où les faits substantiels qui sous-tendent la cause d'action, y compris la gravité de la blessure, sont connus.

La brièveté d'un délai de prescription indique que le législateur attache une grande importance à son rôle de loi qui assure la tranquillité d'esprit (*statute of repose*). Il s'agit de l'une des trois justifications qui incitent la société et les tribunaux à assurer le respect de ces lois. Quel que soit l'intérêt que puisse avoir un défendeur dans l'application universelle d'un délai de prescription, cet intérêt doit être soupesé avec le souci d'équité envers le demandeur qui ne savait pas que ses blessures respectaient les conditions d'ouverture de l'action en justice; voir *Murphy c. Welsh*, précité; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6. Toutes ces justifications ont été énoncées dans *M. (K.) c. M. (H.)*, où la Cour a examiné la *Loi sur la prescription des actions*, L.R.O. 1980, ch. 240 (maintenant L.R.O. 1990, ch. L.15), pour déterminer quand la cause d'action avait pris naissance tout en respectant les objets de cette loi (aux pp. 29 et 30):

There are three, and they may be described as the certainty, evidentiary, and diligence rationales. . . .

Statutes of limitations have long been said to be statutes of repose. . . . The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. . . .

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim . . . .

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

*M. (K.) v. M. (H.)* applied the three rationales to the fact situation there and found that neither the guarantee of repose, the evidentiary concerns nor the expectation of diligence on the part of the plaintiff precluded the application of the discoverability principle.

Since this Court's decisions in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. See *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868 *per* Lord Denning, M.R., citing *Cartledge v. E. Jopling & Sons Ltd.*, *supra*:

It appears to me to be unreasonable and unjustifiable in principle that a cause of action should he held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action.

See also *M. (K.) v. M. (H.)*, *supra*, at p. 32, and *Murphy v. Welsh*, *supra*, at pp. 1079-81.

Il y en a trois et elles peuvent être décrites comme la certitude, la preuve et la diligence . . .

On affirme depuis longtemps que les lois sur la prescription des actions sont des lois destinées à assurer la tranquillité d'esprit [. . .] Le raisonnement est assez simple. Il arrive un moment, dit-on, où un éventuel défendeur devrait être raisonnablement certain qu'il ne sera plus redevable de ses anciennes obligations. . .

La deuxième justification se rattache à la preuve et concerne la volonté d'empêcher les réclamations fondées sur des éléments de preuve périmés. Une fois écoulé le délai de prescription, le défendeur éventuel ne devrait plus avoir à conserver des éléments de preuve se rapportant à la réclamation . . .

Enfin, on s'attend à ce que les demandeurs agissent avec diligence et ne «tardent pas à faire valoir leurs droits»; la prescription incite les demandeurs à intenter leurs poursuites en temps opportun.

Dans *M. (K.) c. M. (H.)*, la Cour a appliqué ces justifications aux faits de l'espèce et a conclu que ni la garantie de tranquillité d'esprit, ni les inquiétudes relatives au caractère périmé de la preuve, ni la diligence attendue de la part du demandeur n'excluaient l'application de la règle de la possibilité de découvrir le dommage. 35

Depuis les arrêts de notre Cour, *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, et *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, à la p. 224, la règle de la possibilité de découvrir le dommage est une règle générale, appliquée pour prévenir l'injustice qu'entraînerait le fait d'interdire à une personne d'intenter une action avant qu'elle ne soit en mesure de le faire. Voir *Sparham-Souter c. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), à la p. 868, lord Denning, maître des rôles, citant *Cartledge c. E. Jopling & Sons Ltd.*, précité: 36

[TRADUCTION] Il me semble déraisonnable et injustifiable, sur le plan des principes, de dire qu'une cause d'action peut être considérée comme ayant pris naissance avant qu'il soit possible de découvrir quelque préjudice que ce soit, et donc avant qu'il ne soit possible d'intenter une action.

Voir aussi *M. (K.) c. M. (H.)*, précité, à la p. 32, et *Murphy c. Welsh*, précité, aux pp. 1079 à 1081.

37 In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

38 The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained", the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the *HTA*, is a distinction without a difference. The discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule. *Kamloops*, *supra*, dealt in part with s. 739 of the *Municipal Act*, R.S.B.C. 1960, c. 255, which required that notice should be given within two months "from and after the date on which [the] damage was sustained". However, this Court

À cet égard, je fais mienne l'affirmation du juge Twaddle dans *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200 (C.A. Man.), à la p. 206, suivant laquelle la règle de la possibilité de découvrir le dommage est un outil qui sert à interpréter les textes de loi établissant des délais de prescription et qui doit être pris en considération chaque fois qu'une telle disposition est en litige:

> [TRADUCTION] À mon avis, la règle prétorienne de la possibilité de découvrir le dommage n'est rien de plus qu'une règle d'interprétation. Dans tous les cas où une loi indique que l'action en justice doit être intentée dans un certain délai après un événement donné, il faut interpréter les termes de cette loi. Lorsque ce délai court à partir du «moment où naît la cause d'action» ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la victime prend connaissance du dommage, c'est la règle prétorienne de la possibilité de découvrir le dommage qui s'applique. Toutefois, si le délai court à compter de la date d'un événement qui survient clairement, et sans égard à la connaissance qu'en a la victime, cette règle ne peut prolonger le délai fixé par le législateur.

En l'espèce, l'appelant a fait valoir que la règle générale de la possibilité de découvrir le dommage a été écartée puisque le législateur a parlé de la date «où les dommages ont été subis» et non de celle «où la cause d'action a pris naissance». Il est peu probable qu'en utilisant les mots «où les dommages ont été subis» le législateur entendait que l'on détermine le point de départ du délai de prescription sans égard au moment où la personne blessée prend connaissance du préjudice. Il faudrait un texte plus clair pour écarter l'application de la règle générale de la possibilité de découvrir le dommage. L'utilisation des mots «date où les dommages ont été subis» au lieu des mots «date où la cause d'action a pris naissance» dans le *Code de la route* est une distinction sans importance. La règle de la possibilité de découvrir le dommage a été appliquée par la Cour même à l'égard de textes de loi établissant des délais de prescription dont le libellé, interprété littéralement, semblait exclure l'application de la règle. L'arrêt *Kamloops*, précité, portait en partie sur l'art. 739 de la *Municipal Act*, R.S.B.C. 1960, ch. 255, qui exigeait que soit donné un avis dans les deux mois [TRADUCTION] «de la date à laquelle le dommage a été subi». Cependant,

applied the discoverability rule even with respect to this section; see *Kamloops*, *supra*, at pp. 35-40.

I agree with the Court of Appeal that to hold that the discoverability principle does not apply to s. 206 *HTA* would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.

The appellant submitted that as a matter of law, the discoverability principle was inapplicable to personal injury actions. Notwithstanding *Cartledge v. E. Jopling & Sons Ltd.*, *supra*, there is no principled reason for distinguishing between an action for personal injury and an action for property damage (see *Kamloops*, *Sparham-Souter* and *M. (K.) v. M. (H.)*).

The appellant also submitted that the natural inference from this Court's application of s. 47 of the Ontario *Limitations Act* in *Murphy v. Welsh*, *supra*, was that the common law discoverability rule does not apply to s. 206(1). If this were not so, it was argued, the Court would not have had to resort to s. 47 in that case. However discoverability played no part in the case. There the minor's injuries were immediately identified and legal advice sought. The limitation period was missed because files were misplaced by lawyers. As the legislature had specifically provided for the postponement of time in the case of minors and those suffering from other legal disability, it was incumbent upon the courts to apply the specific provision. There is no conflict between the rule in s. 47

notre Cour a appliqué la règle, même à l'égard de cet article; voir *Kamloops*, précité, aux pp. 35 à 40.

39 Je conviens avec la Cour d'appel que le fait de statuer que la règle de la possibilité de découvrir le dommage ne s'applique pas à l'art. 206 du *Code de la route* ferait en sorte que les personnes qui ne connaissent pas l'existence de leur cause d'action seraient injustement empêchées d'intenter une action en justice. Lorsqu'on soupèse l'intérêt légitime du défendeur au respect du délai de prescription et l'intérêt du demandeur, l'iniquité fondamentale qu'entraînerait le fait d'exiger de ce dernier qu'il prenne action avant qu'il ait pu raisonnablement découvrir qu'il disposait d'une cause d'action est un facteur déterminant. L'application de la règle de la possibilité de découvrir le dommage ne porterait pas atteinte à la justification fondée sur la diligence, puisqu'elle requiert toujours que le demandeur fasse montre de diligence raisonnable.

40 L'appelant a prétendu que, en droit, la règle de la possibilité de découvrir le dommage ne s'applique pas aux actions en dommages-intérêts pour blessures corporelles. Malgré l'arrêt *Cartledge c. E. Jopling & Sons Ltd.*, précité, il n'y a, sur le plan juridique, aucune raison de principe justifiant de faire une distinction entre les actions en dommages-intérêts pour blessures corporelles et celles pour dommages matériels (voir *Kamloops*, *Sparham-Souter* et *M. (K.) c. M. (H.)*).

41 L'appelant a également soutenu que l'inférence qui se dégage naturellement de l'application par notre Cour de l'art. 47 de la *Loi sur la prescription des actions* de l'Ontario dans *Murphy c. Welsh*, précité, est que la règle de common law de la possibilité de découvrir le dommage ne s'applique pas au par. 206(1) du *Code de la route*. Si ce n'était pas le cas, a-t-on affirmé, la Cour n'aurait pas eu à invoquer l'art. 47 dans cet arrêt. La règle n'était pas en cause dans cette affaire où les blessnres subies par le mineur ont été décelées sur-le-champ et où un avocat a été consulté. L'action n'a pas été intentée avant l'expiration du délai de prescription parce que les avocats ont égaré certains documents. Comme le législateur avait expressément prévu le report du point de départ dans le cas des

of the Ontario *Limitations Act* (which merely codifies the common law rules against allowing time to run against those under a legal disability) and the discoverability principle.

### C. *Application of the Discoverability Principle to the Facts*

42 The respondent Mr. Peixeiro was injured in October 1990 and first discovered that his injury was physical in nature, within the meaning of *Meyer v. Bright*, in June 1993. He commenced his action against the appellant in July 1994. Given the medical advice that Mr. Peixeiro had, and in spite of reasonable diligence by him, his injury was reasonably discoverable for the first time in June 1993.

43 As a matter of law, I do not think that the existence of a cause of action was reasonably discoverable until the respondents learned that Mr. Peixeiro had a herniated disc. Therefore, the respondents' action is not statute-barred, as it was started within two years of the time when they first learned that they had a cause of action.

## VII. Conclusion

44 Under s. 206(1) *HTA*, there is no cause of action until the injury meets the statutory exceptions to liability immunity in s. 266(1) of the *Insurance Act*. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). It was agreed that the respondents first learned of the herniated disc in June 1993. The respondents were reasonably diligent in this respect. It cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was

mineurs et des personnes frappées d'autres incapacités légales, il incombait aux tribunaux d'appliquer la disposition pertinente. Il n'y a aucun conflit entre la règle fixée par l'art. 47 de la *Loi sur la prescription des actions* de l'Ontario (qui ne fait que codifier les règles de la common law portant suspension du délai de prescription à l'égard des personnes frappées d'une incapacité légale) et la règle de la possibilité de découvrir le dommage.

### C. *L'application aux faits de l'espèce de la règle de la possibilité de découvrir le dommage*

L'intimé, M. Peixeiro, a été blessé en octobre 1990, et c'est en juin 1993 qu'il s'est aperçu qu'il avait subi une blessure d'ordre physique au sens de l'arrêt *Meyer c. Bright*. Il a pris action contre l'appelant en juillet 1994. Compte tenu des avis médicaux qu'il avait reçus, et malgré la diligence raisonnable dont il a fait montre, il ne lui a été raisonnablement possible de découvrir sa blessure qu'en juin 1993.

En droit, je ne pense pas qu'il était raisonnablement possible pour les intimés de découvrir l'existence d'une cause d'action avant qu'ils apprennent que M. Peixeiro souffrait d'une hernie discale. Par conséquent, leur action n'est pas prescrite, puisqu'elle a été intentée dans les deux ans de la date où ils ont appris qu'ils disposaient d'une cause d'action.

## VII. Conclusion

En vertu du par. 206(1) du *Code de la route*, il n'existe pas de cause d'action à moins que la blessure soit visée par l'une des exceptions à l'immunité contre la responsabilité civile qui sont prévues au par. 266(1) de la *Loi sur les assurances*. La règle de la possibilité de découvrir le dommage s'applique pour prévenir l'injustice qu'entraînerait le fait d'empêcher une personne d'intenter une action avant qu'elle ne soit en mesure de le faire. Le délai prévu au par. 206(1) ne commence à courir qu'à compter du moment où il est raisonnablement possible de découvrir que la blessure atteint le seuil d'application du par. 266(1). Il a été admis que les intimés ont pris connaissance de l'hernie discale en juin 1993. Ils ont été raisonnablement

commenced in July a year later within the limitation period, it cannot be statute-barred.

I would dismiss the appeal, with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Rachlin & Wolfson, Toronto.*

*Solicitors for the respondents: Faust, Azevedo & Wise, Toronto.*

diligents à cet égard. On ne peut affirmer qu'ils auraient dû découvrir plus tôt la gravité du dommage. Comme l'action a été intentée au mois de juillet l'année snivante, à l'intérieur du délai de prescription, elle n'est pas prescrite.

Je suis d'avis de rejeter le pourvoi avec dépens. 45

*Pourvoi rejeté avec dépens.*

*Procureurs de l'appelant: Rachlin & Wolfson, Toronto.*

*Procureurs des intimés: Faust, Azevedo & Wise, Toronto.*

# Tab 8

**Max Wayne Cowper-Smith** *Appellant*

*v.*

**Gloria Lynn Morgan and Gloria Lynn Morgan Executor of the Will of the Late Elizabeth Flora Cowper-Smith, Deceased** *Respondent*

INDEXED AS: COWPER-SMITH v. MORGAN

**2017 SCC 61**

File No.: 37120.

2017: May 26; 2017: December 14.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Wills and estates — Wills — Property — Equity — Proprietary estoppel — Remedies — Claimant relying to his detriment on promises made by co-beneficiary of their mother's estate to transfer co-beneficiary's interest in property to claimant — Whether trial judge erred in concluding that proprietary estoppel operated to enforce promisor's promise — Whether evidence supports trial judge's conclusion that elements of proprietary estoppel were met — Whether promisor's lack of ownership in property at time promise was made defeats claimant's equitable claim — What is appropriate remedy.*

As early as 1992, E and A made it clear that after their deaths, their property would be divided equally among their three children, G, M and N. After A's death however, E's estate planning changed dramatically: she transferred title to the family home in Victoria and all of her investments into joint ownership with G, indicating in a trust declaration that G would be entitled absolutely to those assets upon her death. Despite the fact that the trust declaration and joint ownership, if valid, assured that the estate would be virtually devoid of assets, E also executed a new will that appointed G as executor and provided that the estate would be divided equally among the three children.

**Max Wayne Cowper-Smith** *Appelant*

*c.*

**Gloria Lynn Morgan et Gloria Lynn Morgan en qualité d'exécutrice testamentaire d'Elizabeth Flora Cowper-Smith, décédée** *Intimée*

RÉPERTORIÉ : COWPER-SMITH c. MORGAN

**2017 CSC 61**

N° du greffe : 37120.

2017 : 26 mai; 2017 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Successions — Testaments — Biens — Equity — Préclusion propriétale — Recours — Demandeur se fiant, à son préjudice, à des promesses faites par une cobénéficiaire de la succession de leur mère de lui transférer son intérêt de cobénéficiaire dans un bien — La juge de première instance a-t-elle conclu à tort que la préclusion propriétale permettait de faire respecter la promesse de la promettante? — La preuve étaye-t-elle la conclusion de la juge de première instance selon laquelle les éléments de la préclusion propriétale sont réunis? — La demande en equity du demandeur doit-elle échouer parce que la promettante ne détenait aucun intérêt dans le bien au moment de la promesse? — Quelle réparation convient-il d'accorder?*

Dès 1992, E et A ont indiqué clairement qu'après leur décès, leur propriété serait partagée également entre leurs trois enfants, G, M et N. Cependant, après le décès d'A, la planification successorale d'E a changé du tout au tout : cette dernière a transféré le titre de la maison familiale à Victoria et tous ses placements en propriété conjointe avec G, indiquant dans une déclaration de fiducie que G aurait un droit absolu sur ces biens à son décès. Malgré le fait que la déclaration de fiducie et la stipulation relative à la propriété conjointe des biens, si elles étaient valides, faisaient en sorte que la succession était pour ainsi dire dépourvue de tout bien, E a aussi signé un nouveau testament dans lequel elle a nommé G exécutrice testamentaire et prévu que sa succession serait partagée également entre les trois enfants.

In 2005, when E could no longer live on her own, M agreed to move back to Victoria to care for her, giving up his employment income, his cottage lease, his contacts with his children and his social life, but only after G agreed that M would be able to live in the family home permanently and eventually acquire G's one-third interest in the property. After E's death, the trust declaration came to light and in 2011, G announced her plans to sell the family home, in which M was still living. M and N sought an order setting aside the trust declaration as the product of G's undue influence over E and declaring that G held the property and investments in trust for E's estate to be divided equally between the three children in accordance with E's most recent will. They also claimed, on the basis of proprietary estoppel, that M was entitled to purchase G's one-third interest in the property. The brothers succeeded at trial, where the trial judge found that G had not rebutted the presumptions of undue influence and resulting trust, and declared that the property belonged to E's estate. The Court of Appeal unanimously upheld the trial judge's conclusions with respect to undue influence and resulting trust, but split on proprietary estoppel. The majority held that since G owned no interest in the property at the time that she made assurances to M, proprietary estoppel could not arise. M appealed on the issue of proprietary estoppel.

*Held*: The appeal should be allowed.

*Per* McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ.: The trial judge did not err in concluding that proprietary estoppel operates to enforce G's promise. Since ownership at the time the representation or assurance was relied on is not a requirement of a proprietary estoppel claim, the fact that G did not have an interest in the property at the time M relied on her promise does not negate G's obligation to keep her promise.

To establish proprietary estoppel, one must first establish an equity of the kind that proprietary estoppel protects. An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation

En 2005, lorsque E n'a pas plus été capable de vivre seule, M a accepté de revenir vivre à Victoria pour s'occuper d'elle, renonçant à son revenu d'emploi, à la location d'une petite maison, aux contacts qu'il avait avec ses enfants et à sa vie sociale, mais il l'a fait uniquement après que G eut accepté qu'il pourrait vivre dans la maison familiale de façon permanente et acquérir un jour l'intérêt de celle-ci sur le tiers de la propriété. Après le décès d'E, la déclaration de fiducie a été mise au jour et, en 2011, G a annoncé qu'elle avait l'intention de vendre la maison familiale, dans laquelle M vivait toujours. M et N ont sollicité une ordonnance annulant la déclaration de fiducie pour cause d'influence indue de G sur E, et déclarant que G détenait la propriété et les placements en fiducie au bénéfice de la succession d'E et que ces biens devaient être partagés également entre les trois enfants conformément au testament le plus récent d'E. Invoquant la préclusion propriétale, ils ont également fait valoir que M était en droit d'acheter l'intérêt de G sur le tiers de la propriété. Les frères ont eu gain de cause en première instance, où la juge a conclu que G n'avait pas réfuté les présomptions d'influence indue et de fiducie résultoire, et déclaré que la propriété appartenait à la succession d'E. La Cour d'appel a confirmé à l'unanimité les conclusions de la juge de première instance concernant l'influence indue et la fiducie résultoire, mais elle était divisée sur la question de la préclusion propriétale. Les juges majoritaires ont conclu que, comme G ne détenait aucun intérêt dans la propriété au moment où elle avait donné des assurances à M, il ne pouvait y avoir de préclusion propriétale. M se pourvoit sur la question de la préclusion propriétale.

*Arrêt* : Le pourvoi est accueilli.

*La* juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon et Rowe : La juge de première instance n'a pas conclu à tort que la préclusion propriétale permettait de faire respecter la promesse de G. Vu que l'existence d'un intérêt dans le bien en cause au moment où une personne se fie à la déclaration qui lui est faite ou à l'assurance qui lui est donnée n'est pas nécessaire pour que la préclusion propriétale puisse être invoquée, ce n'est pas parce que G n'avait pas d'intérêt dans le bien au moment où M s'est fié à la promesse qu'elle lui avait faite que G n'est pas tenue de respecter sa promesse.

Pour établir la préclusion propriétale, il faut d'abord démontrer l'existence d'un droit en equity du type de ceux que protège la préclusion propriétale. Les circonstances suivantes donnent naissance à un tel droit : (1) une déclaration est faite au demandeur ou une assurance est donnée à celui-ci, sur le fondement de laquelle le demandeur

by doing or refraining from doing something and his reliance is reasonable in all of the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word and insist on her strict legal rights. When the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimant's expectation, proprietary estoppel attaches to that interest and protects the equity by making the representation or assurance binding. It is not necessary that the party responsible for the expectation own an interest in the property at the time of the claimant's reliance — when the party responsible for the expectation has or acquires sufficient interest in the property, proprietary estoppel will attach to that interest and protect the equity. Whether a claimant's reliance was reasonable in the circumstances is a question of mixed law and fact. A trial judge's determination of this point is, absent palpable and overriding error, entitled to deference.

Where a claimant has established proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances, and an appellate court should not interfere unless the trial judge's decision evinces an error in principle or is plainly wrong. However, a claimant who establishes the need for proprietary estoppel is entitled only to the minimum relief necessary to satisfy the equity in his favour, and cannot obtain more than he expected. Further, there must be a proportionality between the remedy and the detriment. Courts of equity must strike a balance between vindicating the claimant's subjective expectations and correcting that detriment.

In the instant case, on the trial judge's findings, both M and G had clearly understood for well over a decade that E's estate, including the family home, would be divided equally between her three children upon her death. It was thus sufficiently certain that G would inherit a one-third interest in the property for her assurance to be taken seriously as one on which M could rely. There is no basis on which to overturn the trial judge's conclusion that M's reliance was reasonable. An equity arose in M's favour when he reasonably relied to his detriment on the expectation that he would be able to acquire G's one-third interest in the family home. That equity could not have

s'attend à bénéficier d'un certain droit ou avantage dans un bien; (2) le demandeur s'appuie sur cette attente en faisant quelque chose ou en s'abstenant de faire quelque chose, et cet acte de confiance est raisonnable eu égard à l'ensemble des circonstances; (3) le demandeur subit un préjudice en raison de son acte de confiance raisonnable, de sorte qu'il serait inéquitable ou injuste que la partie à l'origine de la déclaration ou de l'assurance revienne sur sa parole et insiste sur le respect de ses droits stricts. Lorsque la partie dont émane la déclaration ou l'assurance possède dans le bien un intérêt suffisant pour répondre à l'attente du demandeur, la préclusion propriétale grève cet intérêt et protège le droit en equity en cause en rendant obligatoire la déclaration ou l'assurance. Il n'est pas nécessaire que la partie à l'origine de l'attente possède un intérêt dans le bien au moment de l'acte de confiance du demandeur — lorsque la partie à l'origine de l'attente a un intérêt suffisant dans le bien ou en acquiert un, la préclusion propriétale grèvera cet intérêt et protégera le droit en equity en cause. La question de savoir si l'acte de confiance du demandeur était raisonnable dans les circonstances est une question mixte de fait et de droit. La décision du juge de première instance à cet égard commande la déférence, sauf si elle est entachée d'une erreur manifeste et dominante.

Lorsque le demandeur a établi la préclusion propriétale, le tribunal dispose d'un large pouvoir discrétionnaire pour concevoir une réparation adaptée aux circonstances, et le tribunal d'appel ne devrait intervenir que si la décision du juge de première instance révèle une erreur de principe ou est nettement erronée. Cependant, le demandeur qui démontre qu'il est nécessaire d'appliquer la préclusion propriétale n'a droit qu'à la réparation minimale nécessaire pour donner effet au droit en equity en sa faveur et ne peut obtenir plus que ce à quoi il s'attendait. De plus, il doit y avoir proportionnalité entre la réparation et le préjudice. Les tribunaux d'equity doivent établir un équilibre entre la reconnaissance des attentes subjectives du demandeur et la réparation de ce préjudice.

En l'espèce, il ressort des conclusions de la juge de première instance que M et G avaient tous deux clairement compris depuis plus d'une décennie que la succession d'E, y compris la maison familiale, serait partagée également entre ses trois enfants à son décès. Il était donc suffisamment certain que G hériterait d'un intérêt sur le tiers de la propriété pour que l'assurance qu'elle avait donnée soit sérieusement considérée par M comme une assurance à laquelle il pouvait se fier. Il n'y a aucune raison d'infirmer la conclusion de la juge de première instance selon laquelle l'acte de confiance de M était raisonnable. Un droit en equity a pris naissance en faveur de M lorsque

been protected by proprietary estoppel at the time it arose, because G did not then own an interest in the property. However, proprietary estoppel will attach to G's interest as soon as she obtains it from the estate. G, as executor, can be ordered to transfer a one-third interest in the property to each of the estate beneficiaries so that her promise to M may be fulfilled. An *in specie* distribution of shares in the property is not contrary to E's intent and this Court has the power to direct G to exercise her discretion as executor in a certain manner. With respect to remedy, the minimum necessary to satisfy the equity in M's favour is an order entitling him to purchase G's interest in the family home at its fair market value as of the approximate date on which he would reasonably have expected to be able to do so in the first place.

*Per* Brown J.: There is agreement with the majority that the trial judge did not err in allowing the proprietary estoppel claim, but disagreement regarding the appropriate remedy. An equity sufficient to ground a claim in proprietary estoppel may arise where the promisor does not in fact hold that right or benefit at the time of making the promise, but the equity arises only if and when the promisor obtains the right or benefit that was promised to the claimant, not at the moment of detrimental reliance. Where a promisor's attainment of the promised right or benefit rests upon the satisfaction of a future contingency, no equity capable of being remedied through proprietary estoppel can arise until that contingency is satisfied. If the promisor does not hold the right or benefit at the time of the promise, an inchoate equity arises in favour of the claimant at the moment of the claimant's detrimental reliance thereon, but before an equity capable of conferring a proprietary right can be shown to arise, the promisor must gain the promised right or benefit because the promisor cannot grant what he does not have. To qualify as an equity justifying the operation of proprietary estoppel, the equity must be proprietary, because it must be capable of compelling a promisor to relinquish a proprietary right which he or she actually holds.

ce dernier s'est fondé raisonnablement, à son préjudice, sur le fait qu'il s'attendait à pouvoir acquérir l'intérêt de G sur le tiers de la maison familiale. La préclusion propriétale ne pouvait pas protéger ce droit au moment où il a pris naissance, parce que G ne détenait alors aucun intérêt dans la propriété. Toutefois, elle grèvera l'intérêt de G aussitôt que G l'aura obtenu de la succession. G, en sa qualité d'exécutrice testamentaire, peut se voir ordonner de transférer un intérêt sur le tiers de la propriété à chacun des bénéficiaires de la succession de manière à ce que la promesse qu'elle a faite à M puisse être respectée. Un partage en nature de la propriété n'est pas contraire à l'intention d'E et la Cour a le pouvoir d'ordonner à G d'exercer son pouvoir discrétionnaire d'exécutrice testamentaire d'une certaine façon. Pour ce qui est de la réparation à accorder, le minimum requis pour donner effet au droit en equity de M consiste à rendre une ordonnance lui permettant d'acheter l'intérêt de G dans la maison familiale à sa juste valeur marchande établie à la date approximative à laquelle il se serait raisonnablement attendu à pouvoir l'acquérir au départ.

*Le* juge Brown : Il y a accord avec les juges majoritaires sur le fait que la juge de première instance n'a pas commis d'erreur en faisant droit à la demande fondée sur la préclusion propriétale, mais désaccord sur la réparation qu'il convient d'accorder. Un droit en equity suffisant pour justifier une demande fondée sur la préclusion propriétale peut prendre naissance lorsque le promettant n'est pas en fait titulaire du droit ou de l'avantage promis au moment où il fait la promesse, mais ce droit ne naît que si, et au moment où, le promettant obtient le droit ou l'avantage qui a été promis au demandeur, et non au moment de l'acte de confiance préjudiciable. Lorsque l'acquisition par le promettant du droit ou de l'avantage promis dépend de la réalisation d'une éventualité, aucun droit en equity — dont une atteinte est susceptible d'être réparée au moyen de la préclusion propriétale — ne peut prendre naissance tant que l'éventualité ne s'est pas réalisée. Si le promettant n'est pas titulaire du droit ou de l'avantage promis au moment de la promesse, un droit virtuel en equity prend naissance en faveur du demandeur au moment de l'acte de confiance préjudiciable du demandeur à l'égard de celle-ci; toutefois, avant que l'on puisse établir l'existence d'un droit en equity susceptible de conférer un droit propriétal, le promettant doit acquérir le droit ou l'avantage promis, car il ne peut accorder ce qu'il n'a pas. Pour constituer un droit en equity justifiant l'application de la préclusion propriétale, le droit en equity en cause doit être de nature propriétale, parce qu'il doit être susceptible de contraindre un promettant à renoncer à un droit propriétal dont il est effectivement titulaire.

In this case, the requisite equity will only arise from the moment that G holds the right or benefit that was the subject of her promise to M, that is, from the time this Court orders her to divide the property into equal one-third interests and to deliver these to the beneficiaries of E's estate. Therefore, the minimum necessary to satisfy the equity, once it arises, is to permit M to purchase G's one-third share of the property as of the date of this Court's order.

*Per* Côté J.: There is agreement with the majority that a proprietary estoppel claim can arise even where a promisor had no ownership interest in the property at the time the promise was made and that a promisee's reliance is not unreasonable, as a matter of law, solely because the promisor does not own the property at the time the promisee acts, to his or her detriment, in reliance on the promise. Nevertheless, a court cannot order an executor to distribute shares of an estate in a manner that disregards the testator's express intent for the sole purpose of enabling a beneficiary to make good on her promise to a third party. This principle holds true even where that beneficiary also happens to serve as the estate's executor.

In the instant case, this Court has no power to order G to exercise her executorial discretion in a particular manner. E's last will was unambiguous in expressly vesting G with discretion in the administration of her estate and in entrusting her to decide the fate of the property in issue, including whether or not it should be sold. Compelling G to transfer shares of the property to the estate's beneficiaries is to substitute the Court's own judgment for that of G in determining how the property should be administered, effectively creating a specific bequest that E herself opted not to make. If G's duties as executor are truly in conflict with her interests as a beneficiary such that there is a breach of fiduciary duty, the proper remedy is not to order an *in specie* distribution but to replace G as executor. However, if G is ordered to distribute the property *in specie* and compelled to sell her share to M, the sale price should be determined by the value of the property as of the date of this Court's order.

En l'espèce, le droit en equity nécessaire ne prendra naissance qu'à partir du moment où G sera titulaire du droit ou de l'avantage qu'elle a promis à M, c'est-à-dire le moment où la Cour lui ordonnera de partager la propriété en intérêts égaux d'un tiers qu'elle remettra aux bénéficiaires de la succession d'E. En conséquence, le minimum nécessaire pour donner effet au droit en equity, dès qu'il prendra naissance, est de permettre à M d'acheter la part d'un tiers de G dans la propriété à la date de l'ordonnance de la Cour.

*La* juge Côté : Il y a accord avec les juges majoritaires sur le fait qu'il est possible d'invoquer la préclusion propriétale même si le promettant ne détenait aucun intérêt propriétal dans le bien en cause au moment de la promesse, et que la décision par le destinataire de la promesse de s'y fier n'est pas déraisonnable en droit simplement parce que le promettant n'est pas propriétaire du bien au moment où le destinataire de la promesse agit à son préjudice en s'y fiant. Néanmoins, un tribunal ne peut ordonner à un exécuteur testamentaire de procéder à la distribution de la succession sans tenir compte de l'intention expresse du testateur, et ce, à la seule fin de permettre à un bénéficiaire de tenir la promesse qu'il a faite à un tiers. Ce principe s'applique même lorsque ce bénéficiaire agit également comme exécuteur testamentaire.

En l'espèce, la Cour n'a pas compétence pour ordonner à G d'exercer son pouvoir discrétionnaire d'exécutrice testamentaire d'une façon particulière. Le testament d'E accordait expressément et sans équivoque à G un pouvoir discrétionnaire dans l'administration de sa succession, lui confiant le soin de décider du sort de la propriété en cause, notamment de déterminer s'il convenait ou non de la vendre. En enjoignant à G de transférer aux bénéficiaires de la succession leur part dans la propriété, la Cour se trouve à substituer son propre jugement à celui de G et à décider de la façon dont le bien devrait être administré, créant dans les faits un legs spécifique qu'E a elle-même choisi de ne pas faire. Si les devoirs de G en tant qu'exécutrice testamentaire sont réellement en conflit avec ses intérêts en tant que bénéficiaire, de sorte qu'il y a manquement à son devoir fiduciaire, la réparation appropriée ne consiste pas à ordonner un partage en nature, mais plutôt à remplacer G en tant qu'exécutrice testamentaire. Toutefois, s'il est ordonné à G de partager la propriété en nature et qu'elle est obligée de vendre sa part à M, le prix de la vente devrait être établi en fonction de la valeur de la propriété à la date de l'ordonnance de la Cour.

**Cases Cited**

By McLachlin C.J.

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By Brown J.

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**Jurisprudence**

Citée par la juge en chef McLachlin

**Arrêt examiné :** *Thorner c. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776; **arrêts mentionnés :** *Sabey c. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64; *Clarke c. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618; *Idle-O Apartments Inc. c. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243; *Scholz c. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151; *Wolff c. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15; *Taylors Fashions Ltd. c. Liverpool Victoria Trustees Co.*, [1981] 1 All E.R. 897; *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84; *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53; *Crabb c. Arun District Council*, [1975] 3 All E.R. 865; *Willmott c. Barber* (1880), 15 Ch. D. 96; *Canadian Superior Oil Ltd. c. Paddon-Hughes Development Co.*, [1970] R.C.S. 932; *Sohio Petroleum Co. c. Weyburn Security Co.*, [1971] R.C.S. 81; *Sykes c. Rosebery Parklands Development Society*, 2011 BCCA 15, 330 D.L.R. (4th) 84; *Erickson c. Jones*, 2008 BCCA 379, 299 D.L.R. (4th) 465; *Delane Industry Co. c. PCI Properties Corp.*, 2014 BCCA 285, 359 B.C.A.C. 61; *Burgsteden c. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562; *Eberts c. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317; *Bellton Farms Ltd. c. Campbell*, 2016 NSCA 1, 394 D.L.R. (4th) 262; *Wettstein c. Wettstein*, 1992 CarswellBC 1421 (WL Can.); *Waltons Stores (Interstate) Ltd. c. Maher* (1988), 76 A.L.R. 513; *Walton c. Walton*, E.W.C.A., 14 avril 1994; *Gillett c. Holt*, [2001] Ch. 210; *Cobbe c. Yeoman's Row Management Ltd.*, [2008] UKHL 55, [2008] 1 W.L.R. 1752; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Re Basham (deceased)*, [1987] 1 All E.R. 405; *Watson c. Goldsbrough*, [1986] 1 E.G.L.R. 265; *Re Harris* (1915), 22 D.L.R. 381; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197; *Staub c. Staub Estate*, 2003 ABCA 122, 226 D.L.R. (4th) 327; *Griffiths c. Williams*, [1978] 2 E.G.L.R. 121; *de Montigny c. Brossard (Succession)*, 2010 CSC 51, [2010] 3 R.C.S. 64; *Jennings c. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100; *Commonwealth of Australia c. Verwayen* (1990), 170 C.L.R. 394; *Sledmore c. Dalby* (1996), 72 P. & C.R. 196; *Pilcher c. Shoemaker* (1997), 13 R.P.R. (3d) 42; *Ellis c. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70.

Citée par le juge Brown

**Arrêt examiné :** *Southern Pacific Mortgages Ltd. c. Scott*, [2014] UKSC 52, [2015] A.C. 385; **arrêts mentionnés :** *Idle-O Apartments Inc. c. Charlyn Investments*

451, [2015] 2 W.W.R. 243; *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64; *Crabb v. Arun District Council*, [1976] 1 Ch. 179; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618; *Tiny (Township) v. Battaglia*, 2013 ONCA 274, 305 O.A.C. 372; *Schwark Estate v. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105; *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776; *Abbey National Building Society v. Cann*, [1991] 1 A.C. 56; *Yeoman's Row Management Ltd. v. Cobbe*, [2008] UKHL 55, [2008] 4 All E.R. 713; *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133; *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265; *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100.

By Côté J.

**Referred to:** *Browne v. Moody*, [1936] 4 D.L.R. 1; *National Trust Co. v. Fleury*, [1965] S.C.R. 817; *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; *Re Burke* (1959), 20 D.L.R. (2d) 396; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197; *Jackson Estate, Re* (2004), 192 O.A.C. 161; *Re Smith*, [1971] 1 O.R. 584; *Cooper v. Fenwick*, [1994] O.J. No. 2148 (QL).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Smith and Willcock JJ.A.), 2016 BCCA 200, 400 D.L.R. (4th) 579, 386 B.C.A.C. 287, 667 W.A.C. 287, [2016] 10 W.W.R. 497, 19 E.T.R. (4th) 225, 87 B.C.L.R. (5th) 273, [2016] B.C.J. No. 927 (QL), 2016 CarswellBC 1238 (WL Can.), setting aside in part a decision of Brown J., 2015 BCSC 1170, 10 E.T.R. (4th) 218, [2015] B.C.J. No. 1428 (QL), 2015 CarswellBC 1871 (WL Can.). Appeal allowed.

*G. Darren Williams*, *Ellen Vandergrift* and *Moira Dillon*, for the appellant.

*Claire E. Hunter* and *Ryan J. M. Androsoff*, for the respondent.

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

[1] THE CHIEF JUSTICE — Equity enforces promises that the law does not. This appeal concerns such a promise, part of an arrangement between siblings to provide care for their aging mother. The sister assured the brother that, if he moved back into the family home to do so, he would be able to acquire her share of that property after their mother's death. The question before us is whether equity — and specifically the doctrine of proprietary estoppel — now binds her to her word.

[2] The trial judge concluded that all the elements of proprietary estoppel were established: the sister promised the brother that he would be able to purchase her eventual interest in their mother's property; the brother reasonably relied on the expectation that he would be able to do so; and,

*Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Thériault, Scarborough (Ont.), Carswell, 2002 (loose-leaf updated 2012, release 2).

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Saunders, Smith et Willcock), 2016 BCCA 200, 400 D.L.R. (4th) 579, 386 B.C.A.C. 287, 667 W.A.C. 287, [2016] 10 W.W.R. 497, 19 E.T.R. (4th) 225, 87 B.C.L.R. (5th) 273, [2016] B.C.J. No. 927 (QL), 2016 CarswellBC 1238 (WL Can.), qui a infirmé en partie une décision de la juge Brown, 2015 BCSC 1170, 10 E.T.R. (4th) 218, [2015] B.C.J. No. 1428 (QL), 2015 CarswellBC 1871 (WL Can.). Pourvoi accueilli.

*G. Darren Williams*, *Ellen Vandergrift* et *Moira Dillon*, pour l'appelant.

*Claire E. Hunter* et *Ryan J. M. Androsoff*, pour l'intimée.

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

[1] LA JUGE EN CHEF — L'equity permet de faire respecter des promesses que la common law ne permet pas de faire respecter. Le présent pourvoi concerne pareille promesse, faisant partie d'un arrangement entre frère et sœur afin de prendre soin de leur mère vieillissante. La sœur a donné l'assurance à son frère que, s'il retournait vivre dans la maison familiale pour s'acquitter de cette tâche, elle lui vendrait sa part de la maison après la mort de leur mère. Il s'agit de déterminer si l'equity — et, plus particulièrement, la doctrine de la préclusion propriétale — l'oblige maintenant à tenir parole.

[2] La juge de première instance a conclu que tous les éléments de la préclusion propriétale avaient été établis : la sœur a promis à son frère qu'il pourrait acquérir l'intérêt qu'elle aurait un jour dans la propriété de leur mère; le frère s'est raisonnablement fondé sur le fait qu'il s'attendait à pouvoir le faire;

because of the detriment the brother suffered as a result of his reliance, it would be unfair and unjust in the circumstances to permit the sister to resile from her promise. The evidence supports that conclusion.

[3] That the sister did not have an interest in the property at the time her brother relied on her promise does not negate her obligation to keep her promise; proprietary estoppel will attach to the sister's interest in the property as soon as she receives it from their mother's estate. I would allow the appeal.

## I. Facts and Judicial History

[4] The Cowper-Smiths of Victoria were not always at odds. Elizabeth and Arthur married in 1945. Together, they raised a daughter, Gloria, and two sons, Max and Nathan. Gloria became a potter and settled with her husband in Victoria. Max practised law in England. Nathan moved to Edmonton, where he worked with abused children on behalf of the Alberta government.

[5] Shortly before Arthur died in 1992, he explained to his sons that he and Elizabeth would leave everything to be divided equally between the three children. They intended to avoid family discord. In that, they failed.

[6] Gloria first fell out with Nathan, who had moved back home in 2000 after his long-term relationship had ended and he had quit his job in Edmonton. He did work around the house with which Elizabeth seemed satisfied. After visits with Gloria, however, Elizabeth would return agitated, concerned that Nathan intended to take her house from her and troubled by what she said were Nathan's plans to throw "gay parties" there. In February and April 2001, Nathan received two letters in Gloria's handwriting. The first of these demanded that Nathan not shout or raise his voice in the home or "entertai[n] Gay Males" at home, among other things. The second announced he was no longer welcome to live with his mother and should move out at once. He

comme cet acte de confiance s'est révélé préjudiciable pour le frère, il serait inéquitable et injuste dans les circonstances de permettre à la sœur de revenir sur sa promesse. La preuve étaye cette conclusion.

[3] Ce n'est pas parce qu'elle n'avait pas d'intérêt dans la propriété au moment où son frère s'est fié à la promesse qu'elle lui avait faite que la sœur n'est pas tenue de respecter sa promesse; la préclusion propriétale grèvera l'intérêt de la sœur dans la propriété aussitôt qu'elle recevra celui-ci de la succession de sa mère. Je suis d'avis d'accueillir le pourvoi.

## I. Faits et historique judiciaire

[4] Les Cowper-Smith de Victoria n'ont pas toujours été en mauvais termes. Elizabeth et Arthur se sont mariés en 1945. Ensemble, ils ont élevé une fille, Gloria, et deux garçons, Max et Nathan. Gloria est devenue potière et elle s'est établie avec son mari à Victoria. Max a pratiqué le droit en Angleterre. Pour sa part, Nathan a déménagé à Edmonton, où il a travaillé pour le gouvernement albertain auprès d'enfants victimes de mauvais traitements.

[5] Peu avant qu'il meure en 1992, Arthur a expliqué à ses fils qu'Elizabeth et lui légueraient tous leurs biens à parts égales à leurs trois enfants. Ils voulaient éviter la discorde familiale. À cet égard, ils ont échoué.

[6] Gloria s'est d'abord brouillée avec Nathan, qui est revenu habiter la maison familiale en 2000 après la fin d'une relation de longue durée et avoir quitté son emploi à Edmonton. Il s'est effectivement occupé de la maison, ce dont Elizabeth semblait satisfaite. Toutefois, elle revenait perturbée de ses visites chez Gloria, habitée par la crainte que Nathan cherche à s'approprier sa maison et préoccupée par ce qu'elle disait être les plans de Nathan d'y organiser des [TRADUCTION] « fêtes gaies ». Aux mois de février et d'avril 2001, Nathan a reçu deux lettres rédigées à la main par Gloria. Dans la première, elle le sommait notamment de ne pas crier ou élever le ton dans la maison ni d'y « recevoir des hommes gais ». Dans la seconde, elle lui annonçait qu'il ne pouvait

returned from an overseas trip in June 2001 to find the locks changed, with his belongings still inside. He broke in. Gloria had the police escort him out. He eventually moved back to Edmonton. When, in 2005, Elizabeth asked Nathan to forgive her for what had happened, he assured her that he did not blame her; he knew the ordeal had been Gloria's doing.

[7] Max was next. In the years following his father's death, he struggled with financial difficulties and his mental health deteriorated. He turned to alcohol and drugs. His marriage fell apart. After 2000, things improved. A visit to Victoria in 2003 was such a success that he returned later that year and again in 2005. He and Gloria got along well and, when Gloria made it clear that Elizabeth could no longer live on her own, they began to discuss options for their mother's care. Max eventually agreed to give up his life in England, to move back to Victoria, and to care for their mother and the family home. He did so only after Gloria agreed that Max would be reimbursed for various expenses, have the use of their mother's car, and, crucially, be able to live in the house permanently and eventually to acquire Gloria's one-third interest in the same. The arrangement worked until 2009, when Gloria began to back away from her promises. The relationship between the siblings disintegrated, first into acrimony and then into litigation.

[8] In June 2001, around the time that Gloria, accompanied by the police, confronted Nathan at the property, Elizabeth's estate planning changed dramatically. She transferred title to the property and all her investments into joint ownership with Gloria. Pursuant to a "Declaration of Trust", Gloria would hold her interests in the house and the investments as bare trustee, with Elizabeth as the sole beneficiary, and Gloria would be "entitled . . . absolutely" to both the property and the investments upon her mother's

plus habiter chez leur mère et qu'il devait déménager immédiatement. Lorsqu'il est revenu d'un voyage à l'étranger en juin 2001, les serrures avaient été changées alors que ses effets personnels se trouvaient toujours à l'intérieur. Il est entré par effraction dans la maison. Gloria lui a fait quitter les lieux sous escorte policière. Il est finalement retourné habiter à Edmonton. Lorsqu'en 2005, Elizabeth a demandé pardon à Nathan pour ce qui était arrivé, il lui a donné l'assurance qu'il ne lui en tenait pas rigueur; il savait que Gloria était à l'origine de l'épreuve qu'il avait traversée.

[7] Ce fut ensuite le tour de Max. Au cours des années qui ont suivi la mort de son père, il a été aux prises avec des difficultés financières et sa santé mentale s'est détériorée. Il s'est mis à consommer de l'alcool et des drogues. Son couple s'est brisé. Après 2000, les choses se sont améliorées. Son voyage à Victoria en 2003 a été un tel succès qu'il y est revenu plus tard la même année ainsi qu'en 2005. Il s'entendait bien avec Gloria et, lorsque celle-ci lui a clairement fait savoir qu'Elizabeth ne pouvait plus vivre seule, ils ont commencé à analyser différentes façons de prendre soin d'elle. Max a finalement accepté de renoncer à sa vie en Angleterre, de revenir vivre à Victoria, et de s'occuper de sa mère ainsi que de la maison familiale. Il l'a fait uniquement après que Gloria eut accepté que diverses dépenses lui soient remboursées, qu'il puisse utiliser la voiture de sa mère et, point crucial, qu'il puisse vivre dans la maison de façon permanente et acquérir un jour l'intérêt de Gloria sur le tiers de celle-ci. L'arrangement a fonctionné jusqu'à ce qu'en 2009, Gloria commence à revenir sur ses promesses. La relation entre le frère et la sœur s'est dégradée, devenant d'abord acrimonieuse pour ensuite aboutir à un litige.

[8] En juin 2001 — à peu près à l'époque où Gloria, accompagnée par des policiers, a affronté Nathan à la maison —, la planification successorale d'Elizabeth a changé du tout au tout. Cette dernière a transféré le titre de la propriété et tous ses placements en propriété conjointe avec Gloria. Une [TRADUCTION] « déclaration de fiducie » prévoyait que Gloria détiendrait ses intérêts dans la maison et dans les placements en tant que nue-fiduciaire, qu'Elizabeth serait la seule bénéficiaire, et que

death. Elizabeth also executed a new will which appointed Gloria as executor and revoked all previous wills. She revoked this will in 2002, when she executed yet another, her last. She again named Gloria as executor but this time provided that her estate would be divided equally between her three children. Neither the trust declaration nor Gloria's joint ownership of the property and the investments — which, if valid, would have assured that Elizabeth's estate would be virtually devoid of assets, her last will notwithstanding — was ever changed.

[9] Nathan discovered Gloria's joint ownership of the house in 2005. Gloria assured him that the arrangement was to simplify the administration of their mother's estate and that he and Max would still each receive a one-third share. She gave Max the same assurance four years later, when he learned that Gloria's name was on title. Gloria changed her position only in April 2011, when, eight months after Elizabeth's death, the trust declaration entitling Gloria to Elizabeth's assets "absolutely" came to light and Gloria announced her plans to put the house, in which Max was still living, on the market.

[10] These proceedings ensued. Nathan and Max sought an order setting aside the 2001 trust declaration as the product of Gloria's undue influence over Elizabeth and declaring that Gloria therefore held the property and investments in trust for Elizabeth's estate, to be divided equally between the three children in accordance with the 2002 will. They also claimed, on the basis of proprietary estoppel, that Max was entitled to purchase Gloria's one-third interest in the house.

[11] The brothers succeeded at trial: 2015 BCSC 1170, 10 E.T.R. (4th) 218. The trial judge found that

Gloria aurait « un droit absolu » sur la propriété et les placements au décès de sa mère. Elizabeth a aussi signé un nouveau testament dans lequel elle nommait Gloria exécutrice testamentaire et révoquait tous ses testaments antérieurs. En 2002, elle a révoqué ce testament en en signant un autre, son dernier. Elle a de nouveau nommé Gloria exécutrice testamentaire, mais cette fois elle a prévu que sa succession serait partagée également entre ses trois enfants. La déclaration de fiducie et la stipulation relative à la propriété conjointe de la maison et des placements — qui, si elles avaient été valides, auraient fait en sorte que la succession d'Elizabeth aurait pour ainsi dire été dépourvue de tout bien malgré le dernier testament de celle-ci — n'ont jamais été modifiées.

[9] En 2005, Nathan a découvert que Gloria était copropriétaire de la maison. Gloria lui a assuré que l'arrangement visait à simplifier l'administration de la succession de leur mère et que son frère Max et lui recevraient quand même leur part d'un tiers chacun. Elle a donné la même assurance à Max quatre ans plus tard, quand celui-ci a appris que le nom de Gloria figurait sur le titre de propriété. Ce n'est qu'en avril 2011 que Gloria a modifié sa position, soit lorsque huit mois après le décès d'Elizabeth, la déclaration de fiducie lui accordant un droit [TRADUCTION] « absolu » dans les biens de celle-ci a été mise au jour et qu'elle a annoncé qu'elle avait l'intention de mettre en vente la maison, dans laquelle Max vivait toujours.

[10] La présente instance s'en est suivie. Nathan et Max ont sollicité une ordonnance annulant la déclaration de fiducie de 2001 pour cause d'influence indue de Gloria sur Elizabeth, et déclarant que Gloria détenait par conséquent la propriété et les placements en fiducie au bénéfice de la succession d'Elizabeth et que ces biens devaient être partagés également entre les trois enfants conformément au testament daté de 2002. Invoquant la préclusion propriétale, ils ont également fait valoir que Max était en droit d'acheter l'intérêt de Gloria sur le tiers de la maison.

[11] Les frères ont eu gain de cause en première instance (2015 BCSC 1170, 10 E.T.R. (4th) 218).

Gloria had not rebutted the presumptions of undue influence and resulting trust, and she declared that the property belonged to Elizabeth's estate. She also held that the elements of proprietary estoppel had been made out. Gloria appealed. The British Columbia Court of Appeal (2016 BCCA 200, 400 D.L.R. (4th) 579) unanimously upheld the trial judge's conclusions with respect to undue influence and resulting trust, but split on proprietary estoppel. The majority held that, since Gloria owned no interest in the property, proprietary estoppel could not arise. Smith J.A. dissented; she would have dismissed Gloria's appeal entirely.

La juge de première instance a conclu que Gloria n'avait pas réfuté les présomptions d'influence indue et de fiducie résultoire, et elle a déclaré que la propriété appartenait à la succession d'Elizabeth. Elle a également statué que les éléments de la préclusion propriétale avaient été établis. Gloria a interjeté appel. La Cour d'appel de la Colombie-Britannique (2016 BCCA 200, 400 D.L.R. (4th) 579) a confirmé à l'unanimité les conclusions de la juge de première instance concernant l'influence indue et la fiducie résultoire, mais elle était divisée sur la question de la préclusion propriétale. Les juges majoritaires ont conclu que, comme Gloria ne détenait aucun intérêt dans la propriété, il ne pouvait y avoir de préclusion propriétale. La juge Smith était dissidente; elle aurait rejeté l'appel de Gloria dans son intégralité.

[12] Max appeals to this Court on the issue of proprietary estoppel. Gloria has not cross-appealed with respect to undue influence or resulting trust.

[12] Max se pourvoit devant notre Cour sur la question de la préclusion propriétale. Gloria n'a pas interjeté d'appel incident concernant l'influence indue ou la fiducie résultoire.

## II. Issues

[13] The main question before us is whether the trial judge erred in concluding that proprietary estoppel operates to enforce Gloria's promise. We must therefore consider the elements of proprietary estoppel and determine whether the evidence supports the trial judge's conclusion that those elements are met. Specifically, we must decide whether Gloria's lack of ownership of an interest in the property defeats Max's claim.

## II. Questions en litige

[13] La principale question dont nous sommes saisis est celle de savoir si la juge de première instance a conclu à tort que la préclusion propriétale permettait de faire respecter la promesse de Gloria. Nous devons donc examiner les éléments de la préclusion propriétale et vérifier si la preuve étaye la conclusion de la juge de première instance selon laquelle ces éléments sont réunis. Plus particulièrement, il nous faut décider si la demande de Max doit échouer parce que Gloria ne détenait aucun intérêt dans la propriété.

[14] If proprietary estoppel may indeed be established, then we must turn to the question of remedy.

[14] Si la préclusion propriétale peut effectivement être établie, nous devons ensuite nous prononcer sur la question de la réparation à accorder.

## III. Analysis

[15] An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all

## III. Analyse

[15] Les circonstances suivantes donnent naissance à un droit en equity : (1) une déclaration est faite au demandeur ou une assurance est donnée à celui-ci, sur le fondement de laquelle le demandeur s'attend à bénéficier d'un certain droit ou avantage dans un bien; (2) le demandeur s'appuie sur cette

the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word: see *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 29, per Lord Walker; see also *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, at para. 30; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, at para. 52; *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, at para. 49; *Scholz v. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151, at para. 31. The representation or assurance may be express or implied: see *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15, at para. 21; *Sabey*, at para. 33; B. MacDougall, *Estoppel* (2012), at p. 446; *Snell's Equity* (33rd ed. 2015), by J. McGhee, at p. 335. An inchoate equity arises at the time of detrimental reliance on a representation or assurance. It is not necessary to determine, in this case, whether this equity is personal or proprietary in nature. When the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimant's expectation, proprietary estoppel may give effect to the equity by making the representation or assurance binding.

attente en faisant quelque chose ou en s'abstenant de faire quelque chose, et cet acte de confiance est raisonnable eu égard à l'ensemble des circonstances; (3) le demandeur subit un préjudice en raison de son acte de confiance raisonnable, de sorte qu'il serait inéquitable ou injuste que la partie à l'origine de la déclaration ou de l'assurance revienne sur sa parole (voir *Thorner c. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, par. 29, lord Walker; voir aussi *Sabey c. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, par. 30; *Clarke c. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, par. 52; *Idle-O Apartments Inc. c. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, par. 49; *Scholz c. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151, par. 31). La déclaration ou l'assurance peuvent être expresses ou implicites (voir *Wolff c. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15, par. 21; *Sabey*, par. 33; B. MacDougall, *Estoppel* (2012), p. 446; *Snell's Equity* (33e éd. 2015), par J. McGhee, p. 335). Un droit virtuel en equity prend naissance lorsqu'il y a acte de confiance préjudiciable à l'égard d'une déclaration ou d'une assurance. Il n'est pas nécessaire en l'espèce de décider si ce droit en equity est de nature personnelle ou propriétale. Lorsque la partie dont émane la déclaration ou l'assurance possède dans le bien un intérêt suffisant pour répondre à l'attente du demandeur, la préclusion propriétale peut donner effet au droit en equity en rendant obligatoire la déclaration ou l'assurance.

[16] Proprietary estoppel protects the equity, which in turn protects the claimant's reasonable reliance: see S. Bright and B. McFarlane, "Proprietary Estoppel and Property Rights" (2005), 64 *Cambridge L.J.* 449, at p. 452. Like other estoppels, proprietary estoppel avoids the unfairness or injustice that would result to one party if the other were permitted to break her word and insist on her strict legal rights: see *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1981] 1 All E.R. 897 (Ch.), at pp. 909, 915-16 and 918. As Lord Denning M.R. put it in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122:

[16] La préclusion propriétale protège le droit en equity, qui, pour sa part, protège l'acte de confiance raisonnable du demandeur (voir S. Bright et B. McFarlane, « Proprietary Estoppel and Property Rights » (2005), 64 *Cambridge L.J.* 449, p. 452). À l'instar d'autres types de préclusion, la préclusion propriétale prévient l'iniquité ou l'injustice dont serait victime l'une des parties si l'autre pouvait revenir sur sa parole et insister sur le respect de ses droits stricts (voir *Taylors Fashions Ltd. c. Liverpool Victoria Trustees Co.*, [1981] 1 All E.R. 897 (Ch.), p. 909, 915-916 et 918). Comme l'a dit lord Denning, maître des rôles, dans *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), p. 122 :

When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

See also *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 51; MacDougall, at pp. 15-16.

[17] Where protecting the equity of the case may demand the recognition of "new rights and interests . . . in or over land" (*Crabb v. Arun District Council*, [1975] 3 All E.R. 865 (C.A.), at p. 871, per Lord Denning M.R.), proprietary estoppel can do what other estoppels cannot — it can found a cause of action: see MacDougall, at p. 424; McGhee, at pp. 330-33. Where the ingredients for a proprietary estoppel are present, the court must determine whether it is appropriate to satisfy the equity by recognizing the modification or creation of property rights "in situations where there is want of consideration or of writing": *Anger & Honsberger Law of Real Property* (3rd ed. (loose-leaf)), by A. W. La Forest, at p. 28-3.

[18] Consensus as to the elements of proprietary estoppel has proved elusive: see *Thorner*, at para. 29, per Lord Walker; MacDougall, at pp. 444-47. Recent decades have seen a softening of the five criteria, or "probanda", set out by Fry J. in *Willmott v. Barber* (1880), 15 Ch. D. 96, at pp. 105-6 — and cited by this Court in *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932, at pp. 938-39, and *Sohio Petroleum Co. v. Weyburn Security Co.*, [1971] S.C.R. 81, at pp. 85-86 — as judges have moved away from strict requirements that would constrain their ability to do justice in the circumstances of a particular case: see *Clarke*, at paras. 41-53; *Sykes v. Rosebery Parklands Development Society*, 2011 BCCA 15, 330 D.L.R. (4th) 84, at paras. 44-49; *Erickson v. Jones*, 2008 BCCA 379, 299 D.L.R. (4th) 465, at paras. 52-57; *Crabb*, at pp. 876-77, per Scarman L.J.; *Taylors Fashions*, at pp. 915-18.

[TRADUCTION] Lorsque les parties à une opération se fondent sur une présupposition sous-jacente — de fait ou de droit — peu importe qu'elle découle d'une affirmation inexacte ou d'une erreur — qui a guidé leurs rapports —, aucune d'elles ne peut revenir sur cette présupposition lorsqu'il serait inéquitable ou injuste de lui permettre de le faire. Si l'une des parties souhaite revenir sur la présupposition, les tribunaux accorderont à l'autre partie la réparation qui s'impose en equity.

Voir également *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53, par. 51; MacDougall, p. 15-16.

[17] Dans les cas où la protection de l'equity peut nécessiter la reconnaissance de [TRADUCTION] « nouveaux droits et intérêts [. . .] sur la terre ou à son égard » (*Crabb c. Arun District Council*, [1975] 3 All E.R. 865 (C.A.), p. 871, lord Denning, maître des rôles), la préclusion propriétale peut faire une chose que ne sont pas susceptibles de faire les autres préclusions — elle peut fonder une cause d'action (voir MacDougall, p. 424; McGhee, p. 330-333). Lorsque les éléments constitutifs de la préclusion propriétale sont présents, le tribunal doit décider s'il convient de donner effet au droit en equity en cause en reconnaissant la modification ou la création de droits de propriété [TRADUCTION] « dans des situations où il n'y a pas de contrepartie ou d'écrit » (*Anger & Honsberger Law of Real Property* (3e éd. (feuilles mobiles)), par A. W. La Forest, p. 28-3).

[18] Il s'est avéré difficile de parvenir à un consensus sur les éléments de la préclusion propriétale (voir *Thorner*, par. 29, lord Walker; MacDougall, p. 444-447). Au cours des dernières décennies, nous avons pu assister à un assouplissement des cinq critères, ou « éléments à prouver », énoncés par le juge Fry dans *Willmott c. Barber* (1880), 15 Ch. D. 96, p. 105-106 — et cités par notre Cour dans *Canadian Superior Oil Ltd. c. Paddon-Hughes Development Co.*, [1970] R.C.S. 932, p. 938-939, et *Sohio Petroleum Co. c. Weyburn Security Co.*, [1971] R.C.S. 81, p. 85-86 — les juges s'étant écartés d'exigences strictes susceptibles de restreindre leur capacité de rendre justice dans les circonstances d'une affaire donnée (voir *Clarke*, par. 41-53; *Sykes c. Rosebery Parklands Development Society*, 2011 BCCA 15, 330 D.L.R. (4th) 84, par. 44-49; *Erickson c. Jones*, 2008 BCCA 379, 299 D.L.R. (4th) 465, par. 52-57; *Crabb*, p. 876-877, le lord juge Scarman; *Taylors Fashions*, p. 915-918).

[19] But flexibility must not come at the expense of clarity and predictability. As Professor MacDougall has commented:

> While the five probanda ought to be replaced as the criteria for the estoppel, a structured formulation for establishing the need for proprietary estoppel serves the purpose of providing a useful and reasonably clear-cut method for predicting the estoppel. The replacement of such a structure by a single factor of "unfairness" or "unconscionability" leads . . . [to] too open-ended and amorphous a doctrine that only encourages litigation, particularly given the already very flexible and open-ended nature of the effect of the estoppel. [p. 447]

[20] I agree. Unfairness or injustice — sometimes referred to as "unconscionability", albeit not in the sense in which that term is used in contract law (see *Ryan*, at para. 74) — are not stand-alone criteria; they are what proprietary estoppel aims to avoid by keeping the owner to her word.

[21] It has commonly been understood in Canada that proprietary estoppel is concerned with interests in land: *Delane Industry Co. v. PCI Properties Corp.*, 2014 BCCA 285, 359 B.C.A.C. 61, at para. 49; *Burgsteden v. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562, at para. 25; *Clarke*, at para. 52; *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317, at para. 23; *Bellton Farms Ltd. v. Campbell*, 2016 NSCA 1, 394 D.L.R. (4th) 262, at para. 46. Still, as Professor MacDougall has noted, "[a] limitation to land is arguably arbitrary . . . . It arises from the somewhat chance circumstance that proprietary estoppel . . . originated as a device to get round form requirements that mainly constrained the creation of or transfer of rights to land": p. 450; see also *Wettstein v. Wettstein*, 1992 CarswellBC 1421 (WL Can.) (S.C.), at paras. 56-57. The British Columbia Court of Appeal has acknowledged the question of whether proprietary estoppel "also extends to other proprietary rights", although this was not at issue in the case before it: *Sabey*, at para. 32. The English courts have gone much further, allowing proprietary estoppel claims in relation to chattels,

[19] Or, cet assouplissement ne doit pas se faire au détriment de la clarté et de la prévisibilité. Comme l'a mentionné le professeur MacDougall :

> [TRADUCTION] Bien que les cinq éléments à prouver doivent être remplacés comme critères régissant la préclusion, une formulation structurée qui permette d'établir la nécessité d'appliquer la préclusion propriétale sert l'objectif consistant à offrir une méthode utile et raisonnablement claire pour prédire la préclusion. Remplacer une telle structure par un seul facteur du caractère « inéquitable » ou « inique » mène [. . .] [à] une doctrine trop indéterminée et floue qui ne fait qu'encourager le recours aux tribunaux, compte tenu en particulier de la nature déjà très souple et indéterminée de l'effet de la préclusion. [p. 447]

[20] Je suis d'accord. Le caractère inéquitable ou le caractère injuste — parfois dit « inique », quoique dans un sens différent de celui dans lequel ce terme est utilisé en droit des contrats (voir *Ryan*, par. 74) — ne constituent pas des critères indépendants; c'est ce que la préclusion propriétale vise à éviter en obligeant le titulaire de l'intérêt à tenir parole.

[21] Il est généralement entendu au Canada que la préclusion propriétale porte sur des intérêts fonciers (*Delane Industry Co. c. PCI Properties Corp.*, 2014 BCCA 285, 359 B.C.A.C. 61, par. 49; *Burgsteden c. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562, par. 25; *Clarke*, par. 52; *Eberts c. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317, par. 23; *Bellton Farms Ltd. c. Campbell*, 2016 NSCA 1, 394 D.L.R. (4th) 262, par. 46). Néanmoins, comme le professeur MacDougall l'a fait remarquer, [TRADUCTION] « on pourrait soutenir que l'imposition d'une restriction à un bien-fonds est arbitraire [. . .] Tout a commencé par un quelconque concours de circonstances où la préclusion propriétale [. . .] a été créée comme un moyen de contourner les exigences de forme qui limitaient principalement la création ou le transfert de droits fonciers » (p. 450; voir aussi *Wettstein c. Wettstein*, 1992 CarswellBC 1421 (WL Can.) (C.S.), par. 56-57). La Cour d'appel de la Colombie-Britannique a pris acte de la question de savoir si la préclusion propriétale [TRADUCTION] « s'applique également à d'autres droits propriétaux », même si cela n'était pas en cause dans l'affaire dont elle était saisie (*Sabey*, par. 32).

insurance policies, intellectual property rights, commercial assets, and other forms of property: see S. Wilken and K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed. 2012), at pp. 263-64; MacDougall, at pp. 452-53; see also *Thorner*, at paras. 48 and 66, per Lord Walker, and para. 104, per Lord Neuberger.

[22] We need not decide, in this case, whether proprietary estoppel may attach to an interest in property other than land; Max's expectation was that he would enjoy a right over the family home, namely, the right to acquire Gloria's eventual interest in it. Nor need we determine whether equity more broadly enforces non-contractual promises on which claimants have detrimentally relied: see, e.g., *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 76 A.L.R. 513 (H.C.), at pp. 524-25, per Mason C.J. and Wilson J. As I will explain, proprietary estoppel may prevent the inequity of unrequited detriment where a claimant has reasonably relied on an expectation that he will enjoy a right or benefit over property, even when the party responsible for that expectation does not own an interest in the property at the time of the claimant's reliance.

A. *Was Max's Reliance Reasonable?*

[23] As we have seen, to establish proprietary estoppel one must first establish an equity of the kind that proprietary estoppel protects. This requires three things: a representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property, reasonable reliance on that expectation, and detriment as a result of the reliance. When the owner of an interest in the property over which the claimant expects to enjoy a right or benefit is responsible for the representation or assurance, then the equity established by the claimant's reasonable reliance may be given effect by proprietary estoppel.

Les tribunaux anglais sont allés beaucoup plus loin en faisant droit à des demandes fondées sur la préclusion propriétale à l'égard de chatels, de polices d'assurance, de droits de propriété intellectuelle, d'éléments d'actif commercial et d'autres types de biens (voir S. Wilken et K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3e éd. 2012), p. 263-264; MacDougall, p. 452-453; voir aussi *Thorner*, par. 48 et 66, lord Walker, et par. 104, lord Neuberger).

[22] Nous n'avons pas à décider, en l'espèce, si la préclusion propriétale peut grever un intérêt autre qu'un intérêt foncier; Max s'attendait à bénéficier d'un droit dans la maison familiale, soit celui d'acquérir l'intérêt que Gloria aurait un jour dans celle-ci. Nous n'avons pas non plus à trancher la question de savoir si l'equity assure plus généralement le respect de promesses non contractuelles auxquelles des demandeurs se sont fiés, à leur préjudice (voir, p. ex., *Waltons Stores (Interstate) Ltd. c. Maher* (1988), 76 A.L.R. 513 (H.C.), p. 524-525, le juge en chef Mason et le juge Wilson). Comme je l'expliquerai plus loin, la préclusion propriétale peut prévenir l'iniquité d'un préjudice non compensé lorsque le demandeur s'est raisonnablement fondé sur le fait qu'il s'attendait à bénéficier d'un droit ou d'un avantage dans un bien, même si la partie à l'origine de cette attente ne possédait pas d'intérêt dans ce bien au moment de l'acte de confiance du demandeur.

A. *L'acte de confiance de Max était-il raisonnable?*

[23] Rappelons que, pour établir la préclusion propriétale, il faut d'abord démontrer l'existence d'un droit en equity du type de ceux que protège la préclusion propriétale. Trois choses sont nécessaires : une déclaration ou une assurance sur le fondement de laquelle le demandeur s'attend à bénéficier d'un droit ou d'un avantage dans un bien; un acte de confiance raisonnable à l'égard de cette attente; un préjudice résultant de l'acte de confiance. Lorsque le titulaire d'un intérêt dans le bien dans lequel le demandeur s'attend à bénéficier d'un droit ou d'un avantage est à l'origine de la déclaration ou de l'assurance, la préclusion propriétale peut alors donner effet au droit en equity établi par l'acte de confiance raisonnable du demandeur.

[24] There is no question that Gloria assured Max that, if he moved back to Victoria to care for their mother, he would be able to acquire her eventual interest in the house. Nor is it disputed that, as a result of his reliance on that assurance, Max has suffered a detriment. The trial judge determined, and all now agree, that "Max acted to his detriment in moving from England to Victoria, giving up employment income, the long-term lease of a cottage, his contacts with his children, and his social life to look after his aged dementing mother" and that "[h]e did so relying on Gloria's agreement to his conditions for the move": para. 118.

[24] Il ne fait aucun doute que Gloria a donné à Max l'assurance que, s'il retournait vivre à Victoria pour prendre soin de leur mère, il pourrait acquérir l'intérêt qu'elle détiendrait un jour dans la maison. Il n'est pas non plus contesté que, parce qu'il s'est fié à cette assurance, Max a subi un préjudice. La juge de première instance a conclu, et tous en conviennent maintenant, que [TRADUCTION] « Max a agi à son préjudice en quittant l'Angleterre pour venir s'installer à Victoria et en renonçant à un revenu d'emploi, à la location à long terme d'une petite maison, aux contacts qu'il avait avec ses enfants et à sa vie sociale pour prendre soin de sa mère âgée qui souffrait de démence », et qu'« [i]l l'a fait en se fiant au fait que Gloria acceptait les conditions auxquelles il consentait à déménager » (par. 118).

[25] The question is whether Max's reliance was reasonable. If not, then no equity arose in his favour. Gloria argues — and the Court of Appeal majority accepted — that Max's reliance could not have been reasonable because Gloria did not own an interest in the property. As Willcock J.A. wondered, at para. 111 of his reasons, "[h]ow can there be reasonable reliance upon a promise to convey an interest in property made by one who does not have such an interest or whose interest is uncertain?"

[25] La question est de savoir si l'acte de confiance de Max était raisonnable. Dans la négative, aucun droit en equity n'a alors pris naissance en sa faveur. Gloria soutient — et les juges majoritaires de la Cour d'appel ont retenu cet argument — que l'acte de confiance de Max ne pouvait pas être raisonnable parce que Gloria ne détenait pas d'intérêt dans la propriété. Le juge Willcock se pose la question suivante au par. 111 de ses motifs : [TRADUCTION] « Comment peut-on se fier raisonnablement à une promesse de céder un intérêt dans un bien faite par une personne qui ne possède pas un tel intérêt ou dont l'intérêt est incertain? »

[26] Reasonableness is circumstantial. As Lord Walker put it in *Thorner*, "to establish a proprietary estoppel the relevant assurance must be clear enough", that is, "[t]he promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made": para. 56, quoting *Walton v. Walton*, E.W.C.A., April 14, 1994 (unreported), at para. 16, per Hoffmann L.J.; see also *Gillett v. Holt*, [2001] Ch. 210 (C.A.), at p. 225; *Taylors Fashions*, at pp. 915-16; McGhee, at p. 338. What matters is what one party induced the other to expect; as Lord Hoffmann stated in *Thorner*, the question is whether "the meaning . . . conveyed would reasonably have been understood as intended to be taken

[26] Le caractère raisonnable dépend des circonstances. Comme l'a dit lord Walker dans l'arrêt *Thorner*, [TRADUCTION] « pour établir une préclusion propriétale, il faut que l'assurance donnée soit suffisamment claire », c'est-à-dire que « [l]a promesse ne doit comporter aucune ambiguïté et doit donner l'impression de devoir être prise au sérieux. Considérée dans son contexte, la promesse doit permettre raisonnablement de penser que la personne à qui elle a été faite s'y fiera » (par. 56, citant *Walton c. Walton*, E.W.C.A., 14 avril 1994 (non publié), par. 16, le lord juge Hoffmann; voir également *Gillett c. Holt*, [2001] Ch. 210 (C.A.), p. 225; *Taylors Fashions*, p. 915-916; McGhee, p. 338). Ce qui importe, c'est ce que l'une des parties a amené l'autre à croire; comme l'a dit lord Hoffmann dans l'arrêt *Thorner*, la question est de savoir si [TRADUCTION] « le sens

seriously as an assurance which could be relied upon": para. 5; see also *Crabb*, at p. 871; B. McFarlane, *The Law of Proprietary Estoppel* (2014), at p. 98.

[27] In *Thorner*, one party had induced the other to expect that he would inherit farm property. Since the parties knew "that the extent of the farm was liable to fluctuate (as development opportunities arose, and tenancies came and went)", "[t]here is no reason to doubt that their common understanding was that [the] assurance related to whatever the farm consisted of at [the owner's] death": para. 62. This was not the sort of uncertainty which would make reliance on the assurance unreasonable because "it is unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been": para. 65.

[28] This approach to assessing certainty — and thus the reasonableness of reliance — permits equity "to mitigate the rigours of strict law": *Crabb*, at p. 871; see also *Thorner*, at para. 98, per Lord Neuberger. Unlike a contract, which, "subject to the narrow doctrine of frustration, must be performed come what may", equity "looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept": *Walton*, at paras. 20-21, quoted in *Thorner*, at para. 57.

[29] In a proprietary estoppel claim, where the equity is said to have arisen when the claimant relied on an expectation that he would enjoy some right or benefit over property, it may be that the party responsible for the expectation had such a speculative interest in the property that the claimant's reliance could not have been reasonable: see *Cobbe v. Yeoman's Row Management Ltd.*, [2008] UKHL 55, [2008] 1 W.L.R. 1752, at para. 20, per Lord Scott. But whether this is so will depend on context, not on *ex ante* doctrinal restrictions. The Court of Appeal majority's proposed bright line

du message [. . .] véhiculé aurait raisonnablement été interprété comme une assurance à prendre au sérieux et sur laquelle on pouvait se fonder » (par. 5; voir aussi *Crabb*, p. 871, B. McFarlane, *The Law of Proprietary Estoppel* (2014), p. 98).

[27] Dans l'arrêt *Thorner*, l'une des parties avait amené l'autre à croire qu'elle hériterait d'une ferme. Comme les parties savaient que [TRADUCTION] « l'étendue de la ferme était susceptible de fluctuer (en fonction des possibilités de développement et des tenances accordées) », « [i]l ne fait aucun doute que leur perception commune était que l'assurance donnée portait sur ce en quoi consisterait la ferme au décès [du titulaire d'intérêt] » (par. 62). Ce n'était pas le type d'incertitude qui rendait déraisonnable le fait de se fier à cette assurance, parce qu'« il n'est pas avantageux, compte tenu du caractère rétrospectif de l'évaluation qu'exige la doctrine de la préclusion propriétale, d'émettre des hypothèses sur ce qui aurait pu arriver » (par. 65).

[28] Cette méthode d'évaluation de la certitude — et par le fait même du caractère raisonnable de l'acte de confiance — permet à l'equity [TRADUCTION] « d'atténuer les rigueurs du droit strict » (*Crabb*, p. 871; voir également *Thorner*, par. 98, lord Neuberger). Contrairement au contrat qui, [TRADUCTION] « sous réserve de la doctrine restreinte de l'impossibilité d'exécution, doit être exécuté quoi qu'il arrive », l'equity « jette un regard rétrospectif à partir du moment où la promesse doit être exécutée, et appelle à se demander si, dans les circonstances de l'espèce, il serait inique qu'elle ne soit pas tenue » (*Walton*, par. 20-21, cité dans *Thorner*, par. 57).

[29] Dans une demande fondée sur la préclusion propriétale, où l'on prétend qu'un droit en equity a pris naissance lorsque le demandeur s'est appuyé sur le fait qu'il s'attendait à bénéficier d'un certain droit ou avantage dans un bien, il se peut que l'intérêt que la partie à l'origine de l'attente détenait dans le bien en cause ait été tellement hypothétique que l'acte de confiance du demandeur ne pouvait être raisonnable (voir *Cobbe c. Yeoman's Row Management Ltd.*, [2008] UKHL 55, [2008] 1 W.L.R. 1752, par. 20, lord Scott). Or, la réponse à la question de savoir si tel est le cas dépendra du

rule — namely, that reliance on a promise by a party with no present interest in property can *never* be reasonable — is out of step with equity's purpose, which is to temper the harsh effects of strict legal rules.

[30] Whether, in a particular case, a claimant's reliance was reasonable in the circumstances is a question of mixed fact and law. A trial judge's determination of this point is, absent palpable and overriding error, entitled to deference: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[31] Here, on the trial judge's findings, both Max and Gloria had clearly understood for well over a decade that their mother's estate, including the house in which she lived, would be divided equally among her three children upon her death. Nathan, Max, and Max's ex-wife each testified to a conversation with Elizabeth and Arthur, just prior to Arthur's death in 1992, in which both parents made clear that everything they owned would be divided equally among their three children once Elizabeth passed away. Max's evidence was that Elizabeth confirmed as much to him in 2002. Gloria conceded at trial that, in the years before her mother's death, she made statements evincing the same expectation. She departed from that position — and asserted that she was entitled to *all* of her mother's assets, the house included — only in April 2011.

[32] It was thus sufficiently certain that Gloria would inherit a one-third interest in the property for her assurance to be taken seriously as one on which Max could rely. Max and Gloria negotiated for an extended period before Max uprooted his life in England and returned to Victoria. Gloria promised unequivocally that he would be able to acquire her share of the property if he did so. She made that commitment, among others, with the purpose

contexte, et non de restrictions théoriques préalables. La règle de démarcation très nette proposée par les juges majoritaires de la Cour d'appel — à savoir qu'il ne peut *jamais* être raisonnable de se fier à une promesse faite par une partie n'ayant aucun intérêt actuel dans un bien — est incompatible avec l'objet de l'equity, lequel consiste à atténuer les effets draconiens du droit strict.

[30] La question de savoir si, dans une affaire donnée, l'acte de confiance du demandeur était raisonnable dans les circonstances est une question mixte de fait et de droit. La décision du juge de première instance à cet égard commande la déférence, sauf si elle est entachée d'une erreur manifeste et dominante (voir *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 36).

[31] Dans la présente affaire, il ressort des conclusions de la juge de première instance que Max et Gloria avaient tous deux clairement compris depuis plus d'une décennie que la succession de leur mère, y compris la maison dans laquelle celle-ci vivait, serait partagée également entre ses trois enfants à son décès. Nathan, Max et l'ex-femme de Max ont tous trois témoigné avoir eu avec Elizabeth et Arthur, juste avant le décès de ce dernier en 1992, une conversation au cours de laquelle les deux parents avaient clairement dit que tous leurs avoirs seraient partagés également entre leurs trois enfants au décès d'Elizabeth. Max a ajouté qu'Elizabeth le lui avait confirmé en 2002. Gloria a concédé au procès qu'au cours des années ayant précédé le décès de sa mère, elle avait fait des déclarations exprimant la même attente. Ce n'est qu'en avril 2011 qu'elle s'est écartée de cette position, et a affirmé qu'elle avait droit à *l'ensemble* du patrimoine de sa mère, y compris la maison.

[32] Il était donc suffisamment certain que Gloria hériterait d'un intérêt sur le tiers de la propriété pour que l'assurance qu'elle avait donnée soit sérieusement considérée par Max comme une assurance à laquelle il pouvait se fier. Max et Gloria ont négocié longtemps avant que Max ne renonce à sa vie en Angleterre pour retourner à Victoria. Gloria lui a promis sans équivoque qu'il pourrait acquérir sa part de la propriété s'il le faisait. Elle a pris

of enticing him back to the family home. In this, she succeeded. I see no basis on which to overturn the trial judge's conclusion that, in these circumstances, Max's reliance was reasonable.

[33] Max reasonably relied on the expectation that he would be able to acquire Gloria's interest in the property once their mother's estate had been administrated in the usual course. Gloria was responsible for that expectation; she promised Max as much before he returned to Victoria from England. Max suffered a detriment as a result, such that it would be unfair or unjust to permit Gloria to break her word. An equity thus arose in Max's favour. It is this equity that proprietary estoppel will protect, if its elements are established.

B. *Does Proprietary Estoppel Protect the Equity?*

[34] The dispute as to whether the elements of proprietary estoppel are made out in this case turns on whether, at the time of the claimant's reliance, the party responsible for the claimant's expectation that he will enjoy a right or benefit over property must own an interest in the property sufficient to meet the claimant's expectation. The Court of Appeal majority concluded that, since Gloria did not own such an interest at the time of Max's reliance, his proprietary estoppel claim could not succeed. Willcock J.A. wrote, at para. 117:

> . . . I see no reason in principle why the cause of action should be expanded to permit a person to acquire an interest in property by reliance upon an assurance by a non-owner that falls short of a contractual obligation. Such an expansion would be problematic, untying entirely from its ties to property the only estoppel that can be used as a sword.

cet engagement, entre autres, pour l'inciter à retourner vivre dans la maison familiale. À cet égard, elle a réussi. Je ne vois aucune raison d'infirmer la conclusion de la juge de première instance selon laquelle, dans les circonstances, l'acte de confiance de Max était raisonnable.

[33] Max s'est raisonnablement appuyé sur le fait qu'il s'attendait à pouvoir acquérir l'intérêt de Gloria dans la propriété une fois que la succession de leur mère aurait été administrée de la manière habituelle. Gloria est à l'origine de cette attente. Elle a fait cette promesse avant que Max ne quitte l'Angleterre pour retourner à Victoria. Max a de ce fait subi un préjudice, de sorte qu'il serait inéquitable ou injuste de permettre à Gloria de manquer à sa parole. Un droit en equity a donc pris naissance en faveur de Max. C'est ce droit en equity que la préclusion propriétale protégera si les éléments d'une telle préclusion sont établis.

B. *La préclusion propriétale protège-t-elle le droit en equity en cause?*

[34] Pour trancher la question de savoir si les éléments de la préclusion propriétale sont établis en l'espèce, il faut se demander si, au moment de l'acte de confiance du demandeur, la partie à l'origine du fait que ce dernier s'attendait à bénéficier d'un droit ou d'un avantage dans la propriété devait avoir dans celle-ci un intérêt suffisant pour répondre à l'attente du demandeur. Les juges majoritaires de la Cour d'appel ont conclu que, comme Gloria ne possédait pas un tel intérêt au moment de l'acte de confiance de Max, la demande fondée sur la préclusion propriétale ne pouvait être accueillie. Le juge Willcock a écrit ce qui suit au par. 117 :

> [TRADUCTION] . . . je ne vois aucune raison de principe d'élargir la cause d'action afin de permettre à une personne d'acquérir un intérêt dans un bien du fait qu'elle s'est fiée à une assurance — donnée par un non-titulaire d'intérêt — qui ne constitue pas véritablement une obligation contractuelle. Un tel élargissement poserait problème, défaisant entièrement les liens qui rattachent au bien la seule préclusion susceptible d'être utilisée comme moyen d'attaque.

[35] I cannot agree. With respect, the conclusion reached by the Court of Appeal majority conflates proprietary estoppel with the equity to which it gives effect. That Gloria did not own an interest in her mother's property at the time of Max's reliance is not dispositive in itself: see MacDougall, at p. 456; see also *Thorner*, at para. 61, per Lord Walker; *Re Basham (deceased)*, [1987] 1 All E.R. 405 (Ch.), at p. 415. An equity arises when the claimant reasonably relies to his detriment on the expectation that he will enjoy a right or benefit over property, whether or not the party responsible for that expectation owns an interest in the property at the time of the claimant's reliance. Proprietary estoppel may not protect that equity immediately. It may not protect the equity until considerable time has passed. If the party responsible for the expectation never acquires a sufficient interest in the property, proprietary estoppel may not arise at all; where there is proprietary estoppel, there must be an equity, but not vice versa. When the party responsible for the expectation has or acquires a sufficient interest in the property, however, proprietary estoppel attaches to that interest and protects the equity: see MacDougall, at p. 458; Wilken and Ghaly, at pp. 265-66; see also *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.), at p. 267. Ownership at the time the representation or assurance was relied on is not a requirement of a proprietary estoppel claim.

[36] An equity arose in Max's favour when he reasonably relied to his detriment on the expectation that he would be able to acquire Gloria's one-third interest in their mother's house. That equity could not have been protected by proprietary estoppel at the time it arose, because Gloria did not then own an interest in the property. But that does not mean that proprietary estoppel cannot attach to Gloria's share of the house once she receives it. I conclude that it can.

[35] Je ne suis pas d'accord. Soit dit en tout respect, la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel confond la préclusion propriétale et le droit en equity auquel elle donne effet. Que Gloria n'ait pas eu d'intérêt dans la propriété de sa mère au moment de l'acte de confiance de Max n'est pas déterminant en soi (voir MacDougall, p. 456; voir aussi *Thorner*, par. 61, lord Walker; *Re Basham (deceased)*, [1987] 1 All E.R. 405 (Ch.), p. 415). Un droit en equity prend naissance lorsque le demandeur se fonde raisonnablement, à son préjudice, sur le fait qu'il s'attend à bénéficier d'un droit ou d'un avantage dans un bien, que la partie à l'origine de cette attente possède ou non un intérêt dans ce bien au moment de l'acte de confiance du demandeur. Il est possible que la préclusion propriétale ne protège pas ce droit immédiatement. Il pourrait s'écouler une très longue période avant qu'elle le protège. Si la partie à l'origine de l'attente n'acquiert jamais d'intérêt suffisant dans le bien, il pourrait ne pas y avoir du tout de préclusion propriétale; lorsqu'il y a préclusion propriétale, il y a nécessairement un droit en equity, mais l'inverse n'est pas vrai. Cependant, lorsque la partie à l'origine de l'attente a un intérêt suffisant dans le bien ou en acquiert un, la préclusion propriétale grève cet intérêt et protège le droit en equity en cause (voir MacDougall, p. 458; Wilken et Ghaly, p. 265-266; voir aussi *Watson c. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.), p. 267). L'existence d'un intérêt dans le bien au moment où une personne se fie à la déclaration qui lui est faite ou à l'assurance qui lui est donnée n'est pas nécessaire pour que la préclusion propriétale puisse être invoquée.

[36] Un droit en equity a pris naissance en faveur de Max lorsque ce dernier s'est fondé raisonnablement, à son préjudice, sur le fait qu'il s'attendait à pouvoir acquérir l'intérêt de Gloria sur le tiers de la maison de leur mère. La préclusion propriétale ne pouvait pas protéger ce droit au moment où celui-ci a pris naissance, parce que Gloria ne détenait alors aucun intérêt dans la propriété. Cela ne signifie pas pour autant que la préclusion propriétale ne peut pas grever la part de Gloria dans la maison lorsqu'elle recevra celle-ci. Je conclus qu'elle peut avoir un tel effet.

[37] Gloria has yet to receive any interest in the property. The property in its entirety remains part of Elizabeth's residuary estate. Elizabeth's will provides that the residue of the estate is to be divided equally and distributed to her three children. The will appoints Gloria as executor, and she is named in this proceeding in that capacity. Gloria, as executor, must therefore transfer one-third interests in the property to each of the estate beneficiaries, including to herself, before proprietary estoppel can attach to her share and the equity in Max's favour can be satisfied. As I have said, proprietary estoppel will attach to Gloria's interest when, and only when, it is sufficient to satisfy the equity — i.e., as soon as she obtains it from the estate.

[38] Gloria submits, and Côté J. agrees, that, as executor, she cannot be bound to transfer a one-third interest in the property to each of the estate beneficiaries so that her promise to Max may be fulfilled. I disagree.

[39] An *in specie* distribution of shares in the property is not contrary to Elizabeth's intent. Elizabeth's will empowered Gloria, as executor, with the discretion to perform an *in specie* distribution of the estate; this outcome was contemplated by Elizabeth and is consistent with the intention expressed in her will. Ordering an *in specie* distribution of the property is therefore not akin to a creating a specific bequest: see Côté J.'s reasons, at para. 77.

[40] Where a will allows for executorial discretion, an *in specie* distribution of real property may be effected by an executor with the consent of all beneficiaries: see *Re Harris* (1915), 22 D.L.R. 381 (Ont. S.C.), at p. 386; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, at paras. 42 and 49. A beneficiary's objection to such a distribution should not be vexatious or manifestly unreasonable: *Re Harris*, at p. 386. In this case, Max clearly desires an *in specie* distribution of the property, Nathan has indicated

[37] Gloria n'a pas encore d'intérêt dans la propriété. Celle-ci fait toujours entièrement partie du reliquat de la succession d'Elizabeth. Le testament de cette dernière dispose que le reliquat doit être partagé en parts égales entre ses trois enfants et distribué à ceux-ci. Gloria y est nommée exécutrice testamentaire, et elle est désignée en cette qualité dans la présente instance. Gloria doit donc, à titre d'exécutrice testamentaire, transférer un intérêt sur le tiers de la propriété à chacun des bénéficiaires de la succession, y compris à elle-même, pour que la préclusion propriétale puisse grever sa part et qu'il puisse être donné effet au droit en equity de Max. Comme je l'ai dit, la préclusion propriétale grèvera l'intérêt de Gloria lorsque, et uniquement lorsque, cet intérêt sera suffisant pour permettre de donner effet au droit en equity en cause — c.-à-d. aussitôt que Gloria l'aura obtenu de la succession.

[38] Gloria soutient, et la juge Côté souscrit à cet argument, qu'en sa qualité d'exécutrice testamentaire, elle ne saurait être tenue de transférer un intérêt sur le tiers de la propriété à chacun des bénéficiaires de la succession de manière à ce que la promesse qu'elle a faite à Max puisse être respectée. Je ne suis pas d'accord.

[39] Un partage en nature de la propriété n'est pas contraire à l'intention d'Elizabeth. Le testament d'Elizabeth conférait à Gloria, en sa qualité d'exécutrice testamentaire, le pouvoir discrétionnaire d'effectuer un partage en nature de la succession; cette possibilité avait été envisagée par Elizabeth et est conforme à l'intention exprimée dans son testament. Le fait d'ordonner un partage en nature de la propriété ne s'apparente donc pas à la création d'un legs spécifique (voir les motifs de la juge Côté, par. 77).

[40] Lorsqu'un testament prévoit que l'exécuteur testamentaire dispose d'un pouvoir discrétionnaire, celui-ci peut, avec le consentement de tous les bénéficiaires, effectuer un partage en nature des biens réels (voir *Re Harris* (1915), 22 D.L.R. 381 (C.S. Ont.), p. 386; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, par. 42 et 49). L'opposition d'un bénéficiaire à un tel partage ne devrait pas être vexatoire ou manifestement déraisonnable (*Re Harris*, p. 386). En l'espèce, Max souhaite clairement un

that he has an agreement with Max regarding the property, and Gloria, *qua* beneficiary, has not raised a compelling objection to an *in specie* distribution of the property. Gloria's objection to an *in specie* distribution is grounded in her desire to escape her equitable obligation and to spite her brother; this is manifestly unreasonable.

[41] Moreover, this Court has the power to direct Gloria to exercise her discretion as executor in a certain manner. As executor, Gloria is a fiduciary with obligations to the beneficiaries of the estate. Courts may interfere with an executor's exercise of discretion where there is a breach of this fiduciary duty: see *Widdifield on Executors and Trustees* (6th ed. (loose-leaf)), by C. S. Thériault, at p. 8-4. In this case, Gloria's conflict of interest and her bad faith are grounds for ordering an *in specie* distribution.

[42] Gloria's duties *qua* executor are clearly in conflict with her interests *qua* beneficiary. As beneficiary, Gloria can only be made to fulfill her equitable obligation to Max if the elements of proprietary estoppel are satisfied. As executor, she could prevent this by deciding not to make an *in specie* distribution of property. Where a conflicted executor uses his or her discretion to convert estate property into cash without a compelling reason (and against the express wishes of beneficiaries), courts may interfere: see *Staub v. Staub Estate*, 2003 ABCA 122, 226 D.L.R. (4th) 327, at paras. 14-24. Gloria has not raised a compelling reason as to why *in specie* distribution should be refused, nor has she explained how selling the property will maximize the value of the estate. Ordering an *in specie* distribution in this case resolves Gloria's conflict of interest without the delay or expense of replacing her as executor.

partage en nature de la propriété, Nathan a indiqué qu'il avait une entente avec Max concernant la propriété, et Gloria, en sa qualité de bénéficiaire, n'a pas soulevé d'objection convaincante en ce qui concerne un tel partage. L'opposition de Gloria à un partage en nature est fondée sur son désir de se soustraire à son obligation en equity et de contrarier son frère, ce qui est manifestement déraisonnable.

[41] De plus, la Cour a le pouvoir d'ordonner à Gloria d'exercer son pouvoir discrétionnaire d'exécutrice testamentaire d'une certaine façon. En sa qualité d'exécutrice testamentaire, Gloria agit à titre fiduciaire et a des obligations envers les bénéficiaires de la succession. Les tribunaux peuvent intervenir dans l'exercice du pouvoir discrétionnaire d'un exécuteur testamentaire lorsqu'il y a manquement à ce devoir fiduciaire (voir *Widdifield on Executors and Trustees* (6e éd. (feuilles mobiles)), par C. S. Thériault, p. 8-4). En l'espèce, le conflit d'intérêts de Gloria et sa mauvaise foi justifient d'ordonner un partage en nature.

[42] Les devoirs de Gloria en sa qualité d'exécutrice testamentaire sont clairement incompatibles avec ses intérêts en sa qualité de bénéficiaire. En tant que bénéficiaire, Gloria peut être tenue de satisfaire à son obligation en equity envers Max seulement si les éléments de la préclusion propriétale sont réunis. À titre d'exécutrice testamentaire, elle pourrait empêcher cela en décidant de ne pas effectuer un partage en nature de la propriété. Lorsqu'un exécuteur testamentaire en conflit d'intérêts exerce son pouvoir discrétionnaire pour convertir un bien de la succession en argent sans raison impérieuse (et contre la volonté expresse des bénéficiaires), les tribunaux peuvent intervenir (voir *Staub c. Staub Estate*, 2003 ABCA 122, 226 D.L.R. (4th) 327, par. 14-24). Gloria n'a pas invoqué de raison impérieuse pour laquelle un partage en nature devrait être refusé, et elle n'a pas non plus expliqué de quelle façon la vente de la propriété maximiserait la valeur de la succession. Le fait d'ordonner un partage en nature en l'espèce règle le problème du conflit d'intérêts de Gloria en permettant d'éviter les retards ou les dépenses qu'occasionnerait son remplacement en tant qu'exécutrice testamentaire.

[43] Further, Gloria's bad faith provides a rationale for ordering an *in specie* distribution. The trial judge found that Gloria is "blinded by her animosity toward her brothers": para. 68. Gloria misled her brothers with respect to the contents of the estate and the planned distribution of the shares, and the record reveals a decade-long feud with respect to the property. These acts are compelling evidence that, absent this Court's interference, Gloria will continue to exercise her discretion in bad faith; an *in specie* distribution prevents this.

[44] I would therefore order that Gloria, as executor, is to divide the property forthwith into equal one-third interests and deliver these to herself, Max, and Nathan as beneficiaries of Elizabeth's estate. As soon as she does, the elements of proprietary estoppel will be satisfied:

1. Gloria — who, by operation of this Court's order, will own a one-third interest in the property — made a promise to Max, on the basis of which Max expected that he would enjoy the right to purchase her interest;

2. Max, relying reasonably on this expectation, moved back to Victoria to care for their mother in the final years of her life; and,

3. In doing so, Max suffered a detriment, such that it would be unfair or unjust to permit Gloria to break her promise.

[45] I therefore conclude that the trial judge did not err in allowing Max's proprietary estoppel claim.

C. *What Is the Appropriate Remedy?*

[46] Where a claimant has established proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances: see *Griffiths v. Williams*, [1978] 2 E.G.L.R. 121 (C.A.), at p. 122, per Goff L.J.; MacDougall, at pp. 498-501. As with any exercise of discretion, an appellate court

[43] De plus, la mauvaise foi de Gloria justifie d'ordonner un tel partage. La juge de première instance a conclu que Gloria était [TRADUCTION] « aveuglée par son animosité envers ses frères » (par. 68). Gloria a induit ses frères en erreur en ce qui a trait au contenu de la succession et au partage prévu de celle-ci, et le dossier révèle 10 années de querelle au sujet de la propriété. Ces éléments sont des preuves convaincantes que, si la Cour n'intervient pas, Gloria continuera à exercer son pouvoir discrétionnaire de mauvaise foi; or, un partage en nature permet d'éviter cela.

[44] Je suis donc d'avis d'ordonner à Gloria, en sa qualité d'exécutrice testamentaire, de partager immédiatement la propriété en intérêts égaux d'un tiers qu'elle remettra à Max, à Nathan et à elle-même à titre de bénéficiaires de la succession d'Elizabeth. Aussitôt qu'elle l'aura fait, les éléments de la préclusion propriétale seront réunis :

1. Gloria — qui, par l'effet de l'ordonnance de notre Cour, détiendra un intérêt sur le tiers de la propriété — a fait une promesse à Max, sur le fondement de laquelle celui-ci s'attendait à bénéficier du droit d'acquérir cet intérêt;

2. En se fondant raisonnablement sur cette attente, Max est revenu vivre à Victoria pour prendre soin de leur mère pendant les dernières années de sa vie;

3. Ce faisant, Max a subi un préjudice, de sorte qu'il serait inéquitable ou injuste de permettre à Gloria de ne pas tenir sa promesse.

[45] Je conclus donc que la juge de première instance n'a pas commis d'erreur en faisant droit à la demande de Max fondée sur la préclusion propriétale.

C. *Quelle réparation convient-il d'accorder?*

[46] Lorsque le demandeur a établi la préclusion propriétale, le tribunal dispose d'un large pouvoir discrétionnaire pour concevoir une réparation adaptée aux circonstances (voir *Griffiths c. Williams*, [1978] 2 E.G.L.R. 121 (C.A.), p. 122, le lord juge Goff; MacDougall, p. 498-501). Comme il en va de

should not interfere unless the trial judge's decision evinces an error in principle or is plainly wrong: see *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 27, citing *Housen*, at paras. 10 and 25.

[47] Still, "the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case": *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, at para. 43, per Walker L.J. A claimant who establishes the need for proprietary estoppel is entitled only to the minimum relief necessary to satisfy the equity in his favour: see *Clarke*, at para. 81; *Sabey*, at para. 78; *Idle-O Apartments*, at para. 73; *Sykes*, at paras. 57-58; MacDougall, at p. 498; R. Megarry and W. Wade, *The Law of Real Property* (8th ed. 2012), by C. Harpum, S. Bridge and M. Dixon, at p. 731. Since the equity aims to address the unfair or unjust detriment the claimant would suffer if the owner were permitted to resile from her inducement, encouragement, or acquiescence, "there must be a proportionality between the remedy and the detriment which is its purpose to avoid": *Commonwealth of Australia v. Verwayen* (1990), 170 C.L.R. 394 (H.C.A.), at p. 413, per Mason C.J.; see also *Sabey*, at paras. 73-75; *Idle-O Apartments*, at para. 76; *Jennings*, at para. 36, per Aldous L.J.; *Sledmore v. Dalby* (1996), 72 P. & C.R. 196 (C.A.), at pp. 208-9, per Hobhouse L.J.; S. Gardner, "The Remedial Discretion in Proprietary Estoppel — Again" (2006), 122 *L.Q.R.* 492, at pp. 499-503; Bright and McFarlane, at pp. 453-54.

[48] This approach recognizes that, while proprietary estoppel arises where the claimant's expectations are frustrated, the reasonableness of the claimant's expectations must be assessed in light of, among other things, the detriment the claimant has actually suffered: see A. Ship, "The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis" (2008), 46 *Alta. L. Rev.* 77, at pp. 104-5. Courts of equity must therefore strike a balance between vindicating the claimant's subjective expectations — which, in their full context,

l'exercice de tout pouvoir discrétionnaire, le tribunal d'appel ne devrait intervenir que si la décision du juge de première instance révèle une erreur de principe ou est nettement erronée (voir *de Montigny c. Brossard (Succession)*, 2010 CSC 51, [2010] 3 R.C.S. 64, par. 27, citant *Housen*, par. 10 et 25).

[47] Néanmoins, [TRADUCTION] « le tribunal doit adopter une approche raisonnée et ne doit pas exercer un pouvoir discrétionnaire absolu qui soit fonction de la conception personnelle d'un juge de ce qui est juste dans un cas donné » (*Jennings c. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, par. 43, le lord juge Walker). Le demandeur qui démontre qu'il est nécessaire d'appliquer la préclusion propriétale n'a droit qu'à la réparation minimale nécessaire pour donner effet au droit en equity en sa faveur (voir *Clarke*, par. 81; *Sabey*, par. 78; *Idle-O Apartments*, par. 73; *Sykes*, par. 57-58; MacDougall, p. 498; R. Megarry et W. Wade, *The Law of Real Property* (8e éd. 2012), par C. Harpum, S. Bridge et M. Dixon, p. 731). Puisque l'equity vise à corriger le préjudice inéquitable ou injuste que subirait le demandeur si l'on permettait au titulaire d'intérêt de revenir sur une incitation, un encouragement ou un acquiescement de sa part, [TRADUCTION] « il doit y avoir proportionnalité entre la réparation et le préjudice qu'elle a pour objet d'éviter » (*Commonwealth of Australia c. Verwayen* (1990), 170 C.L.R. 394 (H.C.A.), p. 413, le juge en chef Mason; voir également *Sabey*, par. 73-75; *Idle-O Apartments*, par. 76; *Jennings*, par. 36, le lord juge Aldous; *Sledmore c. Dalby* (1996), 72 P. & C.R. 196 (C.A.), p. 208-209, le lord juge Hobhouse; S. Gardner, « The Remedial Discretion in Proprietary Estoppel — Again » (2006), 122 *L.Q.R.* 492, p. 499-503; Bright et McFarlane, p. 453-454).

[48] Cette approche reconnaît que, bien qu'il y ait préclusion propriétale lorsque les attentes du demandeur sont déçues, le caractère raisonnable de ces attentes doit être évalué au regard notamment du préjudice réellement subi par le demandeur (voir A. Ship, « The Primacy of Expectancy in Estoppel Remedies : An Historical and Empirical Analysis » (2008), 46 *Alta. L. Rev.* 77, p. 104-105). Les tribunaux d'equity doivent donc établir un équilibre entre la reconnaissance des attentes subjectives du demandeur — lesquelles, eu égard au contexte

may or may not reflect a reasonable valuation of the claimant's detriment — and correcting that detriment, which may be difficult or even impossible to measure: see *Sabey*, at paras. 80-82; *Jennings*, at paras. 50-51, per Walker L.J. In no case, however, may the claimant obtain more than he expected: see *Pilcher v. Shoemaker* (1997), 13 R.P.R. (3d) 42 (B.C.S.C.), at para. 21; *Ellis v. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70 (B.C.S.C.), at para. 26; Bright and McFarlane, at pp. 456-57.

[49] Here, Max's detriment lay in his returning to Victoria to live with and care for his aging mother. He expected, among other things, that he would be able to acquire Gloria's share of their mother's house after their mother's death and once her estate had been administered. Having kept up his end of the bargain, he sought an order requiring Gloria to keep up hers by selling him her one-third interest in the property. The trial judge concluded that this was the minimum required to satisfy the equity.

[50] Requiring Gloria to sell her interest in the house to Max is the minimum necessary to satisfy the equity in Max's favour. The question is, at what price?

[51] Max submits that he should be entitled to purchase Gloria's share for $223,333.33, which reflects the property's 2011 appraised value of $670,000.00. Gloria argues that, if she is ordered to sell her interest to Max, it should be at its current fair market value, which the parties agree is higher than it was in 2011.

[52] I agree with Max. As soon as Gloria receives an interest in the property from their mother's estate, all of the elements of proprietary estoppel will be satisfied. But the relevant equity will have arisen long before — namely, at the time of Max's reliance. The equity in Max's favour exists to avoid the unfairness and injustice that would result if Gloria were permitted to break her word and not sell her interest to Max, notwithstanding the detriment Max

global, peuvent ou non refléter une évaluation raisonnable du préjudice subi par celui-ci — et la réparation de ce préjudice, qui peut être difficile, voire impossible à mesurer (voir *Sabey*, par. 80-82; *Jennings*, par. 50-51, le lord juge Walker). Le demandeur ne peut cependant, en aucun cas, obtenir plus que ce à quoi il s'attendait (voir *Pilcher c. Shoemaker* (1997), 13 R.P.R. (3d) 42 (C.S. C.-B.), par. 21; *Ellis c. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70 (C.S. C.-B.), par. 26; Bright et McFarlane, p. 456-457).

[49] En l'espèce, le préjudice subi par Max réside dans le fait qu'il est retourné à Victoria pour vivre avec sa mère vieillissante et en prendre soin. Max s'attendait entre autres à pouvoir acquérir la part de Gloria dans la maison de leur mère après le décès de celle-ci et une fois que sa succession aurait été administrée. Comme il avait respecté sa part du marché, il a sollicité une ordonnance enjoignant à Gloria de respecter la sienne en lui vendant son intérêt sur le tiers de la propriété. La juge de première instance a conclu que c'était là le minimum requis pour donner effet au droit en equity en cause.

[50] Obliger Gloria à vendre à Max son intérêt dans la maison est le minimum nécessaire pour donner effet au droit en equity de Max. La question est de savoir à quel prix elle doit le faire.

[51] Max soutient qu'il devrait pouvoir acheter la part de Gloria pour la somme de 223 333,33 $, laquelle tient compte de la valeur d'expertise de la propriété établie en 2011 à 670 000 $. Gloria fait valoir que, si on lui ordonne de vendre son intérêt à Max, elle devrait pouvoir le faire à sa juste valeur marchande actuelle, laquelle, les parties en conviennent, est plus élevée qu'en 2011.

[52] Je suis d'accord avec Max. Aussitôt que Gloria recevra de la succession de sa mère un intérêt dans la propriété, tous les éléments de la préclusion propriétale seront réunis. Toutefois, le droit en equity en cause aura pris naissance bien avant — c'est-à-dire au moment de l'acte de confiance de Max. Le droit en equity de Max vise à prévenir l'iniquité et l'injustice qu'il y aurait si Gloria était autorisée à manquer à sa parole et à ne pas lui vendre

suffered in returning to Victoria from England. Max valued that detriment as being worth the concessions he obtained from Gloria. One of those concessions was that Max would be able to acquire Gloria's interest in the property in exchange for an amount equal to one third of its total fair market value once the estate had been administered.

[53] Neither Max nor Gloria could reasonably have expected to wait the better part of a decade to exchange Max's cash for Gloria's interest in the property. It is safe to assume that, had Gloria not sought to escape her promise, Max's equity would have been satisfied and Gloria's share of the house sold to him not long after February 2, 2011, which is when, in the course of administering their mother's estate, the property was in fact appraised for $670,000.00. Rather than sell her interest in the house to Max at that point — that is, roughly when both she and he originally contemplated she would — Gloria took the position that she was under no obligation to do so at all. This litigation was the result. In the years since, Max has had the benefit of the money he would have had to pay Gloria in 2011 for her share of the house, Elizabeth's estate has incurred expenses associated with the upkeep of the property, and the property, the parties agree, has increased in value.

[54] February 2, 2011 is a reasonable approximation of when Max expected to be able to purchase Gloria's one-third interest in the property. That expectation reflects the defined right that Gloria promised Max in exchange for his returning to Victoria to care for their mother. In these circumstances, the claimant's expectation must be the court's guide in exercising its remedial discretion. This is because, as Walker L.J. put it in *Jennings*, at para. 45:

> . . . the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.

son intérêt, malgré le préjudice qu'il a subi en quittant l'Angleterre pour retourner à Victoria. Max a estimé que ce préjudice valait les concessions qu'il a obtenues de Gloria. L'une d'elles était qu'il pourrait acquérir l'intérêt de Gloria dans la propriété en contrepartie d'une somme équivalant au tiers de sa juste valeur marchande totale, une fois que la succession aurait été administrée.

[53] Ni Max ni Gloria ne pouvaient raisonnablement prévoir qu'il faudrait près d'une décennie avant que Max puisse acquérir l'intérêt de Gloria dans la propriété. On peut supposer sans risque de se tromper que, si Gloria n'avait pas tenté de se soustraire à sa promesse, il aurait été donné effet au droit en equity de Max et la part de Gloria dans la maison aurait été vendue à celui-ci peu après le 2 février 2011, date à laquelle, dans le cadre de l'administration de la succession de leur mère, la propriété a effectivement été évaluée à 670 000 $. Au lieu de vendre son intérêt dans la maison à Max à ce moment-là — c'est-à-dire à peu près au moment qu'ils avaient au départ envisagé qu'elle le ferait — Gloria a indiqué qu'elle n'était tenue à aucune obligation en ce sens, d'où le présent litige. Depuis ce temps, Max a bénéficié de l'argent qu'il aurait versé à Gloria en 2011 pour acquérir sa part de la maison, la succession d'Elizabeth a engagé des dépenses pour l'entretien de la propriété et celle-ci, les parties en conviennent, a pris de la valeur.

[54] Le 2 février 2011 est une approximation raisonnable du moment auquel Max s'attendait à pouvoir acquérir l'intérêt de Gloria sur le tiers de la propriété. Cette attente reflète le droit précis que Gloria avait promis à Max en échange de son retour à Victoria pour prendre soin de leur mère. Dans ces circonstances, l'attente du demandeur doit guider le tribunal dans l'exercice de son pouvoir discrétionnaire en matière de réparation. Il en est ainsi parce que, comme le lord juge Walker l'a dit dans l'arrêt *Jennings*, par. 45 :

> [TRADUCTION] . . . l'élément consensuel de ce qui s'est produit indique que le demandeur et le bienfaiteur ont probablement considéré que l'avantage attendu et le préjudice accepté étaient (de façon générale et imprécise) équivalents, ou, en tout état de cause, qu'ils n'étaient pas manifestement disproportionnés.

[55] Vindicating Max's expectation will satisfy the equity in his favour, which arose at the time of his reliance, by avoiding the unfair and unjust detriment that he would suffer if Gloria were permitted to break her promise: see Gardner, at p. 497; Bright and McFarlane, at p. 458. Max's expectation — i.e., the benefit that he and Gloria agreed would offset the detriment he would suffer by returning to Victoria — was that he would be able to purchase Gloria's interest in the property following the administration of their mother's estate, which they could not have expected would take years to complete. The minimum necessary to satisfy the equity in Max's favour is thus an order entitling him to purchase Gloria's interest at its fair market value as of the approximate date on which he would reasonably have expected to be able to do so in the first place, namely, at some point in early 2011.

[56] To hold otherwise would disregard the difference between the equity and the estoppel. That no estoppel was available at the time the equity arose is of no moment. Max's expectations must be considered broadly. Contrary to the position espoused by Brown J., the minimum required to satisfy the equity, and the court's discretion in fashioning a remedy, is not limited by the point in time when the equity became proprietary in nature or when the cause of action arose: "The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment": *Jennings*, at para. 36, per Aldous L.J. What the minimum necessary to satisfy the equity requires — including the amount for which Gloria must sell Max her share — is determined by what it protects.

[57] Still, as the trial judge recognized, satisfying the equity does not require Gloria to sustain a loss. Had events unfolded as Max reasonably expected them to, Gloria would have given up her interest in

[55] Reconnaître l'attente de Max permettra de donner effet au droit en equity que détient celui-ci, et qui a pris naissance au moment de l'acte de confiance, en prévenant le préjudice inéquitable et injuste que Max subirait si Gloria pouvait manquer à sa promesse (voir Gardner, p. 497; Bright et McFarlane, p. 458). L'attente de Max — c.-à-d. l'avantage dont lui et Gloria ont convenu qu'il compenserait le préjudice qu'il subirait en retournant à Victoria — était qu'il pourrait acquérir l'intérêt de Gloria dans la propriété une fois que la succession de leur mère aurait été administrée, ce qui, ils ne pouvaient s'y attendre, prendrait des années. Le minimum requis pour donner effet au droit en equity de Max consiste donc à rendre une ordonnance lui permettant d'acheter l'intérêt de Gloria à sa juste valeur marchande établie à la date approximative à laquelle il se serait raisonnablement attendu à pouvoir l'acquérir au départ, à savoir à un certain moment au début de l'année 2011.

[56] Conclure autrement serait faire abstraction de la différence entre le droit en equity et la préclusion. Le fait que la préclusion ne pouvait pas être invoquée au moment où le droit en equity a pris naissance n'a aucune importance. Il faut envisager de façon large les attentes de Max. Contrairement à ce que soutient le juge Brown, le minimum nécessaire pour donner effet au droit en equity et le pouvoir discrétionnaire dont dispose le tribunal dans la détermination de la réparation à accorder ne sont pas circonscrits par le moment où le droit en equity est devenu un droit de nature propriétale ou le moment où la cause d'action a pris naissance : [TRADUCTION] « La valeur de ce droit en equity dépendra de toutes les circonstances, y compris l'attente et le préjudice. Le rôle du tribunal consiste à rendre justice. L'exigence la plus importante est qu'il doit y avoir proportionnalité entre l'attente et le préjudice » (*Jennings*, par. 36, le lord juge Aldous). Ce que le minimum nécessaire pour donner effet au droit en equity exige — notamment en ce qui a trait à la somme pour laquelle Gloria doit vendre sa part à Max — est déterminé par ce qu'il protège.

[57] Or, comme l'a reconnu la juge de première instance, donner effet au droit en equity en cause ne signifie pas que Gloria doive subir une perte. Si les choses s'étaient passées comme Max s'attendait

the property in early 2011 in exchange for its fair market value. She would have had the benefit of those funds during the intervening years. And her mother's estate would have been relieved of the cost of maintaining the property, increasing the residue in which Gloria and her siblings are to share equally.

[58] Max will therefore be entitled to purchase Gloria's interest in the property for $223,333.33, plus an amount equal to the post-judgment interest that would be payable on a judgment in that amount issued on February 2, 2011, once Gloria has received that interest from Elizabeth's estate. Upon his acquisition of Gloria's interest in the property, Max is to account to the estate for the amount of any expenses incurred by the estate in maintaining the property since February 2, 2011.

[59] No submissions were made as to the existence of third party claims against the estate, which could rank in priority to the claims of the beneficiaries. Further, so long as beneficiaries are willing to pay the debts of the estate, the existence of such debts would not bar an *in specie* distribution of the property: see *Staub*, at para. 23. Nonetheless, this order will be subject to any third party claims against the estate that cannot be satisfied by the estate's other assets (such as Elizabeth's investments).

[60] I would allow the appeal and vary the trial judge's order accordingly, with costs to Max throughout.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[61] While I concur with the Chief Justice that the trial judge did not err in allowing Max Cowper-Smith's proprietary estoppel claim, I find

raisonnablement à ce qu'elles se passent, Gloria aurait renoncé à son intérêt dans la propriété au début de l'année 2011 en échange d'une somme équivalant à sa juste valeur marchande. Elle aurait bénéficié de ces fonds pendant les années qui ont suivi, et la succession de sa mère n'aurait pas eu à supporter le coût de l'entretien de la propriété, de sorte que le reliquat devant être partagé également entre Gloria et ses frères aurait été plus important.

[58] Max aura donc le droit d'acheter l'intérêt de Gloria dans la propriété pour la somme de 223 333,33 $ — plus un montant représentant l'intérêt après jugement qui serait exigible en vertu d'un jugement au même montant rendu le 2 février 2011 — une fois que Gloria aura reçu cet intérêt de la succession d'Elizabeth. Après avoir acquis l'intérêt de Gloria dans la propriété, Max devra remettre à la succession le montant des dépenses engagées par celle-ci pour l'entretien de la propriété à compter du 2 février 2011.

[59] Aucun argument n'a été soulevé relativement à l'existence de revendications de tiers contre la succession, qui pourraient avoir priorité sur les demandes des bénéficiaires. De plus, dans la mesure où les bénéficiaires sont prêts à payer les dettes de la succession, l'existence de telles dettes n'empêche pas un partage en nature de la propriété (voir *Staub*, par. 23). Néanmoins, la présente ordonnance sera assujettie à toute revendication de tiers contre la succession à laquelle les autres éléments d'actif de la succession (comme les placements d'Elizabeth) ne permettent pas de satisfaire.

[60] Je suis d'avis d'accueillir le pourvoi et de modifier en conséquence l'ordonnance de la juge de première instance, avec dépens en faveur de Max devant toutes les cours.

Version française des motifs rendus par

LE JUGE BROWN —

I. Introduction

[61] Bien que je souscrive à la conclusion de la Juge en chef selon laquelle la juge de première instance n'a pas commis d'erreur en faisant droit à la

myself in respectful disagreement regarding the appropriate remedy.

[62] Briefly, in cases of proprietary estoppel the proper remedy is the "minimum necessary to satisfy the equity" (reasons of the Chief Justice, at paras. 50 and 55-56). Where a promisor does not hold the promised right or benefit in the subject property at the time of making his or her promise, an equity capable of being satisfied via proprietary estoppel arises only if and when that right or benefit is acquired by the promisor. In this case, Gloria Morgan will not attain the promised property until the date of this Court's order. The minimum necessary to satisfy the equity cannot, therefore, be an order permitting Max to purchase the property as of a time which predates the equity itself.

## II. Analysis

### *The Test for Proprietary Estoppel Requires a Proprietary Right Which Cannot Arise Until the Promisor Holds the Promised Right or Benefit*

[63] As the Chief Justice explains, a claim in proprietary estoppel requires a court to make three determinations:

(1) Is an equity established?

(2) If an equity is established, what is the extent of the equity?

(3) What remedy is appropriate to satisfy the equity?

(*Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, at para. 49; *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, at para. 25, citing *Crabb v. Arun District Council*, [1976] 1 Ch. 179 (C.A.), at pp. 192-93.)

[64] As to the first determination — whether an equity is established — I agree with the Chief Justice

demande de Max Cowper-Smith fondée sur la préclusion propriétale, je ne partage pas son avis sur la réparation qu'il convient d'accorder.

[62] En résumé, dans les affaires de préclusion propriétale, la réparation appropriée est « le minimum nécessaire pour donner effet au droit en equity » (motifs de la Juge en chef, par. 50 et 55-56). Lorsqu'un promettant n'est pas titulaire du droit ou de l'avantage promis à l'égard du bien visé au moment où il fait sa promesse, le droit en equity auquel la préclusion propriétale permet de donner effet ne prend naissance que si, et au moment où, le promettant acquiert ce droit ou cet avantage. En l'espèce, Gloria Morgan n'acquerra le bien promis qu'à la date de l'ordonnance de la Cour. Le minimum nécessaire pour donner effet au droit en equity ne peut donc pas être une ordonnance permettant à Max d'acheter le bien à une date antérieure à la naissance du droit en equity lui-même.

## II. Analyse

### *Le critère de la préclusion propriétale exige l'existence d'un droit propriétal qui ne peut prendre naissance tant que le promettant n'est pas titulaire du droit ou de l'avantage promis*

[63] Comme l'explique la Juge en chef, le tribunal saisi d'une demande fondée sur la préclusion propriétale doit trancher trois questions :

(1) Un droit en equity a-t-il été établi?

(2) Si un droit en equity est établi, quelle en est l'étendue?

(3) Quelle est la réparation appropriée pour donner effet au droit en equity?

(*Idle-O Apartments Inc. c. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, par. 49; *Sabey c. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, par. 25, citant *Crabb c. Arun District Council*, [1976] 1 Ch. 179 (C.A.), p. 192-193.)

[64] Pour ce qui est de la première question à trancher — celle de savoir si un droit en equity a été

that an equity arises under the doctrine of proprietary estoppel where

> (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word . . . . [Emphasis added.]

(Reasons of the Chief Justice, at para. 15; *Idle-O*, at para. 49; *Sabey*, at para. 27; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, at paras. 48 and 52; *Tiny (Township) v. Battaglia*, 2013 ONCA 274, 305 O.A.C. 372, at para. 131; and *Schwark Estate v. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105, at paras. 16 and 34)

[65] Generally, the promisor who makes the "representation or assurance" regarding the "right or benefit" must hold the promised right or benefit at the time of making the promise (*Idle-O*, at para. 49; *Sabey*, at para. 30; *Clarke*, at para. 26; *Tiny*, at para. 131; *Schwark*, at para. 16; but see *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 61). The question presented by this appeal, then, is whether an equity sufficient to ground a claim in proprietary estoppel *may* still arise where the promisor does *not* in fact hold that right or benefit at the time of making the promise. While I agree with the Chief Justice that it can, my principal disagreement is on the time at which such an equity arises. While the Chief Justice finds that it arises at the moment of detrimental reliance, I view it as arising only if and when the promisor obtains the right or benefit that was promised to the claimant. Where, as here, a promisor's attainment of the promised right or benefit rests upon the satisfaction of a future contingency, no equity capable of being remedied

établi — je suis d'accord avec la Juge en chef pour dire que, suivant la doctrine de la préclusion propriétale, les circonstances suivantes donnent naissance à un droit en equity :

> . . . (1) une déclaration est faite au demandeur ou une assurance est donnée à celui-ci, sur le fondement de laquelle le demandeur s'attend à bénéficier d'un certain droit ou avantage dans un bien; (2) le demandeur s'appuie sur cette attente en faisant quelque chose ou en s'abstenant de faire quelque chose, et cet acte de confiance est raisonnable eu égard à l'ensemble des circonstances; (3) le demandeur subit un préjudice en raison de son acte de confiance raisonnable, de sorte qu'il serait inéquitable ou injuste que la partie à l'origine de la déclaration ou de l'assurance revienne sur sa parole . . . [Je souligne.]

(Motifs de la Juge en chef, par. 15; *Idle-O*, par. 49; *Sabey*, par. 27; *Clarke c. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, par. 48 et 52; *Tiny (Township) c. Battaglia*, 2013 ONCA 274, 305 O.A.C. 372, par. 131; *Schwark Estate c. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105, par. 16 et 34)

[65] Généralement, le promettant qui fait la « déclaration » ou qui donne l'« assurance » doit être titulaire du « droit » ou de l'« avantage » promis au moment où il fait la promesse (*Idle-O*, par. 49; *Sabey*, par. 30; *Clarke*, par. 26; *Tiny*, par. 131; *Schwark*, par. 16; mais voir *Thorner c. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, par. 61). La question soumise en l'espèce est donc de savoir si un droit en equity suffisant pour justifier une demande fondée sur la préclusion propriétale *peut* quand même prendre naissance lorsque le promettant n'est *pas* en fait titulaire de ce droit ou de cet avantage au moment où il fait la promesse. Bien que je convienne avec la Juge en chef qu'un tel droit peut naître, le principal point sur lequel je suis en désaccord avec elle concerne le moment où celui-ci prend naissance. Alors que la Juge en chef est d'avis qu'il prend naissance au moment de l'acte de confiance préjudiciable, j'estime pour ma part qu'il ne naît que si, et au moment où, le promettant obtient le droit ou l'avantage qui a été promis au demandeur.

through proprietary estoppel can arise until that contingency is satisfied.

[66] The Chief Justice states that, where a representation or assurance is made pertaining to a right or benefit which the promisor does not hold at the time of the promise, an inchoate equity nonetheless arises in favour of the claimant at the moment of the claimant's detrimental reliance thereon. This is undoubtedly so. Courts in the United Kingdom, for example, have recognized that in such circumstances an equity may arise in favour of the claimant before the promisor holds the promised right or benefit (*Abbey National Building Society v. Cann*, [1991] 1 A.C. 56 (H.L.), at pp. 95 and 102; *Southern Pacific Mortgages Ltd. v. Scott*, [2014] UKSC 52, [2015] A.C. 385, at para. 79). But such an equity cannot confer a *proprietary* right in the promised property, but rather a mere *personal* right against the promisor (*Abbey*, at pp. 89 and 95; *Scott*, at paras. 104 and 111; S. Wilken and K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed. 2012), at §11.130). Before an equity capable of conferring a proprietary right can be shown to arise, the promisor must gain the right or benefit that was the subject of his or her promise "[s]ince no one can grant what he does not have" (*Abbey*, at p. 102). As Lord Collins explained for (on this point) a unanimous Supreme Court of the United Kingdom in *Scott*, at para. 79, "the [claimants] acquired no more than personal rights against the [promisors] when they agreed to sell their properties on the basis of the [promisors'] promises that they would be entitled to remain in occupation. Those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the [promisors'] acquisition of the legal estate on completion" (emphasis added).

Lorsque, comme en l'espèce, l'acquisition du droit ou de l'avantage promis dépend de la réalisation d'une éventualité, aucun droit en equity — dont une atteinte est susceptible d'être réparée au moyen de la préclusion propriétale — ne peut prendre naissance tant que l'éventualité ne s'est pas réalisée.

[66] La Juge en chef affirme que, lorsqu'une déclaration est faite ou une assurance est donnée relativement à un droit ou à un avantage dont le promettant n'est pas titulaire au moment de la promesse, un droit virtuel en equity prend néanmoins naissance en faveur du demandeur au moment de l'acte de confiance préjudiciable du demandeur à l'égard de cette déclaration ou assurance. Cela ne fait aucun doute. Les tribunaux au Royaume-Uni, par exemple, ont reconnu que, dans de tels cas, un droit en equity pouvait prendre naissance en faveur du demandeur avant que le promettant ne soit titulaire du droit ou de l'avantage promis (*Abbey National Building Society c. Cann*, [1991] 1 A.C. 56 (H.L.), p. 95 et 102; *Southern Pacific Mortgages Ltd. c. Scott*, [2014] UKSC 52, [2015] A.C. 385, par. 79). Cependant, un tel droit en equity ne peut conférer de droit *propriétal* dans le bien promis; il accorde plutôt un simple droit *personnel* contre le promettant (*Abbey*, p. 89 et 95; *Scott*, par. 104 et 111; S. Wilken et K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3e éd. 2012), §11.130). Avant que l'on puisse établir l'existence d'un droit en equity susceptible de conférer un droit propriétal, le promettant doit acquérir le droit ou l'avantage promis, [TRADUCTION] « [p]uisque nul ne peut accorder ce qu'il n'a pas » (*Abbey*, p. 102). Comme l'a expliqué lord Collins (sur ce point) au nom des juges unanimes de la Cour suprême du Royaume-Uni dans l'arrêt *Scott*, par. 79, [TRADUCTION] « les [demandeurs] n'ont acquis rien de plus que des droits personnels contre les [promettants] lorsqu'ils ont consenti à vendre leurs propriétés sur le fondement des promesses des [promettants] selon lesquelles ils auraient le droit de demeurer occupants. Ces droits ne deviendraient propriétaux et susceptibles d'avoir priorité sur une hypothèque que lorsqu'ils seraient soutenus par l'acquisition, par les [promettants], du domaine juridique à la clôture de la transaction » (je souligne).

[67] The Chief Justice holds that it is unnecessary in this case to decide whether the inchoate equity which grounds the remedy in proprietary estoppel is personal or proprietary in nature (para. 15). Respectfully, I disagree. In my view, to qualify as an equity justifying the operation of proprietary estoppel, the equity must be proprietary, because it must be capable of compelling a promisor to relinquish a proprietary right which he or she actually holds. While the three conditions necessary to prove an equity under the test for proprietary estoppel do not explicitly state this requirement, the broader question which those conditions serve to answer demonstrates that this is so. Specifically, those three conditions have been described as part of a broader inquiry into whether it would be "unconscionable" to permit the promisor to renege on the promise made to the claimant (*Crabb*, at p. 195; *Sabey*, at para. 27; *Idle-O*, at para. 61). The concept of unconscionability is not a separate element of the test for establishing the equity sufficient to ground proprietary estoppel, but rather serves as a mechanism for "unifying and confirming" the three conditions (*Yeoman's Row Management Ltd. v. Cobbe*, [2008] UKHL 55, [2008] 4 All E.R. 713, at para. 92). In this sense, the three conditions are designed to answer the question of "whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it" (*Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133 (Ch.), at p. 154 (emphasis added); see also *Crabb*, at p. 195). Alternatively put, "[t]he equity of estoppel arises in an 'inchoate' form as soon as . . . the landowner unconscionably sets up his rights adversely to the legitimate demands of the estoppel claimant" (K. Gray and S. F. Gray, *Land Law* (5th ed. 2007), at §10.22 (emphasis added)).

[67] La Juge en chef conclut qu'il n'est pas nécessaire en l'espèce de décider si le droit virtuel en equity sur lequel repose le recours fondé sur la préclusion propriétale est de nature personnelle ou propriétale (par. 15). Soit dit en tout respect, je ne suis pas d'accord. Selon moi, pour constituer un droit en equity justifiant l'application de la préclusion propriétale, le droit en equity en cause doit être de nature propriétale, parce qu'il doit être susceptible de contraindre un promettant à renoncer à un droit propriétal dont il est effectivement titulaire. Bien que cette exigence ne soit pas explicitement énoncée dans les trois conditions nécessaires pour prouver l'existence d'un droit en equity suivant le critère de la préclusion propriétale, elle ressort de la question plus large à laquelle ces conditions permettent de répondre. Plus précisément, ces trois conditions ont été décrites comme faisant partie d'un examen plus large visant à déterminer s'il serait [TRADUCTION] « inique » de permettre au promettant de manquer à la promesse qu'il a faite au demandeur (*Crabb*, p. 195; *Sabey*, par. 27; *Idle-O*, par. 61). La notion d'iniquité n'est pas un élément distinct du critère servant à établir l'existence d'un droit en equity suffisant pour justifier l'application de la préclusion propriétale, mais elle tient plutôt lieu de mécanisme permettant d'[TRADUCTION] « unifi[er] et confirm[er] » les trois conditions (*Yeoman's Row Management Ltd. c. Cobbe*, [2008] UKHL 55, [2008] 4 All E.R. 713, par. 92). En ce sens, les trois conditions visent à répondre à la question de savoir [TRADUCTION] « si, eu égard aux faits de l'espèce, la situation est devenue telle qu'il serait malhonnête ou inique que le demandeur, ou la personne titulaire du droit que l'on cherche à faire respecter, continue de tenter de faire respecter celui-ci » (*Taylors Fashions Ltd. c. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133 (Ch.), p. 154 (je souligne); voir aussi *Crabb*, p. 195). Autrement dit, [TRADUCTION] « [l]e droit en equity qui sous-tend la préclusion prend naissance sous forme "virtuelle" dès que . . . le propriétaire foncier fait iniquement valoir ses droits de façon préjudiciable aux exigences légitimes de l'auteur de la demande fondée sur la préclusion » (K. Gray et S. F. Gray, *Land Law* (5e éd. 2007), §10.22 (je souligne)).

[68] Where the promisor does not yet have the benefit or interest which was promised to the claimant, the test for unconscionability as described above cannot be met. Indeed, in such circumstances, the personal equitable right that results from the claimant's detrimental reliance arises specifically because the promisor does not yet hold the "right or benefit" that was the subject of his or her promise. At that point, it would be impossible to find that it is unconscionable for the promisor to "continue to seek to enforce" his or her legal right to the promised right or benefit, since the promisor has yet to obtain that right or benefit.

[69] In my respectful view, imprecision in characterizing the type of equitable interest at stake in these cases risks introducing legal uncertainty to cases where competing equitable claims are advanced in relation to the same property. More particularly, the notion that a mere personal equitable right may be sufficient to give rise to a proprietary estoppel is difficult to reconcile with the principles governing the priority of equitable interests in land (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at para. 4-047). In the United Kingdom, the House of Lords and, in turn, the Supreme Court have each recognized that where a promise gives rise to a merely personal equitable right in favour of the claimant (because the promisor does not have the promised right or benefit at the time of his or her promise), the promisor's subsequent acquisition of the right or benefit does not permit the claimant to assert an equity which takes priority over a third party's proprietary right that was established in the meantime — that is, after the claimant's personal equitable right against the promisor arose, but before the promisor attained the right or benefit. Seen in this light, Lord Collins' statement at para. 79 in *Scott*, cited above, that mere personal rights "would only become proprietary and capable of taking priority over a mortgage when they were fed by the [promisor's] acquisition of the [promised right or benefit]" is not a suggestion that personal equitable rights could be retroactively transformed into proprietary rights. Rather, he meant that the establishment of the equity underlying the claimant's personal right prior to the establishment of the third party's proprietary right is insufficient to

[68] Dans le cas où le promettant n'est pas encore titulaire de l'avantage ou de l'intérêt ayant été promis au demandeur, le critère de l'iniquité décrit ci-dessus ne peut être respecté. En effet, dans une telle situation, le droit personnel en equity qui résulte de l'acte de confiance préjudiciable du demandeur prend naissance précisément parce que le promettant n'est pas encore titulaire du « droit » ou de l'« avantage » qu'il a promis. À ce stade, il serait impossible de conclure qu'il est inique que le promettant « continue de tenter de faire respecter » le droit dont il dispose à l'égard du droit ou de l'avantage promis, puisque le promettant n'a pas encore obtenu ce droit ou cet avantage.

[69] À mon humble avis, l'imprécision dans la caractérisation du type d'intérêt en equity en cause dans ces affaires risque d'introduire une incertitude juridique dans les affaires où des demandes en equity concurrentes sont présentées relativement au même bien. Plus particulièrement, l'idée qu'un simple droit personnel en equity puisse être suffisant pour qu'il y ait préclusion propriétale est difficilement conciliable avec les principes régissant la priorité d'intérêts fonciers en equity (*Snell's Equity* (33e éd. 2015), par J. McGhee, par. 4-047). Au Royaume-Uni, la Chambre des lords et, par la suite, la Cour suprême ont chacune reconnu que lorsqu'une promesse donne naissance à un simple droit personnel en equity en faveur du demandeur (parce que le promettant n'est pas titulaire du droit ou de l'avantage promis au moment où il fait sa promesse), l'acquisition subséquente, par le promettant, du droit ou de l'avantage en question ne permet pas au demandeur de faire valoir un droit en equity ayant priorité sur le droit propriétal d'un tiers qui a été établi entre-temps — c'est-à-dire après la naissance du droit personnel en equity du demandeur contre le promettant, mais avant que le promettant n'acquière ce droit ou cet avantage. Examiné sous cet angle, l'affirmation de lord Collins au par. 79 de l'arrêt *Scott*, précité, selon laquelle de simples droits personnels « ne deviendraient propriétaux et susceptibles d'avoir priorité sur une hypothèque que lorsqu'ils seraient soutenus par l'acquisition par [le promettant] du [droit ou avantage promis] » ne revient pas à dire que des droits personnels en equity pourraient être

elevate the claimant's personal right so as to displace the priority enjoyed by the third party's proprietary right (*Scott*, at para. 71; *Abbey*, at pp. 89 and 95; see also *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.)). But were it possible, as is necessarily suggested by the Chief Justice's reasons, to satisfy the requirement for "an equity" within the test for proprietary estoppel by showing a mere personal equitable right, priority could be accorded to an interest that does not ground an equitable claim in land, to the detriment of an interest that does.

[70] I add this. If it is clear that, in cases of competing proprietary claims, the prior establishment of a personal right cannot be considered when determining the priority of those claims, it is all the more puzzling that a claimant's establishment of a personal right should be at all relevant where, as here, a competing proprietary equitable claim does *not* exist. In other words, the only underlying equity that should *ever* be considered in determining whether the test for proprietary estoppel is satisfied is one capable of conferring a proprietary right.

[71] It follows that I disagree that, in this case, the requisite equity was established at the moment of Max's detrimental reliance. In my view, it will only arise from the moment that Gloria holds the right or benefit that was the subject of her promise to Max — that is, from the time that this Court orders her, as executor, to "divide the property forthwith into equal one-third interests and deliver these to herself, Max and Nathan [Cowper-Smith] as beneficiaries of Elizabeth's estate" (reasons of the Chief Justice, at para. 44). While I agree with the Chief Justice that a court's task, when determining the remedy which is "appropriate to satisfy the equity" (para. 17) under the test for proprietary estoppel,

rétroactivement transformés en droits propriétaux. Lord Collins voulait plutôt dire que l'établissement du droit en equity qui sous-tend le droit personnel du demandeur avant l'établissement du droit propriétal du tiers est insuffisant pour élever le droit personnel du demandeur de manière à écarter la priorité dont jouit le droit propriétal du tiers (*Scott*, par. 71; *Abbey*, p. 89 et 95; voir aussi *Watson c. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.)). Toutefois, si, comme tendent nécessairement à l'indiquer les motifs de la Juge en chef, l'établissement d'un simple droit personnel en equity permettait de satisfaire à l'exigence du critère de la préclusion propriétale relative à l'existence d'un « droit en equity », la priorité pourrait être accordée à un intérêt qui ne justifie pas une demande en equity relative à un bien-fonds, au préjudice d'un intérêt qui justifie une telle demande.

[70] J'ajouterais ceci. S'il est clair que, dans les affaires intéressant des demandes concurrentes de nature propriétale, l'établissement préalable d'un droit personnel ne saurait être pris en compte lorsqu'il s'agit de statuer sur la priorité de ces demandes, il est d'autant plus curieux que l'établissement d'un tel droit par le demandeur doive se voir reconnaître la moindre pertinence dans les cas où, comme en l'espèce, il *n'y a pas* de demande concurrente de nature propriétale en equity. Autrement dit, *le seul* droit en equity sous-jacent qui doive être pris en compte pour décider si le critère de la préclusion propriétale est respecté est un droit susceptible de conférer un droit propriétal.

[71] Il en résulte que je suis en désaccord avec la proposition selon laquelle, en l'espèce, le droit en equity nécessaire a été établi au moment de l'acte de confiance préjudiciable de Max. À mon avis, ce droit ne prendra naissance qu'à partir du moment où Gloria sera titulaire du droit ou de l'avantage qu'elle a promis à Max — c'est-à-dire le moment où notre Cour lui ordonnera, en sa qualité d'exécutrice testamentaire, « de partager immédiatement la propriété en intérêts égaux d'un tiers qu'elle remettra à Max, à Nathan [Cowper-Smith] et à elle-même à titre de bénéficiaires de la succession d'Elizabeth » (motifs de la Juge en chef, par. 44). Bien que je sois d'accord avec la Juge en chef pour dire que le rôle du

is "to do justice" (para. 56, citing *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, at para. 36), "do[ing] justice" — even at equity — does not permit a court to take into consideration a merely personal equitable right. Therefore, the minimum necessary to satisfy the equity, once it arises, is to permit Max to purchase Gloria's one-third share of the property as of the date of this Court's order.

III. Conclusion

[72] I would allow the appeal and vary the trial judge's order as proposed by the Chief Justice, save that I would permit Max to purchase Gloria's one-third interest in the property at its fair market value as of the date of this Court's order.

The following are the reasons delivered by

[73] CÔTÉ J. — I concur with the Chief Justice that a proprietary estoppel claim can arise even where a promisor had no ownership interest in the property at the time the promise was made. I also agree that a promisee's reliance is not unreasonable, as a matter of law, solely because the promisor does not own the property at the time the promisee acts, to his or her detriment, in reliance on the promise.

[74] However, I part ways with both the Chief Justice and Justice Brown as to scope of the Court's remedial power in this case. In my view, a court cannot order an executor to distribute shares of an estate in a manner that disregards the testator's express intent for the sole purpose of enabling a beneficiary to make good on her promise to a third party. This principle holds true even where, as here, that beneficiary — the defendant in a proprietary estoppel action — also happens to serve as the estate's executor.

tribunal dans la détermination de la réparation qui « convient » pour « donner effet au droit en equity » (par. 17) selon le critère de la préclusion propriétale consiste à [TRADUCTION] « rendre justice » (par. 56, citant *Jennings c. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, par. 36), le fait de « rendre justice » — même en equity — ne permet pas à un tribunal de prendre en considération un simple droit personnel en equity. En conséquence, le minimum nécessaire pour donner effet au droit en equity, dès qu'il prendra naissance, est de permettre à Max d'acheter la part d'un tiers de Gloria dans la propriété à la date de l'ordonnance de la Cour.

III. Conclusion

[72] J'accueillerais le pourvoi et je modifierais l'ordonnance de la juge de première instance comme le propose la Juge en chef; je permettrais toutefois à Max d'acheter l'intérêt que détient Gloria sur le tiers de la propriété à sa juste valeur marchande à la date de l'ordonnance de la Cour.

Version française des motifs rendus par

[73] LA JUGE CÔTÉ — Je souscris à l'opinion de la Juge en chef selon laquelle il est possible d'invoquer la préclusion propriétale même si le promettant ne détenait aucun intérêt propriétal dans le bien en cause au moment de la promesse. Je conviens également que la décision par le destinataire de la promesse de s'y fier n'est pas déraisonnable en droit simplement parce que le promettant n'est pas propriétaire du bien au moment où le destinataire de la promesse agit à son préjudice en s'y fiant.

[74] Toutefois, je diverge d'opinion avec la Juge en chef et le juge Brown quant à l'étendue du pouvoir de réparation dont dispose la Cour en l'espèce. À mon avis, un tribunal ne peut ordonner à un exécuteur testamentaire de procéder à la distribution de la succession sans tenir compte de l'intention expresse du testateur, et ce, à la seule fin de permettre à un bénéficiaire de tenir la promesse qu'il a faite à un tiers. Ce principe s'applique même lorsque, comme en l'espèce, ce bénéficiaire — la défenderesse dans une action fondée sur la préclusion propriétale — agit également comme exécuteur testamentaire.

[75] Elizabeth's last will and testament was unambiguous in expressly vesting the executor, Gloria, with discretion in the administration of her estate. Elizabeth directed that Gloria "may convert [the] estate . . . into money, and decide how, when, and on what terms", or that she "may keep [the] estate, or any part of it, in the form it is in at [Elizabeth's] death" (A.R., at p. 101). In other words, Elizabeth did not specifically bequeath the property at issue in this appeal. She entrusted Gloria to decide its fate, including whether or not it should be sold.

[76] "[T]he golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used" (*Browne v. Moody*, [1936] 4 D.L.R. 1 (P.C.), at pp. 4-5; see also *National Trust Co. v. Fleury*, [1965] S.C.R. 817, at pp. 828-29; *Feeney's Canadian Law of Wills* (4th ed. (loose-leaf)), by J. MacKenzie, at §10.1). The importance of testamentary autonomy is firmly rooted in our law. As McLachlin J. (as she then was) previously noted, a will "is the exercise by the testator of his freedom to dispose of his property and is [not] to be interfered with . . . lightly" (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at p. 824) (see also *Re Burke* (1959), 20 D.L.R. (2d) 396 (Ont. C.A.), at p. 398: ". . . the Court should strive to give effect to [the testator's intention] and should do so unless there is some rule or principle of law that prohibits it from doing so").

[77] The effect of the Court's remedy in this appeal — an order compelling Gloria to transfer shares of the property to the estate's beneficiaries — is to substitute the Court's own judgment for that of Gloria in determining how the property should be administered. It effectively creates a specific bequest that Elizabeth herself opted not to make. The fact that Elizabeth contemplated the possibility of an *in specie* distribution does not make a court-ordered distribution consistent with her wishes. The relevant intent at issue is that Elizabeth wanted Gloria, not the courts, to decide how her estate should be managed. With great respect, I am of

[75] Le testament d'Elizabeth accordait expressément et sans équivoque à l'exécutrice testamentaire, Gloria, un pouvoir discrétionnaire dans l'administration de la succession. Elizabeth a indiqué que Gloria [TRADUCTION] « peut réaliser l'actif de [l]a succession [. . .], et décider de quelle manière, à quel moment et à quelles conditions [elle] le fera », ou encore qu'elle « peut conserver tout ou partie de [l]a succession dans la forme où elle se trouve [au] décès [d'Elizabeth] » (d.a., p. 101). Autrement dit, Elizabeth n'a pas légué spécifiquement la propriété en cause dans le présent pourvoi. Elle a confié à Gloria le soin de décider du sort de celle-ci, notamment de déterminer s'il convenait ou non de la vendre.

[76] [TRADUCTION] « [L]a règle d'or en matière d'interprétation des testaments consiste à donner effet à l'intention du testateur telle qu'elle ressort des termes qu'il a employés » (*Browne c. Moody*, [1936] 4 D.L.R. 1 (C.P.), p. 4-5; voir aussi *National Trust Co. c. Fleury*, [1965] R.C.S. 817, p. 828-829; *Feeney's Canadian Law of Wills* (4e éd. (feuilles mobiles)), par J. MacKenzie, §10.1). L'importance de l'autonomie testamentaire est fermement ancrée dans notre droit. Comme l'a déjà dit la juge McLachlin (maintenant Juge en chef), le testament « est l'exercice par le testateur de la liberté de disposer de ses biens et il ne doit pas être modifié à la légère » (*Tataryn c. Succession Tataryn*, [1994] 2 R.C.S. 807, p. 824) (voir aussi *Re Burke* (1959), 20 D.L.R. (2d) 396 (C.A. Ont.), à la p. 398 : [TRADUCTION] « . . . le tribunal doit s'efforcer de donner effet à [l'intention du testateur], à moins qu'une règle ou un principe de droit ne l'en empêche »).

[77] En accordant la réparation qu'elle accorde dans le présent pourvoi — une ordonnance enjoignant à Gloria de transférer aux bénéficiaires de la succession leur part dans la propriété — la Cour se trouve à substituer son propre jugement à celui de Gloria et à décider de la façon dont le bien devrait être administré. La Cour crée dans les faits un legs spécifique qu'Elizabeth a elle-même choisi de ne pas faire. Le fait qu'Elizabeth ait envisagé la possibilité d'un partage en nature ne rend pas un partage ordonné judiciairement conforme à ses volontés. L'intention pertinente en l'espèce est qu'Elizabeth voulait que ce soit Gloria — et non les tribunaux

the view that equity affords no justification for disregarding that intent — especially since Max would be free to purchase the property (using, in part, his share of the sale proceeds) if Gloria did decide to sell it at auction.

[78] It is convenient, in this case, that Gloria stands in the shoes of both beneficiary and executor. But if Gloria had resigned as executor, or if someone else had been appointed in the first place, what jurisdiction would this Court have to order that executor to distribute shares of the property in a particular manner? In my view, those scenarios are no different than the case at bar. The distinction between Gloria *qua* executor and Gloria *qua* beneficiary should not be casually cast aside in the interests of equity, particularly where the effect is to disregard the express intent of the testatrix.

[79] The Chief Justice's answer is that "[w]here a will allows for executorial discretion, an *in specie* distribution of real property may be effected by an executor with the consent of all beneficiaries", and that Gloria is unreasonably withholding her consent (para. 40). There is no question in this appeal that Gloria has the executorial authority to make an *in specie* distribution — this power is expressly provided for in Elizabeth's will. But as to Gloria's interest as a beneficiary, she may have good reason to prefer a sale of the property instead of giving her consent to an *in specie* distribution. If the property is sold and the proceeds are distributed among the three beneficiaries, Gloria will receive a one-third share at current market value. If the property is distributed *in specie*, she will be compelled to sell her share of the property to Max for, as the reasons of the Chief Justice indicate, one third of the property's appraised value in 2011, which the parties agree is lower than the current value of the property. Thus, regardless of whether she is the executor, it would not be unreasonable for Gloria, *qua* beneficiary, to refuse to consent to an *in specie* distribution. It is improper to compel her to consent to an *in specie* distribution in this context. It is noteworthy that the promise Gloria made was to *sell* her third of the

— qui décide de la façon dont sa succession devrait être gérée. Avec égards, je suis d'avis que l'equity ne permet aucunement de faire abstraction de cette intention — d'autant plus que Max serait libre d'acheter la propriété (en utilisant, entre autres, sa part du produit de la vente) si Gloria décidait de la vendre aux enchères.

[78] Il appert qu'en l'espèce, Gloria est à la fois bénéficiaire et exécutrice testamentaire. Mais, si elle avait démissionné comme exécutrice testamentaire, ou si quelqu'un d'autre avait été nommé en premier lieu, la Cour aurait-elle eu le pouvoir d'ordonner à l'exécuteur testamentaire de partager le bien d'une façon particulière? À mon avis, la situation qui nous occupe n'est pas différente de ces scénarios. La distinction entre Gloria en sa qualité d'exécutrice testamentaire et Gloria en sa qualité de bénéficiaire ne saurait être écartée à la légère au nom de l'equity, surtout si cela a pour effet de faire abstraction de l'intention expresse de la testatrice.

[79] La réponse de la Juge en chef est que, « [l]orsqu'un testament prévoit que l'exécuteur testamentaire dispose d'un pouvoir discrétionnaire, celui-ci peut, avec le consentement de tous les bénéficiaires, effectuer un partage en nature des biens réels », et que Gloria refuse de façon déraisonnable de donner son consentement (par. 40). Il ne fait aucun doute dans le présent pourvoi que Gloria a le pouvoir, en tant qu'exécutrice testamentaire, de procéder à un partage en nature — ce pouvoir est expressément prévu dans le testament d'Elizabeth. Toutefois, en ce qui a trait à son intérêt en tant que bénéficiaire, Gloria pourrait avoir de bonnes raisons de préférer la vente de la propriété au lieu de consentir à un partage en nature. Si la propriété est vendue et que le produit de la vente est partagé entre les trois bénéficiaires, Gloria recevra un tiers du produit de la vente de la propriété, à sa valeur marchande actuelle. Si la propriété est distribuée en nature, elle sera obligée de vendre sa part à Max pour, comme le souligne la Juge en chef dans ses motifs, le tiers de la valeur marchande de la propriété en 2011, valeur que les parties reconnaissent être inférieure à la valeur actuelle de la propriété. En conséquence, qu'elle soit ou non l'exécutrice testamentaire, il ne serait pas déraisonnable que Gloria, en sa qualité de

property, not to *give it away*. In the present case, the testatrix wanted each child to share equally in the residue of her estate. In a rising market, allowing Max to buy the one-third interest for a past price does not respect her wish, since it effectively gives Gloria less than one third of the current value of the estate, and correspondingly more to Max.

[80] Moreover, the fact that an *in specie* distribution *may* be effected with the consent of all beneficiaries does not imply that the executor is obligated to elect this option (see *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, at paras. 45 and 49; *Widdifield on Executors and Trustees* (6th ed. (loose-leaf)), by C. S. Thériault, heading 5.1.6). "[T]he intention of the testator or the settlor must be adhered to" in determining whether an *in specie* distribution is appropriate (*Gunn Estate*, at para. 45) and here, the testatrix intended that Gloria make that determination. If Gloria's duties as executor are truly in conflict with her interests as a beneficiary such that there is a breach of fiduciary duty, the proper remedy is not to order an *in specie* distribution but to replace Gloria as executor (see, e.g., *Jackson Estate, Re* (2004), 192 O.A.C. 161, at paras. 8-9; *Re Smith*, [1971] 1 O.R. 584 (H.C.J.), at pp. 587-88; *Cooper v. Fenwick*, [1994] O.J. No. 2148 (QL) (Gen. Div.), at paras. 14-15 and 21). This would afford Max, Nathan, and Gloria the benefit of unbiased and sound advice regarding the administration of the estate. With respect, it is no answer, in my view, to order a different remedy simply because the installation of a new executor may involve some cost or delay.

bénéficiaire, refuse de consentir à un partage en nature. Dans ce contexte, il n'est pas justifié de l'obliger à consentir à cette forme de partage. Il importe de souligner que la promesse faite par Gloria, c'est qu'elle *vendrait* sa part d'un tiers du bien, et non qu'elle *en ferait don*. Dans le cas qui nous occupe, la testatrice voulait que chacun de ses enfants touche une part égale du reliquat de sa succession. Dans un marché à la hausse, permettre à Max d'acquérir un tiers de la propriété à un prix fondé sur une valeur passée ne respecte pas les volontés d'Elizabeth, puisque Gloria obtiendra dans les faits moins qu'un tiers de la valeur actuelle de la succession et que, corollairement, Max recevra davantage.

[80] De plus, le fait qu'un partage en nature *puisse* être effectué avec le consentement de tous les bénéficiaires ne signifie pas que l'exécuteur testamentaire est obligé de choisir cette option (voir *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, par. 45 et 49; *Widdifield on Executors and Trustees* (6e éd. (feuilles mobiles)), par C. S. Thériault, rubrique 5.1.6). [TRADUCTION] « [I]l faut respecter l'intention du testateur ou du disposant » lorsqu'on décide s'il convient ou non de procéder à un partage en nature (*Gunn Estate*, par. 45), et, en l'espèce, l'intention de la testatrice était que ce soit Gloria qui prenne une décision à cet égard. Si les devoirs de Gloria en tant qu'exécutrice testamentaire sont réellement en conflit avec ses intérêts en tant que bénéficiaire, de sorte qu'il y a manquement à son devoir fiduciaire, la réparation appropriée ne consiste pas à ordonner un partage en nature, mais plutôt à remplacer Gloria en tant qu'exécutrice testamentaire (voir, p. ex., *Jackson Estate, Re* (2004), 192 O.A.C. 161, par. 8-9; *Re Smith*, [1971] 1 O.R. 584 (H.C.J.), p. 587-588; *Cooper c. Fenwick*, [1994] O.J. No. 2148 (QL) (Div. gén.), par. 14-15 et 21). Cela permettrait à Max, à Nathan et à Gloria de bénéficier de conseils impartiaux et judicieux concernant l'administration de la succession. Avec égards, ordonner une réparation différente simplement parce que la nomination d'un nouvel exécuteur testamentaire pourrait occasionner des coûts ou des délais ne constitue pas, à mon avis, une solution adéquate dans une telle situation.

[81] For these reasons, I am of the view that this Court has no power to order Gloria to exercise her executorial discretion in a particular manner.

[82] However, if Gloria is ordered to distribute the property *in specie* and compelled to sell her share to Max, I concur with Justice Brown that the sale price should be determined by the value of the property as of the date of this Court's order. I would add that imposing a sale price equal to that value of the property would be consistent with the testatrix's wishes. Indeed, the testatrix wanted each child to share equally in the residue of her estate. In a rising market, letting Max buy the one-third interest for a past price does not respect her wishes since it effectively gives Gloria less than one third of the current value of the estate, and correspondingly more to Max.

[83] I would allow the appeal in part.

*Appeal allowed with costs throughout.*

*Solicitors for the appellant: League and Williams, Victoria; Vandergrift Legal, Ottawa; Supreme Law Group, Ottawa.*

*Solicitors for the respondent: Hunter Litigation Chambers, Vancouver.*

[81] Pour ces motifs, j'estime que la Cour n'a pas compétence pour ordonner à Gloria d'exercer son pouvoir discrétionnaire d'exécutrice testamentaire d'une façon particulière.

[82] Toutefois, s'il est ordonné à Gloria de distribuer la propriété en nature et qu'elle est obligée de vendre sa part à Max, je suis d'accord avec le juge Brown que le prix de la vente devrait être établi en fonction de la valeur de la propriété à la date de l'ordonnance de notre Cour. J'ajouterais que l'imposition d'un prix de vente égal à la valeur de la propriété à cette date serait conforme aux volontés de la testatrice. En fait, cette dernière voulait que chaque enfant touche une part égale du reliquat de sa succession. Dans un marché à la hausse, permettre à Max d'acquérir un tiers de la propriété à un prix fondé sur une valeur passée ne respecte pas les volontés d'Elizabeth, puisque Gloria obtiendra dans les faits moins qu'un tiers de la valeur actuelle de la succession et que, corollairement, Max recevra davantage.

[83] J'accueillerais le pourvoi en partie.

*Pourvoi accueilli avec dépens devant toutes les cours.*

*Procureurs de l'appelant : League and Williams, Victoria; Vandergrift Legal, Ottawa; Supreme Law Group, Ottawa.*

*Procureurs de l'intimée : Hunter Litigation Chambers, Vancouver.*

# Tab 9

# ESTOPPEL

**Bruce MacDougall**

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for the effect of the proprietary estoppel) have the property right in question. In estoppel by representation the facts the subject of the representation are in reality not true. This "falseness" characteristic is more artificial if used to characterize promissory estoppel.

## VI.B. - 1. The Establishment of the Need for the Estoppel

**§6.56** The first four factors listed earlier are necessary to establish proprietary estoppel: property context, mistake or misapprehension as to entitlement, reliance and detriment. The fifth factor — equitable considerations — is only sometimes relevant.

### VI.B.1. - *a. Context: Property Rights*

**§6.57** In order for the claimant to raise successfully proprietary estoppel, the owner must have an interest that will support the transfer of the interest or the creation of the right involved. If the effect of the estoppel is meant to transfer a property interest to the claimant then the basic *nemo dat quod non habet* principle of property law applies to constrain what type of property interest can be successfully claimed by the claimant. There may well be a feeding of the estoppel technique that could be argued for if the owner later gets a sufficient interest, as occurs in estoppel by deed,[89] but this technique has not been used in Canada in the context of proprietary estoppel. Similarly if there is a right to property meant to be created by the estoppel, it should generally not adversely affect a right or interest of a third party, except possibly a successor in title of the owner.

**§6.58** This property element has two aspects: (1) property and a sufficient property right of the owner, and (2) in some cases knowledge by the owner of this right. These requirements distinguish proprietary estoppel from estoppel by representation and promissory estoppel, neither of which has any such requirement. The confinement to rights relating to property is peculiar to proprietary estoppel, though rights to property can also be affected by estoppel by deed. The latter estoppel is different from proprietary estoppel in that it works by agreement and also because it often does not relate to rights to property. While an estoppel by representation can relate to a property right, it cannot create or transfer such a right and is personal in nature.[90] Proprietary estoppel can directly effect such a change or transfer or lead to the creation of a right to property — but the property interest of the owner has to be there in the first place, unless it is possible for a feeding the estoppel technique to work, in which case the owner would eventually have to have a sufficient interest in the property concerned.

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[89] See section II.D.3.b. §§2.62-2.77.

[90] *Country Meadow Estates (No. 2) Inc. v. Citibank Canada*, [1994] O.J. No. 1835, 40 R.P.R. (2d) 239 (Ont. Gen. Div.); *Paterson v. Paterson*, [1995] O.J. No. 2868, 16 R.F.L. (4th) 439 (Ont. Prov. Ct.).

**§6.59** The knowledge element is also somewhat different in proprietary estoppel than in estoppel by representation or promissory estoppel in that the person estopped (here, the owner) is more often required, according to most authorities, to have a greater knowledge of its rights than is usually the case with promissory estoppel or estoppel by representation.

### VI.B.1.a. - i. Property Rights

**§6.60** The property component of this first factor of proprietary estoppel has two elements: property and a sufficient right to the property by the owner. Because proprietary estoppel deals with an interest in or rights to property and affords a claimant an interest derivative from that of or a right relating to the property of the owner, it must first be determined whether the owner in fact has an interest and the right sort of interest in the land. Proprietary estoppel is associated with entitlement to land and not chattels or other property, but there is a question as to whether such a restriction is justified.

### VI.B.1.a.i. - *(A) Type of Property – Land*

**§6.61** In almost all cases (especially in Canada) the type of property to which proprietary estoppel relates is land. In *Maritime Telegraph and Telephone Co. v. Chateau Lafleur Development Corp.*, Cromwell J.A. said: "Proprietary estoppel in a case like this one is concerned with equitable rights to land. It follows, therefore, that the expectation or belief on which the estoppel is based must relate to the acquisition of rights in or over land..."[91] He noted that in *Western Fish Products Ltd. v. Penwith District Council*, Megaw, L.J. described the doctrine of proprietary estoppel as follows: "... when A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B's land, such expectation arising from what B has said or done, the court will order B to grant A that right on such terms as may be just."[92] In *Country Meadow Estates (No. 2) Inc. v. Citibank Canada*, Epstein J. said: "It is clear that this form of estoppel, proprietary estoppel, may found a cause of action. It is also clear that the doctrine only applies where the applicant is claiming a right or interest in or over another person's land."[93]

**§6.62** A limitation to land is arguably arbitrary, however. It arises from the somewhat chance circumstance that proprietary estoppel (like part performance) originated as a device to get round form requirements that mainly constrained the creation of or transfer of rights to land. It is quite arguable, however, that a similar equity ought to be available for non-land property. Jane Matthews Glenn has written:

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[91] [2001] N.S.J. No. 471, 2001 NSCA 167, 207 D.L.R. (4th) 443 at para. 50 (N.S.C.A.).

[92] [1981] 2 All E.R. 204 at 217 (C.A.).

[93] [1994] O.J. No. 1835, 40 R.P.R. (2d) 239 at para. 36 (Ont. Gen. Div.). See also *Tarling v. Tarling*, [2008] O.J. No. 3009, 43 E.T.R. (3d) 177 (Ont. S.C.J.); *Fraser Valley Credit Union v. Siba*, [2001] B.C.J. No. 1045, 2001 BCSC 744, 42 R.P.R. (3d) 135 (B.C.S.C.).

> ...it seems odd, even unprincipled, to make a fundamental difference in the doctrine of estoppel between promises relating to land and other promises, and to give more weight to the former than the latter, in the context of a legal system that places more formal requirements on dealings with property, especially land, than on other dealings.[94]

§6.63 There can certainly be mistaken assumptions or misapprehensions about entitlement to non-land property. In fact in the context of land registries such as exist in Canada where there is often deemed knowledge of what interests are registered, proprietary estoppel may make more sense (by way of being more frequently "needed") in non-land contexts. If I stand by when I see you treating my bicycle as though it were your own, taking care of it and enhancing its usefulness, why should proprietary estoppel not be available to assist you when it is available if you were to do similar things with respect to my land.

§6.64 The reason for the confinement to land appears to be more of a floodgates concern than a conceptual concern. The problem with an expansion of proprietary estoppel to non-land contexts is developing a usable, predictable way of constraining its application. If it can be used to lead to the creation or transfer of a right to *any* type of property, then it is of boundless potential, as all obligations are the property of the rights-holder. If it can be used for land, why not for chattels. If for chattels, why not for property that has some tangible form (including documentary intangibles). If for documentary intangibles, then why not for all intangibles. If proprietary estoppel can relate to all property including intangibles, of course, all known legal rights would then be included. It might, therefore, be argued that proprietary estoppel is limited to rights *in rem* as opposed to rights *in personam*, but that is not how it is currently limited even in the context of land, at least with respect to the remedies given. While it is true that most authority deals with mistakes as to estates in land, this limitation seems pointless as the remedy given is often less than an estate.[95] It is noted in the chapter on promissory estoppel that some Australian cases have in fact sought to eliminate some of the confines of the different types of estoppel so as to allow the creation of rights in contexts not usual for proprietary estoppel. In *Waltons Stores (Interstate) Ltd. v. Maher*,[96] Brennan J. thought the range of remedies allowed for proprietary estoppel was constrained only by the notion of unconscionability. On the distinction between what promissory and proprietary estoppels do, he said:

> ... unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for

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[94] Jane Matthews Glenn, "Promissory Estoppel, Proprietary Estoppel and Constructive Trust in Canada: 'What's in a Name?'" (2007), 30 Dal Law J. 141 at 163.

[95] See *Ashburn Anstalt v. Arnold*, [1989] Ch. 1 (C.A.); *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, [2003] B.C.J. No. 663, 2003 BCCA 197, 7 R.P.R. (4th) 163 (B.C.C.A.).

[96] [1988] HCA 7, 164 C.L.R. 387.

> an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.[97]

**§6.65** The ability of such an extension of proprietary estoppel to undermine the accepted rights-creating mechanisms (most notably contract law) is self evident. It is this potential to undermine the law of contract (and in particular the doctrine of consideration) that has kept promissory estoppel constrained to the modification of existing rights (and not the creation of new ones). If promissory estoppel is to be so constrained then so perhaps ought proprietary estoppel. Outside the recognized context of land where proprietary estoppel clearly applies, the creation of rights (and even the transfer of property interests) should perhaps be left to the well-recognized devices of contract, restitution and tort. If there are flaws in those mechanisms, it is better that those areas of law be modified to make the needed changes rather than to use estoppel.

**§6.66** The distinction between land and non-land property is admittedly arbitrary. But it is a well-recognized distinction and has on the whole worked little hardship. It will be noted that the Australian case that led to the radical reformulation of estoppel there — *Waltons Stores* — was a case dealing with a right to land. It is perhaps justifiable to extend proprietary estoppel to other tangible property — *i.e.*, chattels, especially — when what is sought is not the creation of new rights (*in personam*) by an owner of a property interest, but the transfer of some of those rights (*in rem*) from the owner to the claimant. Here, there is less interference with rights-creating devices like contract.

**§6.67** There are a few cases, especially in England, where proprietary estoppel has been held to be capable of being based on the owner's interests in chattels, for example with respect to an interest in a car.[98] Insurance policies have been the subject of proprietary estoppel.[99] Intellectual property rights and powers have been affected - for example, the power to show films.[100] In *Bruner v. Moore*,[101] the court ordered that an option to purchase patent rights be extended because of estoppel, though arguably the estoppel in that case was promissory estoppel ("the principle in *Hughes v. Metropolitan Railway*"). Proprietary estoppel has been used to gain rights to the payment of proceeds of sale of a hotel (when the

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[97] *Ibid.*, at para. 30.
[98] *Moorgate Mercantile Co. v. Twitchings*, [1976] Q.B. 225 (C.A.), revd [1977] A.C. 890 (H.L.).
[99] See *Re Foster (No. 2)*, [1938] 3 All E.R. 610 (Ch. D.).
[100] *Film Investors Overseas Services SA v. The Home Video Channel*, [1997] E.M.L.R. 347 (Ch. D.).
[101] [1904] 1 Ch. 305 (Ch. D.).

claimant had been led to believe it would be left the hotel but instead it was sold), though this case is probably better seen as relating to land.[102]

**§6.68** Canadian courts have shown more reluctance to extend proprietary estoppel to any type of property other than land.[103] There is nonetheless some weak or indirect authority in Canada for extending proprietary estoppel beyond the category of land interests. In *Silver's Garage Ltd. v. Bridgewater (Town)*,[104] Ritchie J. appeared to accept the use of the five probanda of Fry J. from *Willmott v. Barber*[105] as the basis for determining a party's rights to equipment, though it is not clear that Ritchie J. believed he was using proprietary estoppel.[106] The clearest authority for the use of proprietary estoppel to get rights to non-land property is in *Hepburn v. Jannock Ltd.*[107] J.C. Murray J. cited with apparent approval Lord Denning's reference in *Moorgate Mercantile Co. v. Twitchings*,[108] to proprietary estoppel's ability to affect "title to the property, be it land or goods". J.C. Murray J. continued: "In other words, he made it clear that the doctrine of proprietary estoppel could be applied to land or goods."[109] The court thereupon used the doctrine "of promissory or proprietary estoppel" to allow the claimant access to trust funds.[110]

**§6.69** Some cases of estoppel by representation (in particular in the context of estoppel by negligence) that relate to negotiable instruments or other instruments appear to use the same analysis that would apply to proprietary estoppel. So, in *Begley v. Imperial Bank of Canada*,[111] the appellant, a widow, who had a savings account with the respondent bank, gave a power of attorney to another authorizing him "for me and in my name to draw and sign cheques on the said bank ..." The bank claimed that the appellant was responsible for a cheque created by the holder of the power of attorney by which he purported to clear his own indebtedness to the bank. Duff C.J. said:

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[102] *Wayling v. Jones* (1993), 69 P. & C.R. 170 (C.A.). See also: trust property: *Re Vandervell's Trusts (No. 2)*, [1974] Ch. 269 (C.A.); wills: *Anderson v. Anderson*, [2010] B.C.J. No. 1284, 2010 BCSC 911, 58 E.T.R. (3d) 291 (B.C.S.C.); *Re Basham*, [1987] 1 All E.R. 405 (Ch. D.); *Gillett v. Holt* [2000] 2 All E.R. 289, [2001] Ch. 210 (C.A.).

[103] *Belvedere v. Brittain Estate*, [2009] O.J. No. 12, 2009 ONCA 1, 94 O.R. (3d) 655 (Ont. C.A.); *Maritime Telegraph and Telephone Co. v. Chateau Lafleur Development Corp*, [2001] N.S.J. No. 471, 2001 NSCA 167, 207 D.L.R. (4th) 443 (N.S.C.A.).

[104] [1970] S.C.J. No. 93, [1971] S.C.R. 577 (S.C.C.).

[105] (1880), 15 Ch. D. 96 (Ch. D.).

[106] See similarly *Davies v. Traders Finance Corp.*, [1959] O.J. No. 103 (Ont. C.A.).

[107] [2008] O.J. No. 62, 63 C.C.E.L. (3d) 101, 40 B.L.R. (4th) 165 (Ont. S.C.J.), affd [2008] O.J. No. 5113, 2008 ONCA 847, 305 D.L.R. (4th) 571 (Ont. C.A.).

[108] [1976] Q.B. 225 (C.A.), revd [1977] A.C. 890 (H.L.).

[109] *Hepburn v. Jannock Ltd.*, [2008] O.J. No. 62, 63 C.C.E.L. (3d) 101, 40 B.L.R. (4th) 165 (Ont. S.C.J.), affd [2008] O.J. No. 5113, 2008 ONCA 847, 305 D.L.R. (4th) 571 at para. 117 (Ont. C.A.).

[110] See also *Belvedere v. Brittain Estate*, [2009] O.J. No. 12, 2009 ONCA 1, 94 O.R. (3d) 655 (Ont. C.A.).

[111] [1934] S.C.J. No. 61, [1935] S.C.R. 89, [1935] 2. D.L.R. 12 (S.C.C.), affd [1936] J.C.J. No. 3, [1936] 2 All E.R. 367 (P.C.).

> But the weakness of the bank's case, in so far as it rests upon estoppel by acquiescence, lies deeper. The remedy the appellant seeks to enforce is, as I have said, the proprietary remedy. In a proceeding in a court of equity, the appellant, having, as the Alberta courts have unanimously held, established her equitable title to the moneys, cannot be denied her remedy on the ground of acquiescence unless with a full knowledge of her rights and with independent advice, she has confirmed the impeachable transaction.[112]

Possibly, therefore, proprietary estoppel should apply to land contexts and to contexts where there is a mistaken assumption about the *transfer* of an interest in some other form of property that is not land. Nonetheless, by far the strongest view in Canada is that proprietary estoppel does not serve this latter function.

### VI.B.1.a.i. - *(B) Certainty of Property*

**§6.70** Whatever the property involved in the estoppel, there should be some certainty with respect to what the property is. There is a degree of kinship between specific performance and proprietary estoppel in this regard. If the property is unknown or unclear then usually proprietary estoppel is not available, though some other device such as a constructive trust might possibly be available. This certainty criterion has some built-in give, however.[113]

**§6.71** What has to be certain is the property of the owner, but not necessarily the property interest or right to property that the claimant expects or believes he or she already has. This issue is related to the principle that there need be no clear and unambiguous statement in a proprietary estoppel and also to the fact that the effect of the proprietary estoppel (unlike in estoppel by representation or promissory estoppel) need not satisfy the expectations of the claimant. Both these matters relate to the right the claimant will get by the satisfaction of the equity and not usually to the property involved. In *Yeoman's Row Management Ltd. v. Cobbe*,[114] Lord Scott of Foscote stated that there had to be a certain interest in property in order for proprietary estoppel to exist. He thought that where the owner had an interest that was itself "subject-to-contract" the certainty criterion would not be satisfied. In *Thorner v. Major*,[115] Lord Neuberger of Abbotsbury clarified how the law concerns itself with the identity of the property and how the nature of the parties can have an effect so as to help satisfy the identity issue. The case concerned two parties who were well acquainted over a long period of time and the property involved was farm land. He said:

> Based on the reasoning of my noble and learned friend, Lord Scott of Foscote in *Yeoman's Row Management Ltd. v. Cobbe*, ... the respondents con-

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[112] Citing *De Bussche v. Alt* (1877), 47 L.J. Ch. 381 at 389; *Moxon v. Payne* (1873), 43 L.J. Ch. 240 at 243. See also *Ewing v. The Dominion Bank*, [1904] S.C.J. No. 42, 35 S.C.R. 133 (S.C.C.); *Bank Leu Ag v. Gaming Lottery Corp.*, [2003] O.J. No. 3213, 231 D.L.R. (4th) 251 (Ont. C.A.) (good title to share certificates through estoppel by representation — "common law estoppel").

[113] *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (H.L.).

[114] [2008] UKHL 55, [2008] 4 All E.R. 713 (H.L.).

[115] [2009] UKHL 18, [2009] 3 All E.R. 945 (H.L.).

# Tab 10

1967

*May 26, 29
30, 31
Oct. 3

CLARK'S-GAMBLE OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

GRANT PARK PLAZA LIMITED, GRANT PARK WESTERN LIMITED, GRANT PARK EASTERN LIMITED and ARONOVITCH & LEIPSIC LIMITED (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Contracts—Interpretation—Premises in shopping centre constructed for and leased to plaintiff department store—Plaintiff later advised that further development of centre would include additional department store—Injunction sought to restrain developer from constructing proposed store.*

The defendant Grant Park Plaza Ltd. was engaged in the development and construction of a shopping centre and after prolonged negotiations it had accepted a proposal for a lease from the plaintiff department store. The proposal and the lease itself were executed at the same time and formed one contract. The defendant encountered difficulties in securing tenants and as a result of financial stringency, work on the centre ceased after completion of the building leased to the plaintiff and certain other buildings. Some two years later, the plaintiff was advised by the defendant that it was proceeding with further development of the centre and that this additional development would include another department store. The plaintiff immediately objected to the proposed lease for a "Woolco Store" and upon the defendant's refusing to desist, an action was brought for a permanent injunction restraining Grant Park Plaza Ltd., its two subsidiary companies and its agent, from entering into an agreement with W Co. for the construction and operation of an additional department store in the Grant Park Centre. This action was dismissed at trial. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these claims were dismissed.

On appeal to the Court of Appeal, the main appeal was dismissed; the appeal from the dismissal of the claim for damages by the plaintiff was discontinued and the counterclaim for damages was not pursued. An appeal from the judgment of the Court of Appeal was then brought to this Court.

*Held:* The appeal should be dismissed.

The Court rejected the appellant's contention that by the agreement between the parties the leasing of any space in a building within the proposed shopping centre to any department store or discount store was prohibited. The appellant had relied on para. 5 of the proposal which read "We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown

*PRESENT: Cartwright, Martland, Judson, Hall and Spence JJ.

on the layout in the plans submitted by Waisman & Ross dated November 22, 1961." However, as held by the trial judge, there was no covenant by Grant Park Western Ltd. (the assignee of the lease) to build the shopping centre other than that building which was constructed for and leased to the appellant.

The section of the lease relating to competitive use had no application to the present situation: (1) It applied only outside the shopping centre and had no application to two sites within the same shopping centre. (2) The proposed construction of a building for the "Woolco Store" and the lease thereof was not one of the things prohibited by the section if the respondents were bound by it.

The submission that the proposal which the appellant made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implied a negative covenant of the respondent not to depart from that scheme failed. This was not a building scheme as dealt with in the many cases upon that subject. In such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and that was not at all the situation contemplated in the present case. The argument that to permit the respondent to lease any part of the shopping centre to a discount department store the activities of which would be competitive with the appellant's business would be in derogation of its grant was not accepted.

The further submission that the respondents were estopped by the conduct of Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store also failed. That there was no covenant by the said respondent to build the shopping centre other than the one building to be leased to the appellant was in itself sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence. The representations alleged here were all representations of intentions to act in a certain way in the future.

[*Browne v. Fowler*, [1911] 1 Ch. 219; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; *Jorden v. Money* (1854), 5 H.L. Cas. 185; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Marquess of Salisbury v. Gilmore*, [1942] 2 K.B. 38, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal by the plaintiff from a judgment of Smith J. Appeal dismissed.

*Hon. C. H. Locke, Q.C.*, and *M. J. Mercury*, for the plaintiff, appellant.

*Clive K. Tallin, Q.C.*, and *A. S. Dewar, Q.C.*, for the defendants, respondents.

[1] (1966), 57 W.W.R. 27.

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The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[1] which dismissed an appeal by the plaintiff from the judgment delivered at trial by Smith J., as he then was.

The learned trial judge had dismissed the plaintiff's action for a permanent injunction restraining the defendants from entering into an agreement with the F. W. Woolworth Company for the construction and operation of an additional department store in the Grant Park Plaza Shopping Centre in the City of Winnipeg. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these damage claims were dismissed. The appeal from the dismissal of the claim for damages by the plaintiff was discontinued on the appeal to the Court of Appeal for Manitoba and the counterclaim for damages was not pursued. Therefore, we are left with the main appeal by Clark's-Gamble of Canada Limited only, that is, against the judgment refusing the injunction.

The defendant Grant Park Plaza Limited, represented by Aronovitch and Leipsic Limited, was engaged in the development and construction of a shopping centre in the City of Winnipeg. It entered into negotiations with Clark's-Gamble of Canada Limited and its founders and main shareholders Marshall Wells of Canada and MacLeod's Limited. Clark's-Gamble was represented by Mr. P. C. Fikkan and Mr. Irving Strum. Mr. Fikkan was the merchandising expert for the appellant and Mr. Strum was the real estate expert for the appellant who had negotiated its leases.

As pointed out by the learned trial judge, the lease in this case, which is the subject of the present action, was the result of thorough and prolonged negotiations between the officials of the parties and their solicitors. The negotiations culminated in the delivery by the appellant to the respondents Grant Park Plaza Limited of a document, ex. 25, which bears the date March 27, 1962 and which has been designated throughout the proceedings as "The Proposal". That was a proposal for the lease which was accepted by the respondent Grant Park Plaza Limited.

[1] (1966), 57 W.W.R. 27.

The lease itself, two copies of which had been filed, one as ex. 1 and one as ex. 55, bears the same date, March 27, 1962. The learned trial judge found, upon the evidence, that exs. 1 and 25 were executed at the same time and that ex. 25 was intended to be part of the contract holding that the two exhibits must be read together as forming one contract. That finding was accepted in the Court of Appeal for Manitoba and I propose to adopt the finding in these reasons. It might be added that the same is in exact accordance with para. 7 of the Proposal, ex. 25, which reads:

> 7. The Company will enter into a lease with Grant Park Plaza Limited (hereinafter called the "Lessor") in the form to be attached and executed by the Lessor and the Company and the said lease together with this letter when executed by us and accepted by you and the Lessor will constitute but one agreement between the parties.

It should be noted that the lease is on the printed form supplied by the solicitors for Grant Park Plaza Limited and, apart from schedules, it is thirteen pages in length. Many of those pages have extensions pasted to them and every page but one bears alterations, strike-outs and additions. It is quite apparent and in accordance with the evidence that the lease resulted from intense negotiations between not only the representatives of the parties but their solicitors. The counsel for the appellant, when the lease was produced at trial, upon the Court putting to him the query, "Did you draft the lease?", replied, "Our firm drafted it". Despite the fact the lease is on a form from Aronovitch & Leipsic Limited, under these circumstances I am of the opinion that there is no basis for the argument advanced by counsel for the appellant in this Court based upon the maxim *contra proferentem*. The mere fact that the document was originally first typed on a form provided by the solicitor for one of the parties in the light of the circumstances which occurred thereafter and up to its execution is not sufficient to bring the transaction within the class of cases where a contract is presented by one person for execution by another.

Grant Park Plaza Limited encountered difficulties in obtaining leases for the various stores which were to line each side of an enclosed mall under the original concept for the shopping centre and although certain work was carried out in the construction of the shopping centre other than

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the building intended for occupancy by the appellant, due to financial stringency the respondent after construction of the building leased to the appellant and certain other buildings, particularly a food store and a service station, ceased work, levelled the site of the enclosed mall and its adjoining stores, and cut off at ground level the pilings which had been driven for such construction. Matters stood in this fashion until the year 1964. On April 22, 1964, Mr. Aronovitch, as President of Aronovitch & Leipsic Ltd., which is described as managing agent for the respondent Grant Park Plaza Limited, wrote to the plaintiff as follows:

> We are pleased to advise that we are now completing negotiations for further development of Grant Park Plaza Shopping Centre. This additional development will include a second food store; 53,000 square feet of closed mall, made up of approximately thirty allied stores; and a department store having an area of approximately 150,000 square feet.
>
> We are quite confident that the increased number of retail stores, with their added variety of merchandise, will generate additional sales. The increased size of the centre should draw from a greater trading area. It is anticipated that these new additions will be completed before August, 1965.

The appellant immediately objected to the proposed lease to the F. W. Woolworth Company for a "Woolco Store" and upon the respondent's refusing to desist, commenced the present action. Almost at the same time, the respondent Grant Park Plaza Limited transferred to its fellow respondent Grant Park Eastern Limited part of the land in the proposed shopping centre on which it proposed that the department store should be constructed for lease to the F. W. Woolworth Company.

In 1962, the respondent Grant Park Plaza Limited had already transferred to Grant Park Western Limited a portion of the land which included that which was the subject of the lease to the appellant, and on November 21, 1962, by a document produced at trial as ex. 56, the respondent Grant Park Western Limited and the appellant had agreed as to the term of the lease of the premises in question, *i.e.*, 25 years, and as to the amount of rental, and the appellant had acknowledged that it had received notice of the assignment of the lease to the respondent Grant Park Western Limited, and accepted the latter as its lessor.

The appellant contends that by the agreement between the parties the leasing of any space in a building within the

proposed shopping centre to any department store or discount store is prohibited. The appellant particularly relies on para. 5 of the Proposal, ex. 25, which reads as follows:

> 5. We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown on the layout in the plans submitted by Waisman & Ross dated November 22, 1961.

and submits that under that paragraph the respondent Grant Park Plaza Limited was compelled to construct a shopping centre approximately in accordance with the plans referred to which shopping centre envisaged the store which was constructed for the appellant and occupied by it under the lease, adjoined on the west by a building to be occupied as a food store, on the east by an enclosed mall into which were to face a large number of smaller stores referred to throughout the evidence as "allied stores", and further to the east of them again another food store. I find it most significant that the lease bears as section 2.06 a typed section which has been pasted over the original printed section. That printed section as it appeared in the unaltered original document read as follows:

> With all due diligence to commence and complete the construction *of the shopping centre* and the leased premises in accordance with the schedule.

(The italicizing is my own.)

On the other hand, the opening words of s. 2.06 as they appear on the lease as executed and with the original clause replaced by another pasted over it are "with all due diligence to commence and complete the construction of the leased premises in accordance with the schedule". I am at a loss to understand how in the light of these circumstances, that is, the careful amendment of a very broad clause requiring completion of the whole shopping centre to an exact clause requiring completion of the leased premises, there can be any argument that the respondent Grant Park Western Limited was under any duty to complete the buildings of the shopping centre other than that the subject of the lease. I am in complete agreement with the learned trial judge when he notes that para. 5 of the Proposal by its very words was only an understanding of what was intended, and what is more, by the use of such words as "approximately" and "layout" the outline of what was intended was, to put it conservatively, very

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tentative. It should, moreover, be noted that the plan referred to in the said para. 5 of the Proposal which was dated November 22, 1961, and produced at trial as ex. 26, places the building to be occupied by the appellant and the surrounding buildings a considerable distance further to the east than the appellant's building was actually constructed, and that this alteration is again reflected in the plan attached to the lease as schedule 2. This plan was dated April 16, 1962, some 19 days after the lease was actually executed but it is signed by the appellant and the respondent Grant Park Plaza Limited. Again, it is, in my view, most significant as it shows on the east side of the proposed shopping centre a large area upon which the words "future expansion" appear and the area of the enclosed mall with its allied stores is designated as "proposed Stage 2".

For all of these reasons, it would seem that the learned trial judge, with respect, was justified in his holding that there was no covenant by the respondent, Grant Park Western Ltd., to build the shopping centre other than that building which was constructed for and leased to the appellant.

In the Court of Appeal for Manitoba, Dickson J., *ad hoc*, said:

> Smith J. considered paragraph 5 of the Proposal to be nothing more than an expression of the parties' intention, and not a binding obligation of Grant Park Plaza Limited. It is a general rule of construction that terms of a written instrument which import that the parties have agreed upon certain things being done have the same effect as express promises. For this reason I think that Grant Park Plaza Limited did become obligated to construct the shopping centre approximately as shown on the layout in the plans attached to the lease. But I hasten to add this: Paragraph 5 must not be considered in isolation, and when read in the context of the lease and of the circumstances obtaining at the time the lease was entered into it is apparent that great latitude was reserved to Grant Park Plaza Limited in the development of the shopping centre.

I am of the opinion that the learned justice in appeal failed to appreciate that the learned trial judge had found that the parties had not "agreed upon certain things", *i.e.*, the completion of the shopping centre in accordance with the plan (ex. 26), and therefore the recital of an understanding was not a recital of matters upon which the parties had agreed. Holding this view, I am not required, therefore, to consider whether the section in the lease

relieving the respondent Grant Park Plaza Ltd. from construction in case it met financial difficulties resulted in a permanent or only temporary release.

I also note in the lease other sections which have been referred to both by the learned trial judge and in the majority judgment of the Court of Appeal for Manitoba, and which further emphasize the latitude granted to the respondent Grant Park Plaza Ltd., particularly s. 8.04:

> NOTWITHSTANDING anything hereinbefore contained, the Lessor may cause other buildings to be constructed within the boundaries of the lands or to retain on the lands any buildings presently located thereon,
>
> PROVIDED that the Lessor shall provide on the lands a parking area not less in extent than three (3) times the aggregate of the following areas:

Section 8.06 reserves to the landlord the right to relocate the auto parking areas and other common areas. The covered mall, which according to the last proposed plans will run from a food store adjoining the appellant's building to the east easterly to the proposed Woolco Store and will be considerably shorter than originally planned, is certainly one of the "common areas".

The appellant relies particularly on para. 1.11. Again as to this section we have an example of the alteration of the original lease. That term originally read:

> Section 1.11—Competitive Use
>
> AND THAT during the term hereof the Lessee shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder, or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the Shopping Centre unless in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor.

That section was amended partly in type and partly in handwriting. The typed amendments were these: the insertion of the word "firstly" after the words "Shopping Centre unless" and before the words "in any instance" in the third line from the end of the original printed section, and by the addition at the end of the printed section of the words "and secondly, in any instance where the business

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enterprise or undertaking occupies store premises self-contained, not exceeding in gross area 5,000 square feet". The hand printed amendment was by the insertion after the words "hereof the Lessee" of the words "or Lessor" in s. 1 of the printed form, so that the section after its amendment read as follows:

> AND THAT during the term hereof the Lessee *or Lessor* shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the shopping centre unless *firstly*; in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor, *and, secondly, in any instance where the business enterprise or undertaking occupies store premises, self-contained, not exceeding in gross area, 5,000 square feet.*

(I have italicized the amendments.)

I am in agreement with the learned trial judge and with the majority judgment in the Court of Appeal that the clause prior to its alteration was an ordinary covenant by the lessee and by no one else which prohibited the lessee going outside the shopping centre to establish or assist in any way another enterprise which would compete with its enterprise inside the shopping centre and therefore reduce the revenue accruing to the lessor from the percentage lease. Much debate both below and in this Court occurred as to the proper interpretation of the section as so amended. I am of the opinion that I need not attempt to resolve the problems of whether the amendments did work out a mutual covenant and if so the extent thereof, as I am of the opinion that the question may be solved very simply.

In my view, the section has no application to the present situation for two reasons: Firstly, it applies only outside the shopping centre. The words " ... if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of 5,000 feet from any part of the shopping centre..." in their natural meaning could only apply outside the shopping centre and have no application to two sites within the

same shopping centre, and I know of no doctrine of law which would require, in the interpretation of the section, the insertion of a revised covenant to apply both within and without the limits of the shopping centre: See *Toronto Railway Company v. City of Toronto*[1], *per* Sedgewick J. at p. 434:

> In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.

Secondly, I am of the opinion that the proposed construction of a building for the Woolco Store and the lease thereof to the F. W. Woolworth Company is not one of the things prohibited by the section if the respondents are bound by it. It prohibits the person, to use the most indefinite word, as an "owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt or to furnish any financial aid or other support or assistance of any nature whatsoever". None of those words are appropriate to the position of the respondent who would be acting as a landlord for the proposed Woolco Store. As Romer J. said in *Ward v. Patterson*[2], if a party had wished to provide against such a course of conduct then it was perfectly easy for it to have done so. When parties, advised by their solicitors, as in the present case, amend a printed clause by the insertion of additional words, then every effort must be made to give meaning to those words, but there is no

[1] (1906), 37 S.C.R. 430.

[2] [1929] 2 Ch. 396.

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requirement that the clause so amended be extended to import covenants which there is no indication in the material or in the circumstances, as revealed in the evidence, the parties ever contemplated.

The appellant also makes the submission that the Proposal which it made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implies a negative covenant of the respondent not to depart from that scheme. The cases, of course, of such building schemes and the enforcement of such so-called negative covenants are numerous and it is quite plain that the common grantor who had required the grantee to enter into restrictive covenants may be enjoined from the utilization of the balance of his lands in a fashion contrary to that envisaged by such restrictive covenants despite the fact that the grantor himself has not entered into like covenants with his grantee. It is, however, significant that in such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and in my view that was not at all the situation contemplated in the present case.

On the other hand, the evidence would indicate that it was intended that each of the grantees, for instance, all these proposed allied stores, would be required to enter into certain covenants as to their utilization of the premises which would vary in each case in accordance with the type of operation which such tenants intended to pursue. One would be under a covenant to sell shoes and other small leather goods such as purses, while another would be under a covenant to sell ladies' wear which might include ladies' shoes, another under a covenant to sell men's wear which might include some men's shoes, and others under covenants to sell only certain wares which would almost inevitably be amongst the stock carried by the appellant. This is not a building scheme as dealt with in the many cases upon that subject.

The appellant argues that to permit the respondent to lease any part of the shopping centre to a discount depart-

ment store the activities of which would be competitive with the appellant's business would be in derogation of its grant.

In *Browne v. Flower*[1], at p. 227 it is said:

> It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which might prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. *After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort.*

(The italicizing is my own.)

And in *Aldin v. Latimer Clark, Muirhead & Co.*[2], Stirling J. said at p. 444:

> The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on...

In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F. W. Woolworth Company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from *Browne v. Flower, supra,* "after all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it

[1] [1911] 1 Ch. 219.

[2] [1894] 2 Ch. 437.

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a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise.

The appellant further submits that the respondents are estopped by the conduct of the respondent Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store. An amendment of the statement of claim to present this argument was permitted by the judgment of the Court of Appeal for Manitoba. The said order permitted the amendment of the statement of claim by the addition of para. 9a which read as follows:

> 9(a). The Plaintiff repeats the allegations in paragraphs 5, 7, 8 and 9 hereof and says that the Plaintiff altered its position, relying upon such representations made orally by the President of the Defendant Grant Park on its behalf and in writing by the said plans prepared by the said Defendant and exhibited to the Plaintiff on its behalf, and entered into the lease referred to in paragraph 11 hereof and the Plaintiff says that the said Defendants are estopped by their conduct in the premises from asserting as against the Plaintiff the right to lease any part of the said shopping centre to a discount or other department store, the activities of which are competitive with the Plaintiff in the said location.

It would seem that the findings of fact made by the learned trial judge affirmed by the majority judgment of the Court of Appeal of Manitoba have held that the appellant failed to prove the allegations made in paras. 5, 7, 8 and 9 which it repeated as the basis of its claim for estoppel. I have already indicated that there was no covenant by the respondent Grant Park Plaza Ltd. to build the shopping centre other than the one building to be leased to the appellant. This in itself would be sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence: *Citizens' Bank of Louisiana v. First National Bank of New Orleans*[1], *per* Lord Selborne L.C. at pp. 360-361, where the Lord Chancellor quoted Lord Cranworth in *Jorden v. Money*[2] at pp. 214-215:

> I think that that doctrine does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not.

[1] (1873), L.R. 6 H.L. 352. [2] (1854), 5 H.L. Cas. 185.

In *Maddison v. Alderson*[1], Lord Selborne L.C. said at p. 473:

> I have always understood it to have been decided in *Jorden v. Money* that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futoro,* which, if binding at all, must be binding as contracts...

I do not regard *Marquess of Salisbury v. Gilmore*[2] as being an authority for the proposition that representations of intention as distinguished from representations of existing facts can found an estoppel. In my opinion, that case turns on the interpretation of the provisions of s. 18 of the United Kingdom *Landlord and Tenant Act, 1927*. MacKinnon L.J., at pp. 51-2, when dealing with estoppel finds that the estoppel alleged was not one of intention although framed in those words, but was a representation of fact.

The representations alleged here were all representations of intentions to act in a certain way in the future which the trial court had found to be nothing more and which the majority judgment of the Court of Appeal has found to be only a very rough guide to the probable development of the centre.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Thorvaldson, Eggertson, Saunders & Mauro, Winnipeg.*

*Solicitors for the defendants, respondents: Tallin, Kristjansson, Parker, Martin & Mercury, Winnipeg.*

[1] (1883), 8 App. Cas. 467.

[2] [1942] 2 K.B. 38.

# Tab 11

1990 CarswellBC 99
British Columbia Court of Appeal

Cusac Industries Ltd. v. Erickson Gold Mining Corp.

1990 CarswellBC 99, [1990] B.C.W.L.D. 951, [1990] C.L.D. 482, 20 A.C.W.S. (3d) 1074, 45 B.C.L.R. (2d) 347

# CUSAC INDUSTRIES LTD. v. ERICKSON GOLD MINING CORP.

Anderson, Proudfoot and Hinds JJ.A.

Heard: March 1 and 2, 1990
Judgment: April 3, 1990
Docket: Vancouver No. CA010094

Counsel: *M.P. Carroll* and *G.F. Gregory*, for appellant.
*B. Williams, Q.C.*, and *O.W. Ilnyckyj*, for respondent.

Subject: Contracts; Natural Resources; Property

**Headnote**

Estoppel --- Estoppel in pais — Estoppel by conduct — Standing by and silence (where positive duty to speak)

Mines and Minerals --- Ownership and acquisition of mineral rights — Options — Extent of rights under option

Energy and natural resources — Mining — Mining contracts — Option agreements — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.

Contracts — Interpretation — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.

Estoppel — Estoppel by conduct or representation — Silence — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.

The plaintiff granted the defendant an option to acquire a 100 per cent interest in the plaintiff's mineral property which the defendant agreed to develop. The option could be exercised either when the defendant commenced commercial production or on payment of four annual $100,000 instalments and a specified expenditure on the property. Under the "commercial production method", net profits were to be split and commercial production was deemed to commence after 12,000 tons of ore had been milled. The defendant made two instalment payments, then after 12,000 tons of particularly rich ore had been removed, gave notice that it was exercising its option under the commercial production method. The plaintiff claimed entitlement to the $2,274,096 worth of mineral that had been extracted from the first 12,000 tons. The defendant contended that under the contract the division of profits applied to all production, not just commercial production. The plaintiff brought an action and recovered judgment for $2,274,096. The defendant appealed.

**Held:**

Appeal dismissed.

The terms of the agreement were clear and unambiguous. Division of net profits would commence once commercial production had been reached. By the terms of the agreement, that would occur the day after 12,000 tons had been milled. Moreover, the division of net profits pertained only to the net profits derived from commercial production. The defendant was wrong in interpreting the contract as providing that profits from "production" rather than "commercial production" were to be divided. Although the plaintiff may have been aware of the defendant's erroneous interpretation from an early date, it had no duty to inform the defendant that its interpretation was wrong. Accordingly the plaintiff was not estopped from asserting its claim based on a correct interpretation.

**Table of Authorities**

**Cases considered:**

*Litwin Const. (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88, (sub nom. *Litwin Const. (1973) Ltd. v. Pan)* 52 D.L.R. (4th) 459 (C.A.) — *distinguished*

*Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248, affirmed 97 D.L.R. (3d) 685 (Sask. C.A.) — *applied*

Appeal from judgment interpreting gold mining option agreement and granting judgment for $2,274,096.

**The judgment of the court was delivered by *Hinds J.A.*:**

1 This appeal raises two main issues, first, the proper construction of a gold mining option agreement, second, the applicability of a defence based upon estoppel.

2 The plaintiff (respondent) Cusac Industries Ltd. ("Cusac") held mineral claims in northern British Columbia. Between 1977 and 1984, it spent almost $3 million on the exploration, development and administration of those claims. Cusac was a relatively small mining company. It needed a larger company to develop the claims to their full potential. After lengthy negotiations it

 

entered into an option agreement ("the agreement") dated 22nd November 1984, with the defendant (appellant) Erickson Gold Mining Corp. ("Erickson"). The latter company was larger than Cusac and held numerous mineral claims in the same area as Cusac's claims, and it operated a mill in the general area of the claims.

3 The agreement was drafted by the in-house solicitor of Erickson and was reviewed by a solicitor experienced in mining law retained by Erickson. It was also reviewed by a solicitor retained by Cusac.

4 The agreement granted to Erickson an option to acquire a 100 per cent interest in the "property", which term was defined in the agreement to mean the Cusac mineral claims. The option could be exercised in one of two ways. First, by payment by Erickson to Cusac of four annual instalments of $100,000 each and by the expenditure by Erickson on the property of $1,225,000 within four years of the date of the agreement. Second, upon Erickson commencing "commercial production" upon the property. The term "commercial production" was defined in the agreement. The former method was referred to as the "payment/work expenditure method"; the latter was referred to as the "commercial production method". Erickson had the choice of which method to use to exercise the option.

5 The agreement further provided that on the occurrence of commercial production, Erickson would pay Cusac 40 per cent of the net profits from commercial production from the property until $3 million had been paid and thereafter it would pay 30 per cent of the net profits to Cusac.

6 Pursuant to the agreement, Erickson entered upon the property and carried out development work. It made the first two instalments of $100,000 each. In the course of the development work, Erickson discovered two veins unexpectedly rich in gold content. It decided to mine those veins by an underground rather than by a surface method.

7 On 1st July 1986, Erickson commenced production on the property. Ore was removed and was milled. By a letter, dated 2nd October 1986, Erickson sent Cusac an accounting summary for the period extending from 1st July to 31st August 1986. The summary confirmed the suspicion held since approximately 1st July 1986, by Guilford H. Brett, the directing mind of Cusac, that Erickson was intending to exercise the option to acquire the 100 per cent interest in the property by means of the "commercial production method". It was also apparent from that statement, and from a further statement sent on 23rd October 1986, covering the period from 1st September to 30th September 1986, that Erickson considered the net profits derived from the first 12,000 tons of ore should be split 40 per cent to Cusac and 60 per cent to Erickson.

8 On 7th November 1986 Cusac wrote to Erickson and advised that it disagreed with Erickson's interpretation of the agreement. Cusac maintained that it alone was entitled to the first 12,000 tons of ore removed from the property and subsequently milled, and that the division of the net profits did not occur until after "commercial production" had commenced.

 

9 By a statutory declaration sworn on 14th November 1986, and forwarded to Cusac, Erickson formally notified Cusac that it had exercised the option by the "commercial production method". As of that date, the cash payment of $100,000 to be made on 22nd November 1986 and 22nd November 1987, had not been paid — they were not yet due. It was therefore clear that Erickson had not exercised the option by the "payment/work expenditure method".

10 By the date of trial, the parties had agreed that $2,274,096 represented the amount payable to Cusac for the first 12,000 tons of ore produced and milled if its interpretation of the agreement was found to be correct.

11 The trial judge construed the terms of the agreement in a manner favourable to Cusac. He rejected the defence of estoppel advanced by Erickson. He granted judgment for $2,274,096 plus prejudgment interest. Erickson appealed that decision.

12 Consideration will be given first to the submission that the trial judge erred in his interpretation of the terms of the agreement. That will involve a consideration of some of the more important paragraphs contained in the agreement. It was a sophisticated contract containing 32 paragraphs and 5 schedules, extending in all to approximately 28 pages.

13 Paragraph 1(a) to (h) dealt with details of the "payment/work expenditure method" by which Erickson could exercise the option to acquire a 100 per cent interest in the property. It dealt with the four annual payments of $100,000 and the expenditure of $1,224,000 on development work on the property, to which reference has earlier been made.

14 Paragraph 5 provided:

> 5. Upon completion by Erickson of the conditions set forth in Paragraph 1 or upon Erickson commencing commercial production on the Property, whichever occurs first, a 100% right, title and interest in and to the Property shall vest in Erickson free and clear of all charges, encumbrances and claims, save and except for the obligations of Erickson under Paragraph 8 and Cusac shall deliver instructions to the Escrow Holder to deliver the escrow document referred to in Schedule "D" hereof to Erickson; *Commercial production shall be deemed to have commenced on the first day after Twelve Thousand (12,000) tons of ore from the Property have been milled.* Upon the commencement of commercial production Erickson's obligation to make the expenditures required pursuant to sub-paragraphs 1(d), (f) and (h) shall cease and the amount of the payments required to be made by it pursuant to sub-paragraphs 1(e) and (g) shall be reduced by the amount of the net profits from commercial production payable to Cusac in accordance with Paragraph 8 in the year immediately preceding the date that the payment is to be made. [emphasis added]

15 Paragraph 7 provided:

7. During the currency of this Agreement, Erickson, its servants, agents and independent contractors, shall have the exclusive right to explore, develop and put the Property into *production* which right shall include but not be limited to bringing and erecting buildings, plant, machinery and equipment upon the Property. [emphasis added]

16 Paragraph 8(a) provided:

8.(a) *If and when commercial production commences*, Erickson will pay to Cusac 40% of all net profits from commercial production from the Property calculated as set forth in Schedule "B" hereto until the sum of Three Million Dollars ($3,000,000) has been paid. Upon payment of Three Million Dollars ($3,000,000) Erickson will pay Cusac 30% of all net profits from commercial production from the Property calculated as aforesaid. [emphasis added]

17 Schedule "B", para 1. stated:

1. The "Net Profits" *derived from commercial production from the Property (as defined in the Agreement)* for any calendar year shall mean the Net Revenue, as defined below:

"Net Revenue" shall mean the gross receipts obtained from the production and sale of ore and concentrate from the Property provided that in the case of gold and silver the Net Revenue shall be calculated as being the gross receipts upon sale to a refinery or smelter, or, if the product is to be tolled the value of the product using the London morning fix for gold on the day the gold is received at the refinery times the actual fine gold shipped in troy ounces and the value of silver as quoted by Handy and Harman on the day of receipt at the refinery times the actual fine silver shipped in troy ounces.

**Less:**

All costs and expenses whatsoever incurred by Erickson in conducting exploration and development work on the Property, in putting the Property into production, carrying on production operations on the Property and marketing the ores and concentrates produced from the Property including reasonably prorated capital expenditures and further including, without restricting the generality of the foregoing, the items listed below, but not including the cash payments to be made to Cusac pursuant to the provisions of subparagraphs 1.(a) and (c) of the Agreement. [emphasis added]

18 It is noted that para. 5 provided that Erickson could exercise the option by means of the "payment/work expenditure method" or the "commercial production method". "Commercial production" was defined in para. 5.

19 The wording of para. 8(a) is significant. It was only "if and when commercial production commences ... " that 40 per cent of the net profits from commercial production from the property

 

were to be paid to Cusac. Moreover, it referred to 40 per cent of the net profits from *commercial production* from the property not merely *production*. The distinction between those terms is demonstrated by reference to para. 7 where the word "production" appeared and not the words "commercial production".

20 Paragraph 8(a) stipulated that the net profits were to be "calculated as set forth in Schedule B". The important portion of Sched. "B" is repeated:

> The "Net Profits" *derived from commercial production from the Property (as defined in the Agreement)* for any calendar year shall mean the Net Revenue, as defined below:
>
> "Net Revenue" shall mean the gross receipts obtained from the *production* and sale of ore and concentrate from the Property ... [emphasis added]

It was submitted on behalf of Erickson that the use of the word "production" in the above paragraph indicated that the division of net profits applied to *all* production whether or not it was "commercial production". That submission cannot prevail. The opening words of Sched. "B" make it clear that it pertains to net profits from commercial production. It was unnecessary to include the word "commercial" in conjunction with the word "production" in the second paragraph of Sched. "B". After commercial production had commenced there was no other type of production involved on the property.

21 The terms of the agreement are clear and unambiguous. Division of the net profits would commence once commercial production had been reached. By the terms of para. 5, that would occur the day after 12,000 tons of ore from the property had been milled. Moreover, the division of net profits pertained only to the net profits derived from commercial production.

22 Until Erickson exercised the option to acquire the property, it had no title thereto. It had no title to any ore removed therefrom. As Erickson exercised the option by the "commercial production method", title to the first 12,000 tons of ore removed and milled remained in Cusac.

23 The trial judge did not err in his interpretation of the agreement. The appeal fails on that ground.

24 The second major issue raised on the appeal involves the defence of estoppel. Counsel for Erickson submitted that the trial judge erred in not upholding Erickson's defence based on that principle.

25 The case for the appellant on this issue, assuming that all findings of fact are made in its favour, is as follows:

26 (1) Brett (Cusac) was aware in the summer of 1986 or earlier that Erickson was going into "commercial production".

27 (2) Brett was aware, according to his interpretation of the agreement, that if Erickson exercised its option by going into "commercial production", the first 12,000 tons of ore would belong to Cusac.

28 (3) Brett did not inform Erickson of his interpretation of the agreement because he knew that if he alerted Erickson to his interpretation of the agreement Erickson would probably exercise its option under cl. 1 of the agreement, the "payment/work expenditure method", and thereby deprive Cusac of the first 12,000 tons of ore.

29 Counsel for Erickson submits that the failure of Brett to speak in the above described circumstances constituted estoppel within the meaning of *Litwin Const. (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88, (sub nom. *Litwin Const. (1973) Ltd. v. Pan)* 52 D.L.R. (4th) 459 (C.A.). He was unable to cite any cases supporting his position. Counsel for Cusac referred us to *Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248, affirmed 97 D.L.R. (3d) 685. In that case, Bayda J. (as he then was) said at p. 257:

> I find that the defendants were not *innocently* and in ignorance conducting themselves with reference to the processed gravel in a manner inconsistent with the plaintiff's title. The defendants were parties to the agreement and in full possession of the facts. In these circumstances there was no legal duty on the part of the plaintiff to inform the defendants of their wrong interpretation of that agreement. It follows that the defence of estoppel by silence or inaction is unavailable to the defendants.

While the Court of Appeal affirmed the judgment of Bayda J., they made no reference to the estoppel issue.

30 All the cases, including *Litwin*, refer to the failure of the party sought to be estopped from knowingly, or unknowingly, asserting its legal rights. Thus in all the cases, where the plea of estoppel has succeeded, the party sought to be estopped, has "lulled the other party to sleep" by failing to assert a legal right. There is nothing in any of the cases which suggests that there is any duty to tell the other party that, in the view of the party sought to be estopped, the other party has wrongly interpreted the contract. There are, of course, cases where both parties have wrongly interpreted the contract. In those cases, however, the plea of estoppel has succeeded because the party sought to be estopped has unknowingly failed to assert its legal rights.

31 In commercial cases where both parties are of equal bargaining strength, there is no compelling reason why the modern doctrine of estoppel, as expressed in *Litwin*, should be extended to cases where the party sought to be estopped has failed to advise the other party that in its opinion the other party has misinterpreted the contract.

32 The law of contract is designed to create certainty in the market place and to accede to the argument of counsel for Erickson would be to create uncertainty where none now exists. Accordingly, the modern doctrine of estoppel is applicable only to cases where the party sought to be estopped has "lulled the other party to sleep" by failing to assert its legal rights.

33 In the case on appeal there is no evidence that Cusac induced Erickson to act to its detriment by failing to assert its legal rights. Failure of Cusac to express its interpretation of the agreement did not amount to a failure to assert its legal rights.

34 For the foregoing reasons, I would dismiss the appeal with costs.

*Appeal dismissed.*

Court File No. CV-12-9545-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding Commenced at Toronto

# SUPPLEMENTARY BRIEF OF AUTHORITIES


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