Court File No. CV-15-11080-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THIRD EYE CAPITAL CORPORATION

Applicant

and

RESSOURCES DIANOR INC. / DIANOR RESOURCES INC.

Respondent

BRIEF OF AUTHORITIES OF THIRD EYE CAPITAL CORPORATION (ON MOTIONS OF RECEIVER AND LEADBETTER RETURNABLE SEPTEMBER 27, 2016)

September 21, 2016

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INDEX

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INDEX

Tab	Authority
1	*Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No 4804, 51 OR (3d) 641, (Ont CA).
2	*Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137, 4 OR (3d) 1, (Ont CA).
3	Walter M Traub, *Falconbridge on Mortgages*, 5th ed (Toronto: Canada Law Book, 2015) 35:130.
4	*Practice in Mortgage Remedies* (Toronto: Thomson Reuters, 2015) 33-30.4.
5	*Ostrander v Niagara Helicopters Ltd et al* (1973), 1 OR (2d) 281, 40 DLR (3d) 161.
6	*Regal Constellation Hotel Ltd, Re,* [2004] OJ No 2744, 71 OR (3d) 355 (Ont CA).
7	*ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, [2008] OJ No 2265, 168 ACWS (3d) 244, aff'd 2008 ONCA 587.
8	*Fiber Connections Inc v SVCM Capital Ltd*, [2005] OJ No 3899, 5 BLR (4th) 271, leave to appeal to the CA granted, 198 OAC 27.
9	*Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7, SCJ No 70.
10	*Anglo Pacific Group PLC v Ernst & Young Inc.*, 2013 QCCA 1323, 237 AVWS (3d) 28.
11	*Vandergrift v Coseka Resources Ltd*, [1989] AWLD 528, 15 ACWS (3d) 36 (Alta QB).

12	*St. Andrew Goldfields Ltd v Newmont Canada Limited*, [2009] OJ No 3266, 179 ACWS (3d) 826, aff'd 2011 ONCA 377.
13	*Vanguard Petroleums Ltd v Vermont Oil & Gas Ltd*, [1977] 1 ACWS 172s, 72 DLR (3d) 734 (Alta SC).
14	*Ally Credit Canada Ltd v All-Ontario Towing and Storage Inc*, 2011 CarswellOnt 18837.
15	*1258917 Ontario Inc v Daimler Truck Financial*, 2012 ONSC 2522, 292 OAC 136.
16	*Coniagas Mines Ltd v Cobalt (Town)*, 1910 OWR 761, 20 OLR 622 (Ont Ca).
17	*Fuller v. Howell*, [1942] 1 D.L.R. 462.
18	*Minister of Natural Resources v. Malouf* (2010), MLC File No. MAA 022-09
19	*Nova Scotia Business Capital Corp. v. Coxhealth Gold Holdings Ltd.* (1994), 119 D.L.R. (4^{th}) 518.
20	Canadian Encyclopedic Digest, Mines and Minerals (Ontario), X. 3 Mining and Operations Agreements, Royalties.

Tab 1

2000 CarswellOnt 4836
Ontario Court of Appeal

Chippewas of Sarnia Band v. Canada (Attorney General)

2000 CarswellOnt 4836, [2000] O.J. No. 4804, [2001] 1 C.N.L.R. 56, 101 A.C.W.S. (3d) 859, 139 O.A.C. 201, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1, 51 O.R. (3d) 641

The Chippewas of Sarnia Band (Plaintiff / Appellant / Respondent) and Attorney General of Canada, Her Majesty the Queen In Right of Ontario and Canadian National Railway Company, Dow Chemical Canada Inc., the Corporation of the City of Sarnia, Amoco Canada Resources Ltd., Amoco Canada Petroleum Company Ltd., Ontario Hydro Networks Company Inc., Union Gas Limited, Interprovincial Pipe Line Inc., the Bank of Montreal, the Toronto-Dominion Bank and Canada Trustco Mortgage Company individually and as class representatives (Defendants / Respondents / Appellants / Cross-Appellants)

Osborne A.C.J.O., Finlayson, Doherty, Charron, Sharpe JJ.A.

Heard: June 19-29, 2000
Judgment: December 21, 2000
Docket: CA C32170, C32188, C32202

Proceedings: reversing in part (April 30, 1999), Doc. 95-CU-92484 (Ont. S.C.J.)

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Jeff G. Cowan, for Amoco Canada Resources Ltd. and Amoco Canada Petroleum Company Ltd.
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Brian A. Crane, Q.C., for Interprovincial Pipe Line Inc.
M. Celeste McKay, Alan Pratt, for Intervener, Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario
Paul Williams, for Intervener, Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames et al.

Subject: Public; Property; Civil Practice and Procedure

APPEALS by band and Crown from judgment reported at 1999 CarswellOnt 1244, 40 R.P.R. (3d) 49 (Ont. S.C.J.), granting in part property owners' motion for summary judgment dismissing band's claim for possession of land, and granting in part band's cross-motion for summary judgment declaring patent transferring reserve lands was void; CROSS-APPEAL by owner in band's appeal.

***Per curiam*:**

I. Overview of the Proceedings

A. The Chippewas' Claim

1 The Chippewas of Sarnia Band ("the Chippewas") claim ownership of a parcel of land located in and around the City of Sarnia ("the disputed lands"). Prior to 1827, the disputed lands were part of a vast tract of land over which the Chippewa Nation [1] had dominion. By 1827, the Chippewas had surrendered almost all of that territory to the Crown. They had, however, retained four reserves, including one referred to as the Upper Reserve located on the St. Clair River near present-day Sarnia. The ancestors of the Chippewas of Sarnia lived on the Upper Reserve. The Upper Reserve originally occupied 10,280 acres. The disputed lands are the 2,540 acres located at the rear or back of the reserve furthest from the St. Clair River, and are presently occupied by over 2,000 different individuals, organizations, and businesses.

2 In November 1839, Malcolm Cameron, a politician and land speculator, purported to purchase the disputed lands from the Chippewas. The lands were eventually conveyed to him by Crown patent in 1853 ("the Cameron patent"). The present occupants of the disputed lands trace their title to the Cameron patent. The Chippewas claim that their ancestors never surrendered the disputed lands and that their interest in the land is the same now as it was in 1827.

3 The Chippewas started this action in 1995. In essence, they seek declaratory relief recognizing their right to the disputed lands and damages for trespass and breach of fiduciary duty. If the Chippewas obtain the declaratory relief claimed, they would be entitled to possession of the land, although they have made it clear that they are ready and willing to negotiate with the federal and provincial governments and do not seek the wholesale eviction of the present occupiers of the property.

4 The individual defendants, other than the Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), occupy parts of the disputed land. They also represent the defendant class certified by Adams J. in 1996 under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In this decision we refer to them collectively as the landowners.

B. The Motions for Summary Judgment

5 Canada brought a motion for summary judgment asking that the parts of the Chippewas' claim seeking declaratory relief be dismissed. The landowners also brought a motion for summary judgment seeking the dismissal of the action against them on the grounds advanced by Canada in its motion and on other grounds applicable only to the individual defendants.

6 Ontario supported both motions.

7 The Chippewas responded with a cross-motion seeking summary judgment against all defendants on the parts of the claim seeking a declaration as to the Chippewas' rights to the disputed lands.

8 None of the motions for summary judgment touched the parts of the claim seeking damages against Canada and Ontario. The trial of those claims awaits the result of these proceedings.

9 The motions judge, Campbell J.:

- dismissed Canada's motion for summary judgment;
- allowed in part the landowners' motion for summary judgment, dismissed the action against them and declared that they held title free and clear of any aboriginal title or treaty right; and
- allowed the Chippewas' motion to the extent that it sought a declaration of invalidity with respect to the letters patent issued to Malcolm Cameron in 1853, but dismissed the Chippewas' motion for a declaration that they continued to enjoy "aboriginal, treaty and constitutional rights" in the disputed lands.

10 The motions judge's main findings were:

• There was no evidence that the Chippewas ever surrendered the disputed lands.

• The sale of the disputed lands by three chiefs of the Chippewas to Malcolm Cameron in 1839 was a private sale without formal surrender and as such was prohibited by common law and by the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 ("*Royal Proclamation*").

• There was no evidence that the Chippewas ever expressed a free, voluntary and fully informed collective intention to release their interest in the lands or to consent to the sale to Cameron.

• The Governor General, Lord Elgin, had no authority to issue a patent for the disputed lands in 1853. Therefore, the patent issued to Cameron was void *ab initio* and of no force and effect.

• The Chippewas' interest in the lands continued to this day, unless extinguished by some constitutionally applicable statute, rule of law, or principle of equity.

• None of the limitations statutes relied upon by the parties operated to extinguish the Chippewas' interests in the lands or to bar the Chippewas' action for recovery of the lands.

• The doctrines of laches, acquiescence and estoppel by election did not bar the Chippewas' action.

• The defence of good faith purchaser for value without notice was a fundamental aspect of the applicable real property regime. This defence could, in appropriate cases, bar an aboriginal claim against an innocent third party purchaser.

• Against ordinary property, the good faith purchaser for value without notice defence operated immediately upon purchase. Such an abrupt application, if applied to land subject to aboriginal title, would ignore the legal priority to be accorded to aboriginal rights and would result in the extinguishment of the Chippewas' title immediately in 1861.

• The competing interests of the Chippewas and the innocent purchasers without notice would best be balanced by allowing the good faith purchaser without notice defence to operate only after sixty years. A sixty-year equitable limitation period would protect aboriginal property interests against immediate extinguishment on sale to a good faith purchaser for value without notice.

• The sixty-year equitable limitation to the claim against the good faith purchaser began on August 26, 1861 and ended on August 26, 1921. As of August 26, 1921, no action had been commenced against any good faith purchaser. Therefore, the defence of good faith purchaser for value without notice operated to extinguish the Chippewas' aboriginal title and treaty rights in the lands on August 26, 1921.

• The aboriginal rights which were extinguished as of August 26, 1921 have crystallized into a damage claim against the Crown.

11 Based on his findings, the motions judge directed that the following order should issue:

(a) Canada's motion to dismiss the Chippewas' claim on the basis that the Cameron patent was valid was dismissed.

(b) The landowners' motion in respect of the validity of the 1853 Cameron patent was also dismissed.

(c) The Chippewas' motion in respect of the invalidity of the Cameron patent was allowed. A declaration was issued to the effect that the patent issued to Malcolm Cameron on August 13, 1853 was void *ab initio* and of no force and effect because there was no lawful surrender. Neither the orders-in-council of March 19, 1840

and June 18, 1840 which approved the sale to Cameron, nor the subsequent letters patent extinguished the Chippewas' unceded, unsurrendered, common law, and aboriginal interests in the lands.

(d) The Chippewas' motion for a declaration that they enjoyed continuing and unextinguished common law, aboriginal, treaty and constitutional rights in the lands was dismissed.

(e) The Chippewas' action for damages against the Crown was permitted to continue.

(f) The motion by the landowners was allowed. The Chippewas' claim against the landowners was dismissed on the basis that the defence of good faith purchaser for value without notice protected the landowners' title and that the application of an equitable limitation period of sixty years worked to extinguish all right, title and interest of the Chippewas in the disputed lands as of August 26, 1921. A declaration was issued to the effect that the present landowners held their title free and clear from any aboriginal title claims.

C. The Appeals and Cross-Appeals

12 The motions judge's decision gave rise to six appeals and cross-appeals, all of which were argued during the last two weeks of June 2000. In particular:

• Canada appealed from the dismissal of its motion for summary judgment, the order dismissing in part the landowners' motion for summary judgment, and the order allowing the Chippewas' motion. Canada sought an order dismissing that part of the Chippewas' claim in which the Chippewas asserted that the Crown had no authority, right or jurisdiction to issue the patent to Malcolm Cameron and a further order dismissing that part of the claim which alleged that the patent was void *ab initio* and unenforceable at law.

• The Chippewas appealed from the orders allowing the landowners' motion for summary judgment and from the dismissal of the Chippewas' cross-motion for summary judgment. They sought an order declaring that they enjoyed continuing and unextinguished common law, statutory, aboriginal, treaty and constitutional rights in the disputed lands. Canada, Ontario and the landowners are respondents on the Chippewas' appeal.

• The landowners cross-appealed in the Chippewas' appeal, seeking:

(a) an order declaring that the letters patent issued to Cameron were valid and created a valid interest in the lands in question;

(b) a declaration that the effect of the patent was to extinguish any aboriginal title or treaty rights in the lands; and

(c) a declaration that any right of action that the Chippewas may have had for recovery or enforcement of any interest in the land was barred by the operation of limitations statutes or by various equitable doctrines.

13 Ontario cross-appealed in the Chippewas' appeal and sought an order granting the landowners' motion for summary judgment and an order dismissing the Chippewas' cross-motion. Ontario contended that the Cameron patent was valid and conveyed the lands to Cameron free of any interest of the Chippewas. Ontario also claimed that the doctrine of good faith purchaser for value without notice extinguished any claim that the Chippewas had from the time of the purchase rather than sixty years after the purchase.

14 On January 27, 2000, the Chippewas moved to quash Ontario's appeal from the dismissal of Canada's motion for summary judgment and Canada's cross-appeal in the Chippewas' appeal. These motions were dismissed. [2]

15 The following representatives of First Nations appeared as interveners on the appeals: Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames, Chief Mary Jane Wardell on behalf of the Ojibways of

Thessalon, Martin Bayer on behalf of the United Chiefs and Councils of Manitoulin and Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario.

16 The appellate proceedings were case-managed by Goudge J.A. who, among other things, determined the order of, and time allocations for, oral argument after consulting with all counsel. It was agreed by all parties that, given the nature of the judgment appealed from, none of the appeals and cross-appeals related to interlocutory orders and that, consequently, the proceedings were properly before this court. We are grateful to Goudge J.A. for his assistance. We are also grateful to counsel, not only for the quality of their oral arguments, but also for their cooperation in adhering to the times allocated for hearing the appeals.

D. Our Decision in a Nutshell

17 In our view, these appeals and cross-appeals give rise to two main issues. First, was there a surrender of the disputed lands by the Chippewas to the Crown? Second, if there was no surrender, what remedies, if any, are the Chippewas entitled to?

18 Although the first issue gave rise to questions that were essentially factual, much of the argument was focussed on whether the surrender provisions in the *Royal Proclamation* had the force of law at the relevant time, and if so, what effect would any failure to comply with these provisions have on the Cameron transaction. The motions judge held that the surrender procedures in the *Royal Proclamation* had the force of law at the relevant time, that these procedures were not followed and that the Chippewas never consented to or affirmed the Cameron transaction. Consequently, the following points were argued before us:

> 1. Did the surrender procedures set out in the *Royal Proclamation* have the force of law at the time of the sale to Cameron in 1839 and the subsequent letters patent in 1853?
>
> 2. Did the Chippewas surrender the disputed lands to the Crown?
>
> 3. If the lands were not surrendered, did the Chippewas nonetheless consent to or affirm the sale to Cameron?

19 The first question has been authoritatively determined by this court in *Ontario (Attorney General) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 (Ont. C.A.), aff'd [1991] 2 S.C.R. 570 (S.C.C.). This court held that the surrender provisions of the *Royal Proclamation* were revoked by the *Quebec Act, 1774*, R.S.C. 1985, App. II, No. 2. The motions judge was bound by this decision and, consequently, he erred in departing from its authority when he determined otherwise. However, we are of the view that, in this case, little turns on whether the surrender provisions of the *Royal Proclamation* had the force of law at the relevant time. Instead, we adopt the view that surrender was necessary as a result of the established protocol between the Crown and First Nations peoples that aboriginal title could be lost only by surrender to the Crown. The precise legal status of the *Royal Proclamation* at the time of the Cameron transaction is therefore of no consequence to our decision.

20 On the second point, we accept the proposition that a surrender required a voluntary, informed, communal decision to give up the land and we agree with the motions judge that the Chippewas never surrendered the disputed lands to the Crown. However, we disagree with a number of the motions judge's findings relating to the Chippewas' participation in the Cameron transaction. This brings us to the third point.

21 In our view, the evidence leads to the inescapable conclusion that, notwithstanding the absence of a surrender, the Chippewas accepted the sale to Cameron. This finding becomes important in our determination of the appropriate remedies.

22 The following points were argued with respect to the remedies sought by the Chippewas:

> 4. Is the Chippewas' claim barred by any statutory limitation periods?

5. In the absence of a surrender, is the Cameron patent void *ab initio* or is the remedy subject to the exercise of the court's discretion?—

6. Do the equitable defences of laches and acquiescence apply to bar the Chippewas' claim to the disputed lands?

7. Does the equitable defence of good faith purchaser for value apply to defeat the Chippewas' claim? If so, was the motions judge correct in finding that the defence of good faith purchaser for value was subject to an equitable sixty-year limitation period before it can operate to extinguish the Chippewas' claim to the land?

8. If the Chippewas enjoy continuing and unextinguished rights in the disputed lands, should this court order that the Crown has a duty to negotiate in good faith with the Chippewas?

23 The motions judge held that the Chippewas' claim was not barred by any statutory limitation period. He held further that in the absence of surrender, the Cameron patent was void *ab initio* and that the defences of laches and acquiescence could not be relied upon. The motions judge concluded, however, that the present occupiers of the land could rely on the doctrine of good faith purchaser without notice subject to a sixty-year "equitable limitation period" which in effect postponed the application of the doctrine.

24 We agree with the motions judge that the Chippewas' claim is not barred by any statutory limitation period. However, we do not agree that the Cameron patent was void *ab initio*. In our view, the patent was valid on its face and continues to have legal effect unless and until a court decides to exercise its discretion to set it aside. We are of the view that the principles governing the availability of the relevant public and private law remedies militate against a court exercising its discretion in this case. Finally, we are of the view that the imposition of a sixty-year "equitable limitation period" is not supportable in law. In the result, we are of the view that the Chippewas have no entitlement to the remedies they seek for the return of the disputed lands and that they are left with their claim in damages against Canada and Ontario.

II. Preliminary Issues

25 Two preliminary issues were raised by the parties. First, the Chippewas sought to introduce fresh evidence on their appeal. Second, Ontario challenged the motions judge's authority to decide the case on motions for summary judgment.

A. Chippewas' Motion to Introduce Fresh Evidence

26 The Chippewas sought to introduce fresh evidence which generally fell into two categories:

(a) new evidence relating to sales of property within the disputed lands that occurred after the decision below; and

(b) further evidence of the circumstances surrounding the sale of Indian lands which was already addressed in the existing record.

27 It was agreed that we would deal with the fresh evidence issue on the basis of counsel's written material. No oral submissions were made.

28 The test for the admission of fresh evidence on appeal is that set out by the Supreme Court of Canada in *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44 (S.C.C.). See also *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). The requirements for the admission of fresh evidence are as follows:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the proceeding.

3. The evidence must be credible in the sense that it is reasonably capable of belief.

4. The evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

29 In our view, the proposed fresh evidence does not meet these requirements. In particular, it is not evidence that if believed could reasonably, when taken with the other evidence, affect the result.

30 The motion to admit fresh evidence is therefore dismissed.

B. The Summary Judgment Issue

31 Ontario submits that the motions judge "significantly overstepped" the narrow role of a motions judge when he dealt with the motions that were brought before him. Ontario asserts that in his 241-page reasons for judgment, the motions judge assessed credibility, weighed evidence, made findings of fact on disputed evidence and generally dealt with the summary judgment motions in such a way as to conduct what was essentially a paper trial.

32 Ontario accepts that, pursuant to Rule 20.04 of the Rules of Civil Procedure, the motions judge was entitled to determine questions of law and to " . . . grant judgment accordingly". In particular, Ontario accepts that the motions judge could grant judgment on discrete issues of law such as the application of the doctrine of good faith purchaser for value without notice. However, Ontario submits that where the resolution of discrete issues of law required the motions judge to make findings of fact on evidence that was in conflict, the motions judge exceeded the jurisdiction given to him by Rule 20.

33 We are prepared to accept that in some instances, the motions judge made findings of fact and drew inferences from evidence which was to some degree conflicting. We are, nonetheless, not disposed to give effect to Ontario's submissions on the summary judgment issue for the following reasons.

34 Ontario participated fully in the summary judgment proceedings. None of the parties, including Ontario, took the position that, having regard to the voluminous evidence placed before the motions judge and the issues of law raised by the material, it was not appropriate to deal with the matter under Rule 20. To the extent that the parties, including Ontario, participated in what Ontario asserts was a paper trial, they got precisely what they agreed to: a resolution of clearly identified issues of fact and law on the basis of a paper record. In addition, Ontario filed no material on the motion that would in any way suggest that this was not an appropriate matter to be decided under Rule 20.

35 Apart from the expert witnesses, there are no living witnesses who could give relevant evidence. Thus, if the action were to proceed to trial, the trial judge would be in no better position to deal with the issues than the motions judge, unless one were to accept Ontario's late submission that the trial judge would have an advantage from seeing and hearing the expert witnesses testify. In our opinion, absolutely nothing would be gained by sending this matter to trial.

36 We are authorized by s. 134(1)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make a decision on appeal that " . . . is considered just". It would not, in our view, be " just" to accede to Ontario's position on the summary judgment issue, particularly where Ontario did not see fit to raise the issue below: see *National Trust Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 (Ont. C.A.); *Scarboro (Scarborough) Golf & Country Club Ltd. v. Scarborough (City)* (1988), 66 O.R. (2d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused [1989] 2 S.C.R. vi (S.C.C.); *Shaver Hospital for Chest Diseases v. Slesar* (1979), 27 O.R. (2d) 383 (Ont. C.A.), leave to appeal to S.C.C. refused (1980), [1981] 1 S.C.R. xiii (S.C.C.).

37 We would not give effect to this ground of appeal.

III. The Facts

A. Introduction

38 The summary judgment motions raised complex legal issues, turning in part on the interpretation of old statutes and documents, the nature and scope of arcane remedies, and traditional property law concepts, some of which seem to have more relevance to 17th century England than to present-day Ontario. Despite the many difficult legal issues raised, however, this case is first and foremost a factual one. The determination of the Chippewas' claim is necessarily site-specific and primarily fact-driven. As the motions judge noted:

> This decision affects these lands only. As noted below in response to the argument *in terrorem*, this decision turns on the unique story that unfolded around these four square miles and the specific terms of the instruments affecting it; above all, the site-specific provisions of Treaty 29.

39 The events giving rise to these proceedings spread over more than 200 years and are found in the thousands of historical documents filed by the parties and analyzed in the affidavits and cross-examinations of various experts. There was no *viva voce* evidence presented on the motions. The motions judge undertook an exhaustive review of the massive record. He told the story underlying this dispute with extraordinary clarity and vitality. We have borrowed liberally from his reasons (which unfortunately are not reported) in setting out the relevant facts.

40 The motions judge made numerous findings of fact. Many were primary findings of fact based directly on information contained in the historical documents or found in the uncontested parts of the evidence of the various experts. Others findings were in the nature of inferences drawn from one or more of the primary findings of fact. The primary facts as found by the motions judge are not challenged. Some of the inferences he drew from those facts are, however, very much in dispute. In the unusual circumstances of these summary judgment proceedings, justice dictates that we approach the motions judge's findings of fact as though they were made at trial. We defer to the inferences he drew except where we conclude that they are based on a misapprehension of the evidence, a failure to consider material evidence, or where in the light of the totality of the undisputed primary facts, we conclude that the inferences the motions judge drew were unreasonable. As will become evident, we do not accept some of the inferences drawn by the motions judge.

B. The Occupants of the Disputed Lands: Then and Now

41 At the turn of the 18th century, the disputed lands were in Chippewa territory. The Chippewas were established over a vast expanse of land, including present-day southwestern Ontario. The Chippewa Nation consisted of three distinct groups who occupied different territories, but shared a common language and similar customs and traditions. The Mississauga Chippewas occupied southwestern Ontario. By 1760 they had established several seasonal villages in southwestern Ontario, including one on the St. Clair River near present-day Sarnia.

42 The Chippewas lived in relatively small groups spread out over their vast territory. They survived by hunting, fishing, gathering, growing corn, and harvesting maple sugar. To do so they moved from place to place within their lands on a seasonal basis. Groups of families, referred to as bands, shared a territory which supplied them with the necessary food, shelter and clothing. Within these regional bands, there were a number of smaller traditional bands consisting of thirty to sixty people. In the late 1820s after the Chippewas had given up most of their land and began to settle on reserves, traditional distinctions between various bands became somewhat blurred and those who lived on particular reserves were seen as having a communal interest in that reserve. The evidence indicates that as of 1839 there were approximately six regional bands of Chippewas in southwestern Ontario, each of which had 250 to 350 members. The St. Clair regional band, the ancestors of the Chippewas of Sarnia, included approximately eight to ten traditional bands.

43 Each traditional band had a chief. The chief was usually the eldest son of the former chief, however, the band could choose someone else if it decided that the eldest son was not up to the task. The chief acted with the concurrence of the band as expressed at meetings of the principal men in the band, and had little authority to act on his own. The actual power of any particular chief depended in large measure on his own leadership abilities. The regional Chippewa bands

came to recognize one chief as the Head Chief. The Head Chief was the primary spokesman in dealings with the Crown but within the Chippewa community had no more power than the other chiefs.

44 The traditional bands managed their own local affairs at Local Councils attended by the principal men of the band. Matters of general importance to the region were resolved at General Councils attended by the chiefs and principal men of the traditional bands within the region. Traditional bands within a region would come together on occasion at a principal village within the region, like the one near present-day Sarnia, to engage in various social activities and decide matters of regional importance.

45 Today, the Chippewas live on what is left of the Upper Reserve. Their reserve occupies some 3,000 acres adjacent to the disputed lands. The disputed lands themselves have been divided into 2,276 properties. The properties are zoned for various uses ranging from agricultural to industrial. There are over 2,000 residences, five schools, five churches and a number of commercial and industrial properties located on the disputed lands. The Canadian National Railway Company's main line between Ontario and western Canada runs through the disputed lands.

46 The individual defendants and the defendant class are the present occupants of the disputed lands. Until this action was commenced in 1995, they had no way of knowing or discovering the existence of the claim made by the Chippewas of Sarnia. They and their predecessors in title since 1861 are innocent of any illegality or prohibited act. They acquired the land in good faith for good value with no knowledge of and no reason to believe the Chippewas of Sarnia had any claim to the land. The individual defendants and their predecessors in title have developed the property at considerable expense. The motions judge described their investment in the property as being in the "hundreds of millions of dollars". He also observed that those who now live and work on the disputed lands have a "deep connection" with those lands.

C. The Time Line

47 Before examining the relevant events in some detail, it is helpful to set out a chronology of the central events:

Date—	**Event**
1756-1763	Southwestern Ontario, including the disputed lands, was under the dominion of the Chippewa Nation. Both the French and English, who were at war, claimed the area as part of their North American empires. The white men in the area were primarily involved in military operations or fur trading.
1763	The Treaty of Paris ended the seven-year war between France and England. The French Crown ceded New France to England and also relinquished any other claim to present-day Ontario. Southwestern Ontario, including the disputed lands, became part of British North America and fell under the control of the English Crown.
October 7, 1763	George III, by order-in-council, issued a Royal Proclamation. The Proclamation created four new colonies, including Quebec, from the land ceded to the English Crown by France in the Treaty of Paris, established governments for those colonies, and addressed the status of Indian lands throughout British North America. Southwestern Ontario was not part of any of the established colonies and was instead part of what was referred to in the Proclamation as the "interior" Indian territory.
1764	William Johnson, the Superintendent of Indian Affairs for the northern district, convened a large meeting with the First Nations chiefs at Niagara. Many Chippewa chiefs

	were present. The English Crown and the chiefs entered into the Treaty of Niagara. William Johnson read the 1763 Proclamation as it related to Indian lands and the regulation of trade. The chiefs promised to keep the peace and deliver up any prisoners taken during the previous hostilities.
1774	The British Parliament passed the *Quebec Act*. The *Act* expanded the boundaries of the colony of Quebec to include southwestern Ontario, introduced French civil law into that colony, guaranteed religious freedom and altered the form of colonial government. The effect, if any, of the *Quebec Act* on the provisions relating to Indian lands in the Royal Proclamation is the subject of dispute in this litigation.
1791	By the *Constitutional Act, 1791*, R.S.C. 1985, App. II, No. 3, the British Parliament divided Quebec into the provinces of Upper and Lower Canada. Southwestern Ontario was part of Upper Canada.
1818 to 1825	The Chippewas and the Crown conducted a series of negotiations aimed at the surrender of a large part of the Chippewas' territory to the Crown for settlement purposes.
April 1825	The Chippewas and the Crown entered into Provisional Treaty 27 1/2 whereby the Chippewas gave up their rights to some 2.2 million acres of land referred to as the Huron tract. The Chippewas, however, maintained their rights to four specific areas (reserves) one of which, the Upper Reserve, included the disputed lands.—
July 10, 1827	The land surrendered by the Chippewas to the British Crown in provisional Treaty 27 1/2 and the four reserves were surveyed and the Chippewas and the British Crown entered into Treaty 29, which finalized the agreement reflected in the provisional Treaty.
August 12, 1839	Malcolm Cameron, a businessman, land speculator and politician, wrote to Lieutenant Governor Arthur proposing that part of Upper Reserve be purchased and opened for settlement.
October 1839	Cameron received permission from Samuel Jarvis, Chief Superintendent of Indian Affairs, to enter into negotiations with the Chippewas for a sale of part of a reserve "subject to the approval of the Lieutenant Governor and the Council".
November 9, 1839	Cameron met with Joshua Wawanash, the Head Chief of the St. Clair Regional Chippewas, and two other chiefs. They reached an agreement whereby Cameron would purchase 2,540 acres at the rear of the Sarnia reserve [the Cameron transaction]. These are the disputed lands.
November 9, 1839	Cameron wrote to Lieutenant Governor Arthur and Jarvis, reporting that he had reached an agreement with "the Indians". He sought approval of the transaction.
November 9, 1839	William Jones, the resident Superintendent of Indian Affairs at Sarnia, wrote to his superior Samuel Jarvis, telling him that the three chiefs had advised Jones of the agreement with Cameron and had asked that he "propose to the government the sale" of the part of the reserve referred to in the Cameron transaction.
November 16-18, 1839	In correspondence, Jarvis took issue with the terms of payment proposed by Cameron and observed that where similar transactions had been approved, the Crown first

	took a surrender of the land from the Indians and then made a grant of the land to a stated party.
March 19 and June 18, 1840	Two orders-in-council were passed, approving the Cameron transaction on terms as modified by the proposal of Jarvis. Neither order-in-council referred to a surrender to the Crown by the Chippewas.
1840	By the *Union Act, 1840*, R.S.C. 1985, App. II, No. 4, the British Parliament unified Upper and Lower Canada to form the province of Canada. The Indian Department was reorganized to reflect the Union.
February 27, 1841	Cameron made the first payment against the purchase price to the Crown.—
June 1841 to June 1842	Discussions were ongoing concerning the survey of the land referred to in the Cameron transaction. Jarvis favoured a survey of the entire reserve, however, the Chippewas refused to agree to a survey of any land other than the land encompassed in the Cameron transaction.
June 1842	John O'Mara surveyed the lands referred to in the Cameron transaction. He was on site for about fifteen days.
December 1846	Cameron wrote to Resident Superintendent Clench stating that he had "just put sixteen settlers on 1600 acres."
January 1851 to May 1851	A dispute arose as to whether the Cameron transaction included certain road allowances. Eventually, the dispute was resolved in favour of the Chippewas and they surrendered a single road allowance through the reserve.
January-November 1851	Cameron sold off large parts of the disputed lands.
August 11, 1853	Cameron paid the rest of the purchase price. He had not made any payments since the first payment in 1841.[3]
August 13, 1853	Letters patent for the disputed lands were granted by the Crown to Cameron. The letters patent were in the form used when the land referred to in the patent was surrendered land. The validity of this Cameron patent is in dispute.
September 1853 to 1861	Cameron continued to sell parts of the disputed lands.
August 26, 1861	Cameron sold off all of the disputed lands and was no longer on title.
August 1979	William Plan, an amateur historian and researcher for the Chippewas, wrote to an official in the Indian Affairs Department in connection with an ongoing dispute over a road allowance claim. Mr. Plan contended that the disputed lands were never surrendered to the Crown by the Chippewas and that the Chippewas maintained their original interest in those lands. This was the first indication that the Chippewas asserted a continuing interest in the disputed lands.
October 18, 1995	The Chippewas commenced this action.

D. Crown-First Nations Relations

48 In the first half of the 18th century the English Crown showed little interest in the First Nations of North America. Unlike its Catholic counterparts in France and Spain, the English Crown did not pursue active efforts to "civilize" the First Nations peoples and convert them to Christianity. Relationships between the First Nations and English colonies in North America were left primarily to the individual colonies and developed on an *ad hoc* basis. By the 1750s, however, French imperialist ambitions, aided and abetted by First Nations allies, threatened the security of English interests in

North America. Those who shaped imperial policy came to see the military need to develop better relations with First Nations peoples in North America.

49 An Indian Department under the control of English ministers of the Crown was established in the 1750s. Sir William Johnson was appointed Superintendent of the Northern District. His district encompassed present-day southwestern Ontario. Johnson and members of his family played a key role in the administration of English-First Nations relations in the latter part of the 18th and the early part of the 19th century. All were familiar with First Nation customs and appear to have been well regarded by the First Nations.

50 At first, the Crown's policy was aimed at gaining the military support, or at least the neutrality of First Nations in England's ongoing war with the French. When that war ended with an English victory in 1763, English control over the territories it had won from France depended in part on maintaining good relations with the First Nations. The English Crown continued its wartime Indian policy in the hope of forging new military alliances with First Nations who had supported the French (*e.g.* the Mississauga Chippewas) and avoiding further uprisings like that led by Chief Pontiac of the Odawa in 1763.

51 The Indian Department underwent many changes between 1750 and 1860. The lines of responsibility and the titles of various officials changed repeatedly. As the bureaucracy grew, responsibility for different aspects of the policy fell to various Crown agencies. Despite these many bureaucratic changes, two fundamental tenets of the Crown's policy towards First Nations remained constant until 1860.[4] First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative. Like all imperial policies, Indian policy was formulated in England and those responsible for the implementation of it in North America reported to Crown officials. Indian affairs were no concern of the colonial legislatures.

52 Second, the English Crown, primarily for military reasons, actively pursued the support of the First Nations. In doing so, it sought to address First Nations' grievances. Those grievances had arisen out of incursions by white settlers onto Indian lands and the dishonest actions of some of those who traded with the First Nations. In an effort to gain First Nations support, the Crown sought to assure the First Nations that they would not be deprived of their lands or cheated in their (trade) dealings with the white man. The Crown pursued these goals by recognizing First Nations' land rights, taking steps to protect those rights against white settlers, and regulating trade between the white man and First Nations.

53 The *Royal Proclamation* was an important, albeit not the first, manifestation of Crown imperial policy as it applied to Indian lands. The *Royal Proclamation*:

- recognized that First Nations had rights in their lands;
- established imperial control over settlement on Indian lands whether those lands were within or beyond the boundaries of the established British colonies in North America;
- prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands be by way of surrender to the Crown; and
- established a process by which surrenders of Indian land would be made to the Crown. The surrender process accepted that Indian rights in their lands were collective and not individual.

54 After setting out its policy in the *Royal Proclamation*, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the *Royal Proclamation* would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended

a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the *Royal Proclamation* respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the *Royal Proclamation* to the First Nations can be traced to this extraordinary assembly and the treaty it produced. [5]

55 The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown's promise to all of the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.

56 The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.

57 Between 1764 and 1774, the commanders of the British forces in North America who were responsible for Indian relations emphasized the applicability and the importance, not only of the specific terms of the *Royal Proclamation*, but also of the policies underlying it.

58 In 1774, the English Parliament passed the *Quebec Act*. That *Act* radically changed the government of the province of Quebec and extended the boundaries of that province to include what is now southwestern Quebec. The effect of that *Act* on the terms of the *Royal Proclamation* relating to Indian lands will be addressed later in these reasons. It is safe to say, however, that those responsible for First Nations relations after 1776 continued to follow the central policies underlying the *Royal Proclamation*. The historical record is replete with references to the *Royal Proclamation* and its policies. For example, in August 1791, Lord Dorchester, the Governor General of Canada, advised a delegation of First Nation chiefs, including Chippewa chiefs, that the King had no right to their lands save where it had been:

> fairly ceded by yourself with your consent by public convention and sale . . .

and that further:

> . . . bargains with private individuals were forbidden and considered as void.

59 Lord Dorchester's comments make it clear that the Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

60 The Crown policy towards the First Nations was reflected not only in official documents like the *Royal Proclamation*, but also in the day-to-day conduct of those relations. People like Sir William Johnson had long-standing connections with First Nations peoples and long-standing associations with them. They were aware of and respected the manner in which First Nations peoples conducted business. Formal meetings between Crown officials and First Nations were held at public Council meetings attended by the chiefs and other members of the First Nations. Certain formalities became an accepted part of these meetings and served to emphasize the nation-to-nation nature of the dealings. Many of those formalities reflected aboriginal customs and usages. The First Nations peoples attached considerable importance to compliance with these formalities and the Crown representatives were aware of the importance of these formalities to the First Nations.

61 By the turn of the 19th century, the procedures associated with the surrender of land by First Nations to the Crown were well established. Those procedures blended aboriginal and British customs and usages and came to be reflected in

various orders issued by responsible Crown officials (*e.g.*, the Dorchester Regulations of 1794). The surrender of First Nations land to the Crown involved the following:

- All surrenders were made "in public council with great solemnity and ceremony, according to the ancient usages and customs of the Indians".

- The Crown representatives at the meeting included the Governor or his designate, representatives from the Indian Department, and military officers.

- An interpreter was present and explained the "nature and extent of the bargain" to the Indians in their language. The consideration for the sale was clearly stated.

- If a surrender was agreed upon, a deed of conveyance surrendering the land to the Crown was prepared in triplicate and executed at the Council meeting by the Indian chiefs who would place their totems on the deed and by the Superintendent of the Indian Department or his designate.

- A descriptive plan of the land to be surrendered was attached to the deed and signed and witnessed in the same manner as the deed.

- The Head Chief received one of the copies of the deed.

62 These formalities recognized the importance of the surrender of lands by First Nations and the collective nature of the First Nations' interest in the land. The procedures also reflected the common law concern that certainty attach to the transfer of land. Certainty was achieved by requiring that the conveyance of land be fully documented, that the documents be placed in the appropriate records and that they be preserved for future reference.

63 Surrender was the first step toward making Indian land available for settlement. After the surrender deed was executed, it was submitted to the Governor in Council for approval. If approved, an order-in-council would issue and the surrender deed could be registered in the appropriate colonial land registry record. At this stage, the surrendered land could be granted by the Crown to third parties by way of letters patent. Over time, the patents were standardized and made reference to the fact that the land had been acquired from a First Nations people. Where the First Nations were to be paid from the proceeds of the grant to the third party, the Crown held those proceeds for the benefit of the First Nations.

64 Although a surrender could only be authorized by a General Council meeting of the First Nations people, Crown Indian policy also depended on the development of strong working relationships between Crown officials and influential chiefs of regional bands. Indian Department officials worked at obtaining the confidence and support of key chiefs. The relationship with these chiefs became even more important as the Indians surrendered much of their lands and took up residence on reserves.

65 Indian Department officials would meet with key chiefs prior to Council meetings in an effort to gain their support on the matters that were to be considered at the Council meeting. If the Crown official and those chiefs could reach an agreement, the chiefs would become the spokesmen for the proposed agreement at the subsequent Council meeting.

E. The Surrender of Chippewa Lands Before the Sale to Cameron

66 By 1815, the military importance to the English Crown of alliances with First Nations, including the Chippewas, had diminished significantly. The war of 1812 had ended and there was no real risk of continued hostilities in the British North American colonies with either the United States or any European power. Soldiers returning from the war of 1812 were looking for land and the pressure to open Indian land to settlement increased dramatically.

67 As the military significance of alliances decreased and demands for settlement increased, the Crown became more receptive to those who petitioned for the opening of Indian land for settlement purposes. Imperial Indian policy also

began to reflect objectives other than military ones. The "civilization" of those First Nations whose land stood in the path of white settlement became a priority. The Crown's "civilization" policy encouraged First Nations to live, farm and worship like the white man, in and around permanent sites located on lands reserved for the First Nations.

68 Despite the change in focus of the Crown's Indian policy, the Crown continued to control access by settlers to Indian lands by insisting that Indian land could not be sold directly to settlers but had to be surrendered to the Crown first. This policy reflected both the Crown's desire to control settlement and to protect aboriginal people as the harmful effects of contact with the white man became more obvious. [6]

69 The Crown's continued recognition of Indian rights to their lands, the prohibition against alienation of land to anyone except the Crown by way of surrender and the requirement that the surrender be accompanied by a public manifestation of the First Nations' agreement to surrender are all evident in the extensive land dealings between the Chippewas and the Crown between 1818 and 1827. Those dealings resulted in the surrender of some 2.2 million acres of Chippewa land and the retention by the Chippewas of four reserves within that tract of land.

70 The possibility of acquiring a large part of the Chippewas' land in southwestern Ontario for settlement purposes was first raised by the Surveyor General of Upper Canada in 1815. In October 1818, an official of the Indian Department met with numerous Chippewa chiefs at Amherstburg to discuss the possibility of a surrender of Chippewa land. The Chippewas advised that they were not opposed to the surrender in return for an annuity but were anxious to retain enough land to permit them to continue to enjoy their traditional lifestyle and maintain their viability as a people. The Chippewas were concerned that they not suffer the fate of their American brothers who had failed to retain sufficient reserves when surrendering their land. In the initial discussion, the Chippewas referred to five possible reserves, including one on the St. Clair River which came to be known as the Upper Reserve on which the disputed lands are located.

71 Discussions between the Crown and the Chippewas went on for several years. Progress was slow. The Chippewas' lifestyle was still quite transitory and it was sometimes difficult to arrange for the attendance of the necessary chiefs at Council meetings to discuss the proposed surrender. Various provisional agreements were made and in July 1822, the Crown and the Chippewas concluded their first confirmatory treaty whereby the Chippewas surrendered some 500,000 acres of land along and near the Thames River.

72 This surrender did not satisfy the ever-increasing needs of the white settlers. In 1824 the Canada Company was formed and received a million acre grant of land in Upper Canada for settlement purposes. Part of that land was to come from the Chippewas' land. In March 1825, an official of the Indian Department was directed to assemble the chiefs of the Chippewas in Council " with the least possible delay" to finalize the surrender of over 2,000,000 acres of Chippewa land. This land came to be known as the Huron Tract.

73 A General Council of the Chippewas was held at which the Chippewas and the Indian officials observed the usual formalities. The Crown requested a surrender and the chiefs, "after consultation among themselves", said that they were prepared to make the surrender on behalf of the Chippewas. Provisional Treaty 27 $^{1}/_{2}$ was signed by James Givens, Superintendent of Indian Affairs, representing the Crown and twenty named " chiefs and principal men" of the Chippewas. These chiefs represented the various bands who lived on the affected lands.

74 Under the terms of Provisional Treaty 27 $^{1}/_{2}$, the Chippewas agreed to "freely, fully and voluntarily . . . surrender and convey" to the Crown some 2.2 million acres of land in consideration for a perpetual annuity of 1,100£. The treaty identified 440 Chippewas who were affected by this surrender and provided for a reduction in the annuity if the population decreased.

75 Under the terms of the Provisional Treaty, the Chippewas did not surrender all of their lands. They retained four reserves, including the Upper Reserve, for themselves and future Chippewa generations. The Provisional Treaty provided that the reserves were retained by the Chippewas for their "exclusive use and enjoyment".

76 Upon receipt of the agreement the Lieutenant Governor forwarded it to the Colonial Secretary in London who in turn advised that the Crown accepted the terms.

77 The Crown and the Chippewas could not conclude a final agreement in 1825 because there was no descriptive plan of the surrendered lands available. Under established procedures, a surrender could not be made unless a descriptive plan was attached to a deed of surrender. In 1829, after the land had been surveyed, the Crown and Chippewas entered into Treaty 29 which confirmed the terms of the 1825 agreement.

78 Treaty 29 complied with all the formalities attached to a surrender of Indian land to the Crown. A written document acknowledging the Chippewas' rights in the land and describing the surrender was signed by Superintendent of Indian Affairs George Ironside, for the Crown, and by eighteen named chiefs and principal men of the part of the Chippewas inhabiting and claiming the lands affected by the surrender. Those chiefs, on behalf of the bands they represented, surrendered to the King all their rights, title and interest in the land save their rights and title in the four reserves. Their rights in those four reserves were held by them for their exclusive use and enjoyment for all time.

79 The Chippewas do not question the validity of the surrender made by Treaty 29. As the motions judge observed, it bore all the indicia associated with a valid cession of First Nations land to the Crown. It was the product of direct negotiations between the Crown and the chiefs of the Chippewas. The terms of the surrender, including the annuity to be paid, were put to the Chippewas at a General Council meeting at Amherstburg in July 1827 and approved at that Council. The surrender was formalized in a written document executed by the appropriate officials on both sides. The document recognized pre-existing Chippewa rights in the land and acknowledged that the Chippewas were surrendering those rights to the Crown. The consideration for the surrender was set out in the deed and a descriptive plan attached to it.

80 By July 1827, the face of the map of what is now southwestern Ontario had changed dramatically. The Chippewas had surrendered 2.2 million acres of land to the Crown. They had retained four reserves, including the Upper Reserve. Those four reserves were protected not only by the Chippewas' pre-existing land rights as acknowledged by the Crown, but also by the solemn promise of the Crown in Treaty 29. The land on the reserves, including the disputed lands, belonged to the Chippewas.

81 It would appear that Crown officials initially regarded the four reserves set out in Treaty 29 as held in common by all the various bands who were signatories to Treaty 29. By the late 1830s, however, the St. Clair Regional Band, which included the ancestors of the present Chippewas of Sarnia Band, were regarded as the owners of three of the reserves, including the Upper Reserve. The Walpole Indian Regional Band was seen as the owner of the fourth reserve. Best estimates suggest that by 1839 there were as many as eight to ten chiefs of the St. Clair Regional Band.

82 One of the chiefs for St. Clair Regional Band was Joshua Wawanosh. Wawanosh had a remarkable and checkered career as a leader of the St. Clair Chippewas. He became a chief shortly after the war of 1812 in part because of his military service on behalf of the Crown in the war of 1812. By the mid-1820s, Crown officials and other Chippewa chiefs recognized Wawanosh as the Head Chief. He was the first to sign Provisional Treaty 27 $^{1}/_{2}$ on behalf of the Chippewas, received a copy of the deed and was described by Joseph Clench, a superintendent in the Indian Department, as the "principal chief".

83 By the 1830s, there was opposition to Wawanosh's leadership on the four reserves. That opposition grew during the 1830s reaching its zenith in 1844 when Wawanosh was removed as Head Chief after a public inquiry by Indian Department officials. He remained a chief. Within four years, however, Wawanosh had regained the confidence of the other chiefs on the reserves and recovered from the ignominy of his removal. At the suggestion of the man who had replaced him as Head Chief, Wawanosh was restored to the position of Head Chief.

84 Throughout his long tenure, Wawanosh, who had converted to Christianity, favoured the "civilization" policy. He believed that the Chippewas should establish a permanent farming community on the Upper Reserve and learn the

white man's ways. He also had a keen eye for opportunities and sought to increase his influence and personal wealth whenever the opportunity arose.

85 Wawanosh's position as the spokesman for the Chippewas on the Upper Reserve is evident in discussions between himself and William Jones, the resident Indian Superintendent, in 1830. At the request of the Lieutenant Governor, Jones broached with Wawanosh the possibility of the Chippewas surrendering their land along the river and moving inland to establish permanent farming communities. Wawanosh advised Jones that the Chippewas were firmly against moving from their " present residence on the Upper River", but that they were "pleased with the idea of having their children educated and learning to live like white people . . . ".

86 The Indian Department accepted Wawanosh's position and did not seek a surrender of any part of the reserve, but did step up efforts to establish a permanent village and farming base on the reserve for the Chippewas.

87 Wawanosh spoke for the bands on the Upper Reserve again in 1834 when Jones was directed to approach the Chippewas for permission to allow the private cutting of timber on part of the Upper Reserve. Jones sought out Wawanosh's view on the matter and reported back to Jarvis.

88 Wawanosh's discussions with Jones typified the kind of preliminary discussions that Indian Department officials would have with influential chiefs when important matters arose. There is no suggestion that Wawanosh did not speak for the Band on the Upper Reserve in 1830 or 1834, or that he did not accurately convey the collective position of the Chippewas to Jones.

F. The Cameron Transaction

89 By 1839, responsibility for Indian matters was divided among various Crown departments. Those departments were under the control of the Lieutenant Governor of Upper Canada. The department was headed by a chief superintendent who had a number of deputy superintendents. Various resident superintendents lived at or near reserves and were responsible for overseeing relations with the First Nations people on those reserves. As the bureaucracy grew, those at the top ceased to have any kind of direct, long-standing relationship with First Nations chiefs. Subsequent inquiries (*e.g.* the Bagot Inquiry in 1844) also demonstrated that the Department was in many respects dysfunctional by 1839.

90 The Indian Department was responsible for mediating disputes between white men and aboriginals, keeping the Crown advised of the views and attitudes of the Indians, ensuring that white settlers did not intrude onto Indian lands, supervising the surrender of Indian lands, administering payments due to First Nations under the terms of surrenders, and promoting the "civilization" policy. These responsibilities often brought Indian Department officials into conflict with white settlers. As often as not, those officials found themselves aligned with positions taken by First Nations people and opposed to positions advanced by white settlers.

91 Samuel P. Jarvis was appointed Acting Chief Superintendent of Indian Affairs in Upper Canada in 1837 and remained in that post until his dismissal in 1845 following the revelations of the Bagot Commission. Jarvis, a Tory and member of the Family Compact, appears to have been an honest and well intentioned person who had virtually no hands-on experience with the First Nations prior to 1837. He was an abject failure as an administrator.

92 William Jones was the Resident Superintendent at Port Sarnia from March 1830 until June 1845 when, like Jarvis, he was dismissed as a result of the findings of the Bagot Commission. Jones' relationship with the principals of the Cameron transaction (Cameron and Wawanosh) was far from friendly as of November 1839.

93 Resident Superintendent Jones had many dealings with Chief Wawanosh. He recognized Wawanosh's influence and the need to maintain Wawanosh's support. He also came to regard Wawanosh as dishonest, greedy and intent upon advancing his own interests over those of the Chippewas on the Upper Reserve. Jones's mistrust of Wawanosh increased during the rebellion of 1837 when Wawanosh, unlike many Chippewa chiefs, refused to support the Crown but insisted

on a position of neutrality. By November 1839, Jones had no reason to favour Wawanosh or to assist him in promoting his personal interests.

94 The mistrust of Wawanosh did not stop with Jones. Chief Superintendent Jarvis and even the Lieutenant Governor had reason to doubt Wawanosh's honesty and the reliability of statements he purported to make on behalf of the Band.

95 Malcolm Cameron, a businessman, politician and land speculator from eastern Canada, took up residence in Port Sarnia in the early 1830s. As an accomplished businessman with political connections, he quickly became one of the town's most influential citizens. Cameron was a reformer, a Methodist, and a strong proponent of the "civilization" policy. He took the forefront in attempts to secure parts of the Upper Reserve for white settlement, taking the position that the Chippewas could use the proceeds from the sale of parts of their land to finance the development of the rest.

96 Wawanosh, like Cameron, was a Methodist and shared Cameron's entrepreneurial spirit. The two developed a close working relationship. Cameron lent money to Wawanosh from time to time. On various occasions, to the consternation of officials in the Indian Department, Cameron assisted Wawanosh in making direct representations to the Lieutenant Governor or, after 1840, the Governor General.

97 Although Cameron had strong political support in 1839, including that of the reform-minded Lieutenant Governor Arthur, Cameron did not enjoy good working relations with the officials of the Indian Department. As a Methodist reformer, he had nothing in common with High Anglican Tories like Superintendent Jarvis. His support of Wawanosh also brought him into conflict with Jones.

98 The residents of Port Sarnia had from time to time after 1827 petitioned the government to obtain the surrender of parts of the Upper Reserve. They felt that the reserve was blocking key trade and communication channels along the St. Clair River and inhibiting the development of their town. In the late summer of 1839, Wawanosh, speaking for the Chippewas on the Upper Reserve as he had in 1830 and 1834, made it clear that the Chippewas were not prepared to sell any part of the front part of the Upper Reserve running along the St. Clair River. This was the part of the reserve coveted by the white settlers at Port Sarnia. As in 1830 and 1834, Wawanosh spoke for, and accurately expressed the position of the Chippewas on the Upper Reserve.

99 At almost the same time that Wawanosh told Jones that the Chippewas were not prepared to give up any land along the front of the St. Clair River, Wawanosh advised Jarvis that the Chippewas were inclined to sell part of the rear of the Upper Reserve. A document found in the papers of Jarvis and purporting to be a translation and transcription of an address given by Wawanosh in September 1839 reads in part:

> You recommended to us last year to cultivate the soil and proposed that, workmen should be hired to put our fields in proper condition for sowing crops. We have thought of this & think the advice good, but are unwilling that the expense should be defrayed from our annuity. We wish your advice on a plan which we think would please us all. We propose to sell a mile in depth off the rear of our Reserve, and with the money produced by this sale to cultivate the front. What is your opinion?

100 The exact circumstances in which Wawanosh made this purported address have been lost in time. It cannot be said whether he made the address at a Council of the Chippewas, or at some public gathering of the St. Clair Regional band. It is, however, clear that his proposal was consistent with the ongoing development of a permanent agricultural settlement on the Upper Reserve. Most of the land at the back of the reserve which Wawanosh indicated the Chippewas were prepared to give up was not as well suited for farming as the front of the reserve. Nor, contrary to the finding of the motions judge, was there any inherent contradiction between the Chippewas' refusal to sell off any part of the front of the reserve and Wawanosh's indication that they were prepared to sell off parts of the back of the Upper Reserve. The Chippewas sold off pieces of the Upper Reserve from time to time after 1827.

101 Cameron advanced his proposal that the Upper Reserve be opened for settlement in a letter to Lieutenant Governor Arthur in August 1839. Cameron argued that the lands within the reserve exceeded those needed by the Chippewas

to establish a permanent farming settlement. He suggested that the proceeds of the sale of a considerable part of the reserve could be used to improve the remaining land so that it could be effectively farmed by the Chippewas. Cameron suggested that the money could be realized either by a purchase by the government or a purchase by private individuals with government approval.

102 In the fall of 1839 Cameron met with Lieutenant Governor Arthur and subsequently with Chief Superintendent Jarvis to promote the acquisition of a large part of the Upper Reserve. Jarvis told Cameron that he, Cameron, could negotiate with the Chippewas and, if possible, strike a bargain, subject to the approval of the Governor in Council. Cameron travelled to the Upper Reserve, met first with Jones, and later with Wawanosh and two other chiefs.

103 Cameron advised both Lieutenant Governor Arthur and Jarvis in letters dated November 9, 1839 that he had met with Wawanosh and "other chiefs". He explained that the chiefs were reluctant to give up any part of the reserve because they feared that their agreement to give up part of the reserve would be seen by land-hungry settlers as an invitation to take more land than the Chippewas had agreed to sell. According to Cameron, he had the "confidence" of the chiefs and was able to convince them that he would adhere to any bargain they made. Cameron advised that he had concluded a bargain for the purchase of four square miles at the rear of the reserve furthest from the St. Clair River. According to Cameron, the Chippewas also agreed to provide four roads running from that block of land through the reserve to the river. Cameron said that he had agreed to pay the Chippewas 10 shillings per acre with an initial payment of 250£. The rest of the purchase price (1,020£) was to be paid in nine annual instalments. Cameron observed that the price was two shillings higher than the "government price", but that he had agreed to the higher price in lieu of paying any interest on the unpaid part of the purchase price. Cameron attached a rough map of the land which he said the Chippewas had agreed to give up. The map showed four roads running through the reserve to the river.

104 In his letter to Lieutenant Governor Arthur, Cameron stressed the "public good" of the transaction and urged Arthur to approve it if he thought it to be a "fair and advantageous bargain for the Indians".

105 Resident Superintendent Jones also wrote to Jarvis on November 9, 1839. He advised that Cameron had met with the only three chiefs who were on the Upper Reserve (Wawanosh, Chibigun and Corning). [7] Those chiefs had later called on Jones and asked that he propose to the government on their behalf "the sale of one mile in depth by the whole length of the reserve off the rear of the Upper St. Clair Reserve". Jones reported the terms of the agreement as told to him by the chiefs. He also indicated that, under the bargain, a road was to run from each concession line through the reserve to the river. Jones said that the Chippewas expected to be paid for the land used for these roads.

106 The correspondence outlined above demonstrates that all concerned appreciated that the transaction could not be completed without the approval of the Crown. Cameron and the chiefs both notified the Crown of the bargain and sought Crown approval. Neither believed that they could deal with the disputed lands without the intervention of the Crown.

107 Chief Superintendent Jarvis was asked by the Lieutenant Governor's office to comment on the proposed sale. In correspondence delivered in late November 1839, Jarvis opined that the purchase price appeared to be "fair and reasonable", but went on to observe that Cameron should be required to pay interest on the unpaid balance of the purchase price. [8] Jarvis also noted that there was some suggestion that the purchase price would be paid directly to the Chippewas. He pointed out that this was not Crown policy and that the money should be paid to the Crown to be invested for the benefit of the Chippewas. Jarvis' recommendations were accepted by the Lieutenant Governor and incorporated into two orders-in-council approving the sale.

108 The first order-in-council, dated March 19, 1840, began with the following:

> The Executive Council are respectfully of the opinion that it would be a great public advantage as well as a benefit to the Indians were the tract of land above mentioned disposed of to white settlers at an adequate price.

It also set out the price, required the payment of interest on the instalments, and provided for an allotment of land for clergy reserves.

109 Cameron objected to both the payment of interest and the allotment of lands for clergy reserves. Eventually he agreed to pay interest but persisted in his objection to the clergy reserves. In June 1840 a second order-in-council was passed in the same terms as the March order-in-council save that the requirement for clergy reserves was deleted.

110 Both orders-in-council referred to the proposed purchase by Cameron of the land and neither referred to a surrender or recommended that a surrender of the lands be accepted. In contrast, orders-in-council issued at or about the same time as the Cameron order-in-council and referring to the sale of other parts of the Chippewa reserves made reference to the surrender of the land to the Crown.

111 It is helpful at this stage to summarize the substance of the Cameron transaction.

- Cameron had approached Crown officials for permission to negotiate the purchase with the Chippewa chiefs.

- Negotiations were conducted with the authorization of the senior Crown official responsible for Indian Affairs in Upper Canada.

- Cameron negotiated through an interpreter with three of the chiefs on the Upper Reserve, including Head Chief Wawanosh. The record is clear that no other chiefs were present but is unclear as to who, if anyone else, was privy to the negotiations.

- The bargain arrived at by Cameron and the three chiefs was made known to Crown officials by Cameron and the chiefs separately. Both sought government approval for the transaction.

- The negotiated purchase price was a reasonable one.

- The appropriate official in the Indian Department considered the proposed bargain, altered two of the terms to add further protection of the Chippewa interests, and recommended the approval of the transaction.

- The Lieutenant Governor, the representative of the Crown in Upper Canada, approved the transaction as altered by the Indian Department.

- The land which was the subject of the transaction was not on the part of the Upper Reserve the Chippewas had refused to part with in earlier discussions with the Crown in 1839. Much of it was not ideal for farming. If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with some success by November 1839.[9]

112 It is equally important to bear in mind, as did the motions judge, what did *not* occur as part of the Cameron transaction prior to the issuing of the order-in-council.

- Crown officials were never directly involved in the negotiations with the Chippewas.

- The transaction was never explained, discussed, or approved at a General Council of the regional bands of the Chippewas affected by the transaction.

- Although three chiefs approved the transaction, the approval of the other chiefs (possibly five to seven) was neither sought nor obtained.

• The bargain struck between Cameron and the chiefs was never reduced to writing in a deed, contract, or treaty signed by the necessary chiefs and the Crown representative. Consequently, there was no formal document in which the Crown acknowledged the Chippewas' rights in the land and the Chippewas agreed to surrender those rights.

• There was no descriptive plan of the lands signed by the appropriate Crown officials and chiefs of the Chippewas.

113 We agree with the motions judge that the exchange of correspondence in November 1839 combined with the meetings involving the Chippewa chiefs, Jones and Cameron did not amount to a surrender. As the reasons of the motions judge demonstrate, there was in this transaction a failure to follow virtually every established procedure attendant upon the surrender of Indian land. As the motions judge observed, the failure to follow these procedures makes the Cameron transaction unique among the many land dealings between the Chippewas and the Crown in the 19th century.

114 Although we accept the motions judge's conclusion that there was no surrender in November 1839, we do not agree with his description of the Cameron transaction as a "private sale" between Cameron and three chiefs. The negotiations were conducted with the knowledge of and under the authority of Crown officials in the Indian Department. The terms of the transaction were reviewed and changed by Superintendent Jarvis and only then approved by the Crown. The ultimate terms were dictated by the Crown for the protection of the Chippewas.

115 The motions judge also repeatedly referred to the meeting between Cameron and the three chiefs as a "private meeting". We can accept this characterization if it means only that the meeting between Cameron and the chiefs was not a General Council meeting as that phrase would be understood in the context of the surrender of Indian lands. We do not, however, accept the characterization if it is meant to suggest that the three chiefs were the only Chippewas who were aware of the negotiations or the bargain reached. Although only three chiefs met with Cameron, nothing in the record suggests that they were the only Chippewas who were privy to the meetings, or that the negotiations or the bargain reached were in any way secret from Chippewas who were on the Upper Reserve. Subsequent events lend no support to either of those suggestions.

116 It is not surprising, in the context of Indian land negotiations, that there was no actual surrender as of the end of November 1839. As indicated above, discussions between Indian Department officials and individual chiefs in which agreements were worked out subject to approval at a General Council were quite common. It would have been entirely consistent with established practice had the terms of the Cameron transaction, as agreed upon by Cameron and the three chiefs and as modified by Jarvis, been put to a General Council of the Chippewas for approval at some point after November 1839 and before the land was actually granted to Cameron.

117 There is, however, no evidence that a surrender occurred between November 1839 and the issuing of the orders-in-council in March and June of 1840. The only reference to a surrender in the correspondence preceding the orders-in-council appears in Jarvis' letter to the Lieutenant Governor's office in November 1839. He wrote:

> Should the government think proper to permit the Indians to dispose of a part of their reserve the course heretofore pursued in similar transactions has been to require as a first step a surrender of the land to the Crown after which the Crown will grant the same, on such terms as may be agreed upon, and will take care that the purchase money is safely invested.

118 No one in the Department followed up on Jarvis' statement. The failure of the Department to obtain a surrender and follow the well established practices relating to surrenders is not explained by any conspiracy to deprive the Chippewas of their land, or even by a desire within the Indian Department to assist Cameron and allow him to circumvent established procedures and accelerate settlement of the land. Jarvis carried no brief for Cameron and had

in no way supported or associated himself with the success of Cameron's negotiations with Wawanosh and the other two chiefs.

119 Resident Superintendent Jones also had no reason to help Wawanosh or Cameron. By November 1839, Jones and Wawanosh were engaged in a heated vilification of each other involving a series of charges and counter-charges. It is unlikely that Jones would facilitate a fraudulent transaction involving Wawanosh or knowingly turn a blind eye to any legal requirements of that transaction. It is also unlikely that Jones, given his view of Wawanosh, would accept without question whatever Wawanosh told him about the Chippewas' wishes with respect to the sale of their land.

120 Although neither Jarvis nor Jones acted to secure the appropriate surrender, there is no evidence that they or anyone else in the Indian Department had any reason to believe that a surrender would not be forthcoming if requested.

121 True, the two orders-in-council do not refer to a surrender of the land. The language of these orders-in-council stands in stark contrast to others pertaining to land transactions involving Chippewa land, including one issued on the same day as the second Cameron order-in-council (June 18, 1840). All other orders-in-council referable to Chippewa land make reference to a surrender. However, the Cameron orders-in-council refer instead to a "proposed" sale suggesting that the transaction would close at some time in the future thereby allowing for a surrender before closing. We agree with the motions judge's conclusion that the language of the order-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future.

122 The Crown had ample opportunity to obtain a surrender. The disputed lands were not granted to Cameron in fee simple by way of letters patent until some fourteen years later in August 1853. There were several reasons for the delay, some of which will be examined below. Despite the passage of fourteen years, however, the Indian Department did not arrange for surrender of the land. There was no General Council of the Chippewa bands affected by the transaction at which the details of the transaction were explained and approval of the surrender given. [10] There was also no formal surrender document prepared and executed by the appropriate Crown official and the Chippewa chiefs. In short, none of the established procedures were followed.

123 There were few references to a surrender in the documents touching on the Cameron transaction between 1840 and 1853. By 1851, officials in the Indian Department, none of whom had been involved in the Cameron transaction in 1839 and 1840, had come to believe that a surrender had in fact been made and that a surrender document existed. Although the existence of the document was questioned on one occasion, no one bothered to check the actual records. The form of the letters patent issued in 1853 was consistent with a surrender having been obtained.

124 The failure to take the steps necessary to obtain a proper surrender prior to the issuing of the letters patent was explained by the motions judge in terms which we adopt:

> There is no evidence that Jarvis' recommendations of November 18, 1839 that there should be as a first step a surrender to the Crown of the disputed land, was deliberately rejected. But it was uncontradicted that it was neglected. While there is no evidence that any particular official was asleep at the switch, it is uncontradicted that Jarvis' surrender recommendation simply fell between the cracks in the general chaos and lack of accountability that prevailed in the five separate bureaucracies that then dealt with Indian land. No one was in charge and no one was accountable.

125 Cameron did nothing to encourage the Indian Department to obtain the appropriate surrender. The record suggests that he never concerned himself with obtaining a proper surrender. His attention between 1839 and 1853 was directed to several other problems, including difficulties he encountered in raising the funds to pay the purchase price. He made the initial downpayment in February 1841, but did not make the annual payments as he had promised. It was not until August 11, 1853 that he paid the outstanding amount owing on the purchase price. [11]

126 Cameron's disregard for the legalities associated with the transaction is evident from the fact that he sold large parts of the land and placed settlers on it years before he received the patent and the fee simple. He was a businessman in a hurry.

127 There is no direct evidence of the Chippewas' reaction to the Cameron transaction, and, in particular, the Chippewas' reaction to the failure of the Indian Department to obtain the necessary surrender. The Chippewas' tradition is an oral one and direct evidence of their response to the Cameron transaction has been lost over the 160 years since the transaction.

128 The Chippewas' position may, however, be inferred from events which occurred between November 1839 and 1855. After reviewing some of those events, the motions judge concluded that by 1840, the Chippewas were aware that there was an agreement to sell part of their reserve to Cameron. He further concluded, however, that the Chippewas were never made aware of the details of the sale and may well have expected that before the transaction was consummated the Crown would seek a surrender in accord with the established practice.

129 The motions judge also found that there was no evidence that the Chippewas made any complaint that Wawanosh and the other chiefs had acted without authority in their dealings with Cameron, or that any representative of the Chippewas ever repudiated the transaction. We accept those findings. The motions judge went on, however, to hold that the absence of any complaint, combined with the Chippewas' knowledge of the transaction, did not constitute any evidence that the Chippewas as a community agreed to surrender their lands.

130 The evidentiary significance of the absence of any complaint about the transaction or any repudiation of it must be assessed in the context of the entire record. There is overwhelming evidence that the Chippewas were an intelligent people who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights. By 1839, the Chippewas were well accustomed to addressing grievances to the Crown by way of petitions. Those petitions were prepared at General Council meetings and addressed many issues, including complaints with respect to land transactions. On various occasions, the Chippewas' petitions specifically repudiated earlier transactions to which they had allegedly agreed. For example, the strong objection by the Chippewas to the proposed Saugeen surrender in 1836 demonstrates that even where a proposed land transaction was initiated by the Lieutenant Governor himself, the Chippewas could and would voice strong opposition to it if it did not accord with their wishes.

131 There can also be no doubt but that many chiefs of the St. Clair regional bands, both on and off the Upper Reserve, were not reluctant to complain to the Indian Department and the Lieutenant Governor or Governor General about the conduct of Chief Wawanosh. Complaints about Wawanosh began in the early 1830s, grew more vigorous as time went on and reached a crescendo in early 1844 when Wawanosh was removed as Head Chief following a public inquiry into his conduct. The many complaints against Wawanosh included allegations that he abused his authority as chief, misappropriated band assets, and showed gross favouritism towards friends and allies. There were also allegations that Wawanosh sold, or at least tried to sell, Chippewa land without authority. For example, in October 1836, a number of Chippewas petitioned the government complaining among other things that Wawanosh was "disposing of land reserved for us, our wives and children without our consent". A similar allegation was made in 1841 when various chiefs complained that Wawanosh was trying to sell land without authority.

132 In August 1843, a petition signed by about 200 Chippewas was directed to the Governor General. It contended that Wawanosh was not the hereditary chief, took more than his proper share of the annuity, and favoured his friends and relatives leaving the rest of the band in poverty. The petition concluded with these strong words:

> We are not neither children or foolish. We know perfectly well who either wrongs us or does us good, and we can complain of the former and thank the latter, we therefore beg your Excellency will attend to what comes from ourselves only, and not to the unsolicited and obnoxious interference of white men with whom we neither have nor wish to have any concern; . . . [Emphasis added.]

133 The Chippewas requested a General Council at Port Sarnia at which their complaints against Wawanosh could be aired. The Governor General decided to hold a formal public inquiry into the charges against Wawanosh. That inquiry was held in late 1843. Witnesses for and against Wawanosh testified and Wawanosh replied in detail to the allegations made against him. Summaries of the testimony have survived and provide a detailed account of the accusations against Wawanosh, and insight into the level of animosity that many of the Chippewa chiefs had developed toward Wawanosh.

134 Superintendent Clench presided over the inquiry and prepared a report for Jarvis summarizing his findings. According to Clench, the charges against Wawanosh related to mismanagement of his office as chief, the appropriation of more than his share of the annuities due to the Chippewas, gross favouritism, and making a false claim to being an hereditary chief. Clench reported that over 75 percent of the Chippewas on the four reserves were against Wawanosh.

135 It was determined that Wawanosh should be removed as Head Chief but should remain as a chief. Despite the efforts of Wawanosh and Cameron to prevent the removal of Wawanosh, he was in fact removed as Head Chief and not restored until 1848.

136 The complaints made against Wawanosh between 1830 and 1844 are set out in considerable detail in various affidavits filed by the parties. None of the complaints refer to the Cameron transaction, although it occurred and was known to other Chippewas at the very height of their displeasure with Wawanosh (1839-1843). In our view, it is significant that despite the many general and specific complaints directed at Wawanosh's conduct, there was never any suggestion by the other Chippewa chiefs that Wawanosh had acted beyond his authority in reaching a bargain with Cameron, or that the purported sale was contrary to the wishes of the Chippewas.

137 In assessing the significance of the absence of any reference to the Cameron transaction in the onslaught of complaints made against Wawanosh at the inquiry, we bear in mind that by the fall of 1843, the Chippewas knew the full extent of the lands involved in the Cameron transaction. Those lands had been surveyed into lots in the summer of 1842. The Chippewas knew by the fall of 1843 that the Cameron transaction involved about one quarter of the land on the Upper Reserve.

138 The absence of any reference to the Cameron transaction among the litany of complaints made against Wawanosh defies explanation if the other Chippewa chiefs looked on the Cameron transaction as a "private" deal whereby Wawanosh disposed of one quarter of the Upper Reserve against the wishes of the Chippewas affected by that transaction. The explanation advanced by one witness for the Chippewas that the Chippewas' culture was such that complaints against Wawanosh would be indirect (a contention neither accepted nor rejected by the motions judge), does not hold up. By the fall of 1843, there was a concerted attack underway on Wawanosh's leadership in the years before and following 1839. That attack included specific allegations against him by other Chippewa chiefs. Furthermore, the formal inquiry of 1843 was a trial-like inquiry conducted by Superintendent Clench. The inquiry was directed into any and all allegations that witnesses wished to advance against Wawanosh. Surely, had there been any reason to suspect that Wawanosh had acted improperly in connection with a transaction involving one quarter of the Upper Reserve, some reference to that transaction would have been made in the many complaints brought forward against Wawanosh.

139 The motions judge found, however, that the absence of any complaint about the Cameron transaction had no evidentiary value because in his words:

> . . . The first question is when, and exactly of what, the Chippewas should be expected to have complained. Lack of complaint about lack of surrender cannot be expected until lack of surrender becomes apparent. The legal status of the Cameron lands, between November 1839 and August 13, 1853 was unclear. . . . If the Crown officials could not know the status of the disputed lands one would hardly expect the Chippewas to know enough detail to be in a position to complain specifically. . . . Lack of complaint of lack of surrender has no evidentiary significance when future surrender is reasonably to be expected. [Emphasis added.]

140 The motions judge missed the evidentiary significance of the absence of any complaint about the Cameron transaction by characterizing it as a failure to complain about the lack of a surrender. It is not the Chippewas' failure to complain about the lack of a surrender which is significant. What is significant is that even though the other chiefs were aware that Wawanosh had agreed to sell one quarter of the Upper Reserve, they made no complaint about that transaction in an inquiry, the purpose of which was to air any and all complaints about Wawanosh's conduct as Head Chief. The failure to complain about Wawanosh's actions in connection with the Cameron transaction, or to repudiate that transaction, constitutes evidence from which it can be reasonably inferred that Wawanosh acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known.

G. Post-Cameron Transaction Events

141 The inference of approval or at least acceptance of the Cameron transaction by the Chippewas flowing from the absence of any complaint about it in the avalanche of complaints made against Wawanosh is strengthened by the evidence of several events which occurred between 1840 and 1855. These events shed further light on the Chippewas' attitude towards the Cameron transaction.

142 In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English. [12] In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of those who may have voiced any opposition to Wawanosh's actions.

143 The first reference in the Indian Department correspondence to the Cameron transaction after November 1839 was a letter from Jones to Jarvis in early May 1840. Jones advised Jarvis that the Chippewas wanted approval for the purchase of 300 acres of land in Enniskillen. The Chippewas, including those on the Upper Reserve, had been interested in acquiring Enniskillen land for many years. There were maple groves at Enniskillen which were ideal for sugar-making, a traditional Chippewa activity which had taken on commercial importance as the number of white settlers increased.

144 Jones advised Jarvis that the Chippewas proposed that the purchase price " be paid out of the money which they are to receive from the tract to be sold to Mr. Cameron and co., or, in the event of much delay, the first instalment to be paid out of their annuity".

145 The proposal made by the Chippewas through Jones in May 1840 was the latest of several proposals the Chippewas had made concerning the acquisition of Enniskillen land. Some involved the exchange of reserve land (not land on the Upper Reserve) for Enniskillen property, and others involved the outright purchase of Enniskillen property. These proposals were advanced by the chiefs after Council meetings and reflected the consensus of the Chippewa bands. There is no reason to doubt but that the proposal put forward through Jones in May 1840 also represented the community consensus. Jones refers only to "the Indians" in his letter, however, given his relationship with Wawanosh, we think that had the plan been advanced by Wawanosh, Jones would have said so.

146 The motions judge concluded that the letter from Jones in May 1840 was evidence that the Chippewas on the Upper Reserve had a general awareness of the Cameron transaction as of May 1840 and knew that the land was to be sold to Cameron. We think the letter shows more than that. It indicates a communal awareness of the Cameron transaction as early as May 1840 and a communal acceptance of the transaction. The Chippewas saw the Cameron transaction as providing a source of funds with which they could develop the sugar-making resources on the Enniskillen property. In doing so, they would be pursuing a traditional practice, while at the same time improving their economic base by

developing a commercial relationship between themselves and the white settlers. Far from repudiating the Cameron transaction in May 1840, the Chippewas embraced it as a means of acquiring the Enniskillen property, a long held and actively pursued community goal.

147 The Enniskillen lands were eventually purchased by the Chippewas, but not from the proceeds of the Cameron transaction. Those proceeds were not available. The fact that the Cameron transaction did not fund the purchase has no effect on the inference to be drawn from the Chippewas' position as set out in Jones' letter of May 1840.

148 The events leading up to the survey of the disputed lands in the summer of 1842 also shed light on the Chippewas' attitude towards the Cameron transaction. In June 1841, Cameron complained that he could not commence a settlement of the land until it was surveyed and set out in lots. In October 1841, the Surveyor General suggested that it would be more economical to survey the entire Upper Reserve rather than just the lands affected by the Cameron transaction. Jarvis agreed with his suggestion but observed:

> I entirely concur in your view of the matter but as the Chief of the tribe of Indian who live on the Reserve is not on very good terms with his people I should recommend a reference being first made to them, to ascertain whether they have any objection to the land being laid out into lots.

149 Jarvis understood that the Chippewas might well be opposed to having the entire Upper Reserve surveyed. From the Chippewas' perspective, a survey setting out lots was a precursor to settlement by the white man. Before taking that provocative step, Jarvis wanted to be sure that the Chippewa community would not oppose it. Given the relationship between Wawanosh and many of the Chippewas on the Upper Reserve by the fall of 1841, Jarvis was not prepared to act on Wawanosh's word alone. [13]

150 The motions judge contrasted Jarvis' careful approach to obtaining a Chippewa consensus in relation to the survey with the absence of any concern about the existence of a Chippewa consensus in connection with the Cameron transaction. With respect, the two situations were not analogous. In so far as the survey was concerned, Jarvis had no reason to think that the Chippewas were agreeable to a survey and given the significance of a survey to the Chippewas, very good reason to think that they would be opposed to the survey. With respect to the Cameron transaction, it was brought to the Indian Department representative, Jones, as a concluded bargain by three chiefs of the Chippewas.

151 In October 1842, Jones was told of the proposal to survey the entire reserve and was asked to determine the views of the "chiefs of the tribes generally". Two weeks later, Jones wrote back to Jarvis indicating that he had had some difficulties getting the chiefs together and that it had taken them some time to determine whether they were agreeable to a survey of the entire reserve. Jones indicated that the chiefs did not wish to have the entire reserve surveyed.

152 As the motions judge observed, the Chippewas' consideration of whether to permit a survey of the entire reserve would have necessarily entailed knowledge of the fact of the Cameron transaction and the extent of the land involved in that transaction. The Chippewas' response to the survey request leads to two other conclusions. First, the Chippewas were perfectly capable of resisting attempts to intrude on their land. Second, there was no suggestion that the Crown was not entitled to survey the disputed lands and set out lots on that land. Acceptance of the Crown's right to survey implied recognition of imminent settlement by the white man. Such settlement was inconsistent with any claim by the Chippewas that the Cameron transaction was unauthorized by them, or at least unacceptable to them as of 1842. We infer from the Chippewas' response to the request for a survey of the entire reserve that by the fall of 1842, the Chippewas on the Upper Reserve distinguished between the disputed lands and the rest of the reserve, saw it as their right to prohibit surveys of the latter but not the former, and knew that white settlement of the disputed lands was imminent.

153 Jarvis was inclined to press for a survey of the entire reserve despite the position of the Chippewas, but in January 1842 it was concluded that the benefits of surveying the entire reserve were not worth the harm that the survey would cause to the relations with the Chippewas on the Upper Reserve. The entire reserve was not surveyed until 1855 when the chiefs consented to the survey.

154 Even after the proposal to survey the entire reserve was abandoned, there was a further delay in surveying the lands which were subject to the Cameron transaction. The delay was due in part at least to some confusion over road allowances. That confusion resulted from the absence of proper documentation of the transaction.

155 In May 1842, John O'Mara, a surveyor, went to the Upper Reserve and spent some two weeks doing a detailed survey of the disputed lands. He divided the lands into three blocks, set out a road between blocks A and B, a road between blocks B and C and two roads running from the western limit of the disputed lands through the reserve to the St. Clair River. In referring to the actual making of the survey, the motions judge said:

> This is an important piece of evidence because the band was sensitive to the implications of any survey. The open and notorious presence of surveyors on the disputed land and the visible survey monumentation in the form of stakes and blazed trees would bring home to the band very vividly the fact that their land was being prepared for settlement.

156 We agree with the conclusion of the motions judge. In our view, there were two reasonable inferences to be drawn from the Chippewas' inaction in the face of the survey. Either Wawanosh and the other chiefs acted with the approval of the Chippewas affected by the sale when they made the bargain with Cameron; or even if they did not have their approval, the Chippewas accepted the bargain when it came to their attention, did not seek to repudiate it or otherwise assert any right to the disputed lands.

157 The failed attempt by residents of Port Sarnia to acquire part of the Upper Reserve in February 1843 was the next event discussed in some detail by the motions judge. He accurately observed that the officials in the Indian Department regarded a surrender of the land as a condition precedent to any acquisition of it by the residents of Port Sarnia. He also suggested that the aborted transaction demonstrated:

> the ease with which enthusiastic purchasers can convince government officials, wrongly, that the Chippewas had agreed to sell part of the reserve.

158 With respect, the evidence does not support this conclusion. The government officials were not convinced of anything by the residents of Port Sarnia. Rather, Jones was instructed to convene a meeting of the principal men and determine whether a surrender could be agreed upon. Within a month, the Chippewas indicated they were not prepared to surrender the land at that time, and that ended the matter as far as Jarvis was concerned.

159 The reference to the aborted transaction involving the residents of Port Sarnia provides little insight into the Cameron transaction. Unlike that transaction, there was no bargain presented to the Indian Department in 1843 by chiefs of the Chippewas, but rather a petition to that Department by the land-hungry residents of Port Sarnia asking the Department to obtain a surrender.

160 The attempts by the residents of Port Sarnia to acquire part of the Upper Reserve in 1843 do, however, provide yet another example where Chief Wawanosh, speaking through his son, conveyed the position of the Chippewas on the Upper Reserve to the Indian Department. As with the earlier occasions set out above, there is no suggestion that Wawanosh inaccurately conveyed the community consensus to the Indian Department.

161 The incident in 1843 also demonstrates that the Chippewas' objections to intrusions onto their lands were acknowledged and accepted by the Indian Department even over the opposition of settlers.

162 The Bagot Commission Report in 1844 also deserves brief reference. That Commission examined in detail the affairs of the Indian Department, and was highly critical of the operation of that department. The Commission heard many complaints about unjust land transactions in the 1830s, but recorded no complaints or disputes with respect to the Cameron transaction. The Commission was well aware of the transaction and examined its monetary details at some length. The Commission concluded that Jarvis had placed the initial payment made by Cameron in the wrong bank account and the Commission was highly critical of Jarvis' record-keeping. Nowhere, however, is there any suggestion

that the transaction did not have the approval of the Crown and the Chippewas, or that it was regarded by anyone as a "private deal" between Cameron and Wawanosh.

163 The next reference by the Chippewas to the Cameron transaction appeared in correspondence from Peter McGlashan, the clerk of the Magistrate's Court at Port Sarnia to resident Superintendent Clench in August 1847. McGlashan, who was involved in yet another attempt by the residents of Port Sarnia to acquire land on the Upper Reserve, wrote to Clench to tell him that the Chippewas were not prepared to give up any of their land. He said:

> . . . To all these arguments the Indians have but one answer *viz*, that they were induced some eight years ago to consent to the sale of a large part of the reserve to Mr. Cameron of this place, for which he agreed to pay them within five years, in annual instalments but that to this time they have not received any part of the purchase money, and that they will not dispose of any more of their land for fear that they should be served in the same manner in receiving payment for it.

164 The motions judge found that the letter was further evidence of the Chippewas' knowledge of the transaction albeit that they were mistaken as to the number of annual instalments to be paid. He went on, however, to conclude that McGlashan could not be relied on to accurately convey the Chippewas' attitude towards the transaction, and that it "has little evidentiary weight in determining whether Wawanosh on November 8, 1839 acted with the consent and authority of the band".

165 While it is not unreasonable to conclude that the letter could not be relied on to show that Wawanosh had the consent of the affected bands when he agreed to the transaction, we see no reason to discount the value of the letter as evidence of the Chippewas' attitude towards the transaction in 1847. Their comments to McGlashan do not suggest a repudiation of the agreement. Quite the contrary, they signal a willingness to comply with the agreement and a complaint that the purchaser was not complying with it. The attitude of the Chippewas, as expressed to McGlashan, is inconsistent with the claim that the Chippewas viewed the disputed lands as having been unilaterally taken from them by Cameron. It is equally inconsistent with the claim that, as of 1847, the Chippewas did not accept that the disputed lands were no longer theirs.

166 The Chippewas maintained this same position in subsequent communications with the Indian Department. For example, in 1850, a local Indian Department official reported that the chiefs were concerned that Cameron was issuing deeds for parts of the disputed land when they had not yet been fully paid. As in 1847, the Chippewas' complaint was with Cameron's failure to comply with the bargain, not with the bargain itself.

167 The lengthy dispute over road allowances across the Upper Reserve, between the residents of Port Sarnia and the Chippewas on the Upper Reserve, provides further evidence of the Chippewas' attitude towards the Cameron transaction. In 1849, the residents of Port Sarnia petitioned the government to open a road through the reserve. Some settlers wanted a road through the middle of the reserve, to the river. In August 1849, the provincial land surveyor recommended that a road be built through the reserve. In September 1849, the Chippewas, through their interpreter Henry Chase, responded to the proposed road as follows:

> The chiefs had granted a road should be opened for the use of their white neighbours direct from Sarnia Village, cutting diagonally the northeast corner of the Indian reserve of three quarters of a mile, as the Honourable Malcolm Cameron had proposed to be opened, to his lot of land on the rear of the reserve.

168 Mr. Chase also reported that the chiefs would not agree to a second road being opened through the reserve. In early 1850, the residents of Port Sarnia filed a further petition with the government complaining that the Chippewas' opposition was due to "a child-like ignorance of what is really for their benefit".

169 In July 1850, the residents of Port Sarnia changed tactics. They now contended that three roads had been granted to Cameron as part of the 1839 transaction. They petitioned the town Council of Port Sarnia to create a road along

those allowances and indicated that the Indian Department should "order the agreement with the Honourable Malcolm Cameron to be fulfilled".

170 An exchange of correspondence ensued dealing with the road allowances, if any, that had been granted in the Cameron transaction. The lack of proper documentation respecting the transaction fuelled the controversy. It was in the course of this correspondence that an Indian Department official asked whether a surrender of the land had been made at the time of the sale to Cameron. That question went unanswered.

171 After making inquiries, the Indian Department advised the Port Sarnia municipal Council that:

> On the authority of an existing order of the Governor General in Council that as the land through which you wish the road to pass is an Indian reserve which has never been surrendered to the Crown, no part of it can be considered under the jurisdiction of the municipal Council as a public highway.

172 The municipal Council was not prepared to accept this position and indicated, relying on the letter of Jones to Jarvis of November 9, 1839, that the municipality would press ahead and "abide the consequences if they overstep their authority".

173 Clench responded with equal vigour, advising the municipality that if the road concessions were not provided for in the surrender, the letter of Jones would have no value. Clench assumed that a surrender existed. In fact, there was none.

174 Eventually, the municipality resiled from its threats to proceed with the roads despite the position of the Indian Department. An agreement was reached with the Chippewas whereby the Chippewas agreed to permit a road running diagonally across the corner of the reserve. This was the offer the Chippewas had made in 1849 when they first indicated they were willing to allow their " white neighbours" to run a road through the Upper Reserve from the disputed lands to the river.

175 The Chippewas' attitude throughout the road dispute was one of acceptance of the fact of the Cameron transaction. The back of the reserve was described as Cameron's lands. The Chippewas were also willing to co-operate with their white neighbours in road construction, but insisted that the co-operation be on their terms if the road was to run over their land. Their position was supported throughout by officials at the Indian Department.

176 The road allowance dispute is a good example of the tripartite nature of disputes involving Indian lands in southwestern Ontario in the middle of the 19 th century. The settlers stood on one side of the dispute and the Chippewas on the other with the Indian Department in the middle. That Department did not see itself as a promoter of the interests of white settlers. Where, as in the case of the road allowance dispute, the Department concluded that the Chippewas were correct, they fully supported the Chippewas' position.

177 The willingness of the Indian Department to support the Chippewas' position even against the persistent claims of the white settlers in Port Sarnia was not unique and would not have been lost on the Chippewa leadership. Their failure to take issue with the Cameron transaction cannot be explained on the basis that they assumed that such complaints would not receive a fair hearing at the Indian Department. As the road allowance dispute demonstrates, officials in that department were prepared to support the Chippewas in contentious matters involving lands on the Upper Reserve.

178 The final event which must be examined in considering the Chippewas' attitude towards the Cameron transaction is the General Council meeting of the Chippewa chiefs in March 1855. The chiefs addressed a number of questions to Superintendent Talfourd, Clench's successor. Talfourd's notes indicate that the questions were directed to several transactions involving reserve lands. Talfourd's cryptic notes of the questions put by the Chippewa chiefs included the following reference to the Cameron transaction:

> To what amt. the principal the sale of the parcel of land brought by Mr. Cameron and the amt. of land to have the exclusive use of the money?

179 Talfourd's report on the General Council meeting included the following:

> . . . I attended a Council . . . of the Chippewas of Sarnia when it was decided that I should communicate to Your Lordship their wants and wishes on the following subjects . . .
>
> (Firstly) the sum that will be realized by the late surrender of land at Sarnia Village, the block sold to Honourable M. Cameron in the rear of the reserve, and one lot in Bosanquet sold to Mr. Kennedy, and at what time they may expect the interest on the payments already made.

180 After referring to these documents, the motions judge held:

> . . . The documents show that the band knew of the sale to Cameron, did not know the amount of the sale price, did not know the amount of land sold, knew there was some interest owing, and did not know when it would be paid.

181 We cannot accept some of these conclusions. In our view, it is not reasonable to infer from these notes that the Chippewas were unaware of the purchase price. In his report, Talfourd refers to "the sum that will be realized". This is a very different matter than the purchase price since an interest calculation was involved. Nor is it reasonable to assume that the Chippewas did not know the amount of land that had been sold. As indicated above, a detailed survey of the land had been carried out in 1842. A further more detailed survey was made before 1850. While the Chippewas might not have known how many white man's acres were involved in the transaction, they knew exactly what part of the Upper Reserve had been given up in the Cameron transaction. Lastly, the Chippewas' question concerning when they would pay the accumulated interest does not reflect any ignorance of the terms of the bargain made with Cameron. Actual payment to the Chippewas depended on the Crown who held the money for the benefit of the Chippewas and not on the terms of any bargain struck between Cameron and the three chiefs.

182 We take the queries posed by the chiefs at the General Council in 1855 as strong evidence that the Chippewas accepted the transaction, no longer regarded the disputed land as theirs, were prepared to abide by the terms, but were also determined to get what was due to them under the terms of the transaction. As with the previous events outlined above, the Chippewas did not seek to repudiate the agreement, but rather sought compliance with the terms of the agreement by the purchaser.

183 By 1861, some twenty-two years had passed since the Cameron transaction. Cameron was no longer on title and those who had purchased the land had no involvement in the transaction. They could look to an apparently valid Crown patent issued some eight years earlier for the root of their title.

H. Summary of Findings

184 We summarize our relevant findings with respect to the Cameron transaction and the events in the ensuing twenty-two years as follows:

- Crown officials responsible for First Nations relations continued throughout the relevant time to follow the central policies underlying the *Royal Proclamation*. The Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

- Cameron, with the approval of the Crown, negotiated the transaction with three chiefs of the Chippewas, including Head Chief Wawanosh. The chiefs and Cameron reached a bargain, the terms of which were modified by Jarvis and then approved by the Crown. The bargain was consistent with the goals of the "civilization" policy of the Crown.

• By 1851, the Crown believed that a surrender of the disputed lands had been made and issued a patent on that basis in 1853.

• There was in fact never a surrender of the disputed lands to the Crown.

• The Chippewas were never asked by the Indian Department to surrender the disputed lands to the Crown. Consequently, there is no evidence of the existence of a communal intention to surrender the disputed lands to the Crown at any time.

• The failure to request and obtain the necessary surrender is explained by the dysfunctional state of the Indian Department and the neglect of those charged with the responsibility of obtaining the surrender.

• It cannot be said whether Head Chief Wawanosh and the two other chiefs negotiated the bargain with Cameron with the authority of those Chippewa bands affected by the transaction. It is, however, clear that those bands knew of the transaction shortly after it was made. They chose not to repudiate the agreement, but rather accepted the transaction, sought to obtain the proceeds from it, and sought to apply those proceeds to other well established communal interests.

• In the twenty years following the transaction, those Chippewas affected by it both acknowledged and accepted it. They regarded the disputed lands as no longer part of their Upper Reserve, and insisted that they obtain what was due to them under the terms of the transaction.

• The Chippewas' repudiation of the Cameron transaction and their claim that they retain their interests and rights in the disputed lands first occurred some 140 years after the Cameron transaction when it was discovered that there was no documentation evincing the surrender of the lands by the Chippewas to the Crown.

IV. No Surrender of the Disputed Lands

185 It follows from our review of the evidence that we agree with the motions judge's finding that the Chippewas never surrendered the disputed lands to the Crown. As stated earlier, this issue, which is central to this case, is first and foremost a factual one. However, since the arguments of all parties on this issue were essentially focussed on the surrender provisions of the *Royal Proclamation* and the effect of the *Quebec Act* on those provisions, we will examine the question of surrender in that light.

A. The Royal Proclamation of 1763

186 The *Royal Proclamation of 1763* was an expression of the royal prerogative. It was used as a mode of imposing the imperial power on conquered colonies in North America including New France. In accordance with its stated intention to "Establish New Governments in America" it created four new colonies including the province of Quebec on which it imposed the laws of England until the pre-conquest French Law was restored in Quebec by the *Quebec Act, 1774*: see P. W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough: Carswell, 1997) at 2-7 to 2-8.

187 Stripped to its essentials, the *Royal Proclamation* states that the King has acquired territories in America secured by the Treaty of Paris and has seen fit, with the "Advice of Our Privy Council" to grant letters patent under the Great Seal of Great Britain to create within the territories four distinct and separate governments (i.e., Quebec, East Florida, West Florida and Grenada). The territorial boundaries are then set out; they do not include within Quebec the contested Chippewa lands. The letters patent issued pursuant to the *Royal Proclamation* provide that the Governors of the colonies shall call General Assemblies and that the Governors, with the consent of the assembly, are given the power to make laws for the public welfare and to constitute courts of law. The Governors and councils were also given authority and power to settle and agree with the inhabitants of the New Colonies for such lands, tenements and hereditaments as shall be in "Our Power" to dispose of and to grant certain lands to officers and men of the army and navy who have disbanded in America.

188 The Indian provisions of the *Royal Proclamation* begin with the following declaration:

> And whereas it is just and reasonable, and essential to our Interest and Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them or any of them, as their Hunting Grounds. . . .

189 The Indian provisions of the *Royal Proclamation* are found in the next five paragraphs of the proclamation and are contained in what the motions judge calls "Part IV" (Reasons of the motions judge, paras. 250-257). Paragraph 1 creates an interior Indian territory beyond the colonies and the western settlement barrier. It prohibits government land grants of any kind in this territory and prohibits government land grants in the colonies of unceded Indian land. Paragraph 2 reserves the interior Indian territory including (until 1774) what is now the disputed land "for the use of the said Indians" and prohibits any settlement or land purchase " without Our especial Leave and Licence for that Purpose first obtained". The leave and licence provisions are of little application and have no significance to this case. Paragraph 3 is a removal provision that required any persons settled in the interior Indian territory or on unceded Indian lands within the colonies to remove themselves immediately.

190 Paragraph 4 deals with two distinct provisions; the first, part 4a, prohibits private purchases and sets requirements for the surrender to the Crown of Indian lands within colonies open to settlement. The second, part 4b, regulates the fur trade.

191 The private purchase prohibition and the surrender procedures are introduced with a preamble noting the "great Frauds and Abuses" that have been committed in private purchases from the Indians and the need to prevent such private purchases in order to convince the Indians of the justice of the Crown and to remove sources of discontent. Paragraph 4a provides that, in areas with colonies open to settlement, Indian lands can be acquired only if they are first surrendered to the Crown by the Indians at a public meeting of the nation or tribe held for that specific purpose:

> We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; . . .

192 These are the surrender provisions of the *Royal Proclamation*. The Chippewas submit that these provisions survived the *Quebec Act* and had the force of law until replaced in 1860 by the Legislature of the Province of Canada: see *An Act Respecting the Management of the Indian Lands and Property*, S. Prov. C. 1860, 23 Vict., c. 151, s. 6. They submit that the Crown could only acquire legal title to Indian lands by following the letter of the surrender provisions in the *Royal Proclamation*. Otherwise, they say, the transaction was a private sale and void *ab initio* leaving the present landowners without title.

193 The motions judge accepted the Chippewas' position. He found that: (1) there was no formal surrender of the disputed lands; (2) the sale to Cameron was a private sale; (3) the private sale of unsurrendered aboriginal land was prohibited by the *Royal Proclamation* and by common law; and (4) the letters patent to Cameron were illegal and void *ab initio*.

194 The motions judge's reasons, in summary form, for deciding the surrender issue were as follows: the surrender procedures in the *Royal Proclamation* had the force of law in 1839 and accordingly any sale of Indian lands had to comply with these procedures; the disputed lands had never been surrendered by the Chippewas because the mandatory surrender procedures set out in the *Royal Proclamation* had not been complied with; absent a formal surrender, the Chippewas did not and could not have consented to or affirmed the sale of the disputed lands. The motions judge therefore decided

the surrender issue in the Chippewas' favour and characterized their interest in the disputed lands in the nature of an "unceded unsurrendered common law aboriginal interest and title guaranteed by Treaty 29".

195 The motions judge held that the *Royal Proclamation* had the force of law in 1839 and that its full surrender requirements were directly in force in the disputed lands at the material time. He also noted that "[t]he surrender procedures incorporated into the *Proclamation*, quite apart from the *Proclamation* itself, reflect fundamental aspects of Indian title at common law" and accordingly that the surrender requirements themselves were "in force in 1774 and thereafter in the area of the disputed lands as fundamental conditions precedent for the valid alienation of Indian land" (para. 286). He concluded that any surrender of Indian lands in 1839 had to comply with the *Royal Proclamation* and common law surrender requirements.

196 The motions judge rejected the various defendants' arguments that the surrender provisions of the *Royal Proclamation* had been repealed by the *Quebec Act* and thus rendered inoperative. He concluded, as a matter of statutory interpretation, that the *Quebec Act* was not intended to, and in fact did not, repeal or abrogate the surrender procedures of the *Royal Proclamation*. He further noted that the *Quebec Act*, which made no reference to Indians at all, did not evidence the "clear legislative intent" required to derogate from Indian title or treaty rights. Following a chronological review of the relevant case law, he distinguished the *Bear Island Foundation* case, in which this court held that " the *Quebec Act* repealed the surrender procedures of the *Royal Proclamation*" and that there was no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown (para. 333). He supported his decision to not follow the *Bear Island* "repeal dictum" on the basis that the case was "fact-driven", that it was overruled by subsequent Court of Appeal authorities, and that although the Supreme Court of Canada upheld this Court's decision, the Supreme Court expressly stated that it did not necessarily agree with all the legal findings of this Court.

197 In the submission of the Chippewas, these findings of the motions judge support the legal conclusion that the Crown had acquired no title to the disputed land and could grant no title to Cameron. The Chippewas further submit that because they have a constitutionally entrenched right to the occupation of these lands that continues to this day, the court is not in a position to grant any relief to the present landowners.

198 In the light of our findings on the evidence before us that whatever the formal legal status of the *Royal Proclamation* subsequent to the passage of the *Quebec Act*, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57-65 above), little turns in this case on whether the surrender provisions per se of the *Royal Proclamation* had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the *Royal Proclamation* and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.

199 As we accept the proposition that aboriginal title could be lost only by surrender to the Crown, and that a surrender required a voluntary, informed, communal decision to give up the land, it is not necessary to our analysis that we determine the precise legal status of the *Royal Proclamation* at the time of the Cameron transaction.

200 On the one hand, the record contains evidence that, historically, the *Royal Proclamation* was intended to be a provisional arrangement which, in so far as Quebec was concerned, was replaced by the *Quebec Act* and that the temporal limitations of the *Royal Proclamation* also applied to the Indian provisions. For example, we refer to certain statements to this effect made by the Lords of Trade, [14] the drafting of legislation for Parliament in 1764 entitled "Plan for Future Management of Indian Affairs", and the provisions of the *Quebec Act* itself. Further, one Crown expert, Dr. Paul Gerald McHugh, posits that the government of the day did not regard the *Royal Proclamation* as being operative even before the passage of the *Quebec Act*. According to his evidence, it would appear that instructions as to the treatment of Indians, including the formalities for the surrender of Indian lands, were treated as an ongoing exercise of the royal prerogative.

He further asserted that while the spirit of the *Royal Proclamation* was respected in that all surrender procedures were to be of a public nature, the specific procedure in each case was a matter to be determined on a case-by-case basis by the Governor in Council.

201 On the other hand, the evidence shows that while the *Royal Proclamation* was a unilateral declaration of the imperial Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that the Crown took extraordinary steps to make the First Nations aware that the policy set out in the *Royal Proclamation* would govern Crown-First Nations relations and the importance attached to the *Royal Proclamation* by First Nations as their *Charter*. There can be little doubt that from the aboriginal perspective, the *Royal Proclamation* was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the *Royal Proclamation* were still in effect even after the passage of the *Quebec Act*. Moreover, the *Royal Proclamation* is expressly referred to in the *Canadian Charter of Rights and Freedoms*, s. 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [15] and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the aboriginal people of Canada.

202 As stated earlier, in view of our findings of fact, we do not find it necessary to make any final determination on the precise legal status of the *Royal Proclamation*. We note as well that the importance of the *Royal Proclamation* as the source of aboriginal title has been much diminished by recent decisions of the Supreme Court of Canada. That Court has made clear that, contrary to the suggestion of earlier case law, aboriginal rights, including aboriginal title, are pre-existing rights. As was stated by Dickson J. in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at 379:

> Their [the Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or any other executive order or legislative provision.

203 In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at 1082, Lamer C.J.C. stated:

> Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling* [*St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46]. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples.

And at 1091-1092:

> Aboriginal title at common law is protected by s. 35(1) [of the *Constitution Act, 1982*]. This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" [emphasis added by Lamer C.J.C.]. On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (*e.g. Calder* [*Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313]), s. 35(1) has constitutionalized it in its full form. [Emphasis in original.]

204 Lamer C.J.C. also stated that "the same legal principles governed the aboriginal interest in its reserve lands and lands held pursuant to aboriginal title" (at 1085). He quoted with approval from 379 of the reasons of Dickson J. in *Guerin* (at 379):

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . . [Emphasis in original.]

205 This last statement is important to this case where the Chippewas and the motions judge made much of the language of Treaty 29, consummated at Amherstburg on July 10, 1827, expressly reserving to the Indians from the lands surrendered a reservation covering the disputed lands.

B. The Quebec Act, 1774

206 In light of these recent pronouncements by the Supreme Court, it would appear that the *Quebec Act, 1774* could not and did not effect any change in the nature and extent of aboriginal title to the extent that it did revoke the *Royal Proclamation*. In any event, we are not concerned so much with the nature and extent of aboriginal rights, as with the question of their surrender. On that subject, we are bound by our own decision that the surrender provisions of the *Royal Proclamation* were revoked by the *Quebec Act*: see *Ontario (Attorney General) v. Bear Island Foundation*, *supra*, at 410.

207 In *Bear Island Foundation*, it was argued that the members of the Temagami Band were not bound by the Robinson-Huron Treaty of 1850 because the surrender procedures followed by the Crown were contrary to the *Royal Proclamation*. As to this argument, this court said at 410:

> It is at least questionable whether these provisions affected the Temagami lands since they may not have been "within those parts of Our Colonies where We have thought proper to allow Settlement". It is, however, not necessary to resolve this question since the relevant procedural aspects of the Proclamation were repealed by the *Quebec Act*,1774 (U.K.), c. 83 [R.S.C. 1970, App. II, No.2]. Section 3 of the *Quebec Act, 1774* makes it clear that it does not make void, vary or alter any right, title or possession. Therefore, whatever right, title or possession the Temagami Band may have had pursuant to the Royal Proclamation was not affected by the *Quebec Act, 1774*. We think it clear, however, that the procedural requirements for purchase "at some public Meeting or Assembly . . ." was repealed. *Thus, at the relevant times there was in existence no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown.* [Emphasis added.]

208 It is argued that these remarks were *obiter dictum*. They were not. The entire thrust of the judgment was that it was not necessary to determine whether that Band had acquired aboriginal rights because any rights they had were extinguished either by being parties to the Robinson-Huron Treaty or because the Band's subsequent conduct amounted to adhesion to the Treaty.

209 The Supreme Court of Canada dismissed the appeal of the Temagami Band: [1991] 2 S.C.R. 570 (S.C.C.). The Supreme Court recognized that the case was largely fact-driven and that there were concurrent findings of fact in the two lower courts with which it would not take issue. It then said at 575:

> It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see in this context *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

210 This court did not accept this legal conclusion either, and proceeded on the assumption that the Band had established aboriginal rights over the disputed lands. In effectively taking the same approach, the Supreme Court said at 575:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.

211 In our view, these passages cast no doubt on the legal conclusions reached by this court. In particular, the Supreme Court's acceptance of the proposition that "arrangements subsequent to the treaty" amounted to a surrender indicate that it was no longer necessary to follow the letter of the procedure prescribed by the *Royal Proclamation*.

212 Nor do we accept the contention that this court "impliedly" reversed *Bear Island Foundation* in *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (Ont. C.A.), leave to appeal to S.C.C. refused [1994] 2 S.C.R. v (S.C.C.), and *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* (1996), 31 O.R. (3d) 97 (Ont. C.A.), aff'd [1998] 1 S.C.R. 756 (S.C.C.). Neither case mentions *Bear Island Foundation* nor the Quebec Act. The only references to the *Royal Proclamation* were made in an historical context. There was no suggestion that it was still in force as the operative surrender procedure.

213 In *Hopton*, the Shawanaga Indian Band was the respondent to an action for a declaration that a road, which ran through its unsurrendered Indian lands, was a public road. The public had used the road from 1850 to 1978 when the Band took the position that it was a private road. The trial judge declared the road to be a public highway by reason of the common law doctrine of dedication and in addition, or in the alternative, by virtue of s. 257 of the *Municipal Act*, R.S.O. 1980, c. 302 [now R.S.O. 1990, c. M.45, s. 261] which provides that "all roads passing through Indian lands . . . are common and public highways". The Band appealed and the trial judgment was set aside.

214 This court held that the doctrine of dedication is inapplicable to unsurrendered Indian lands because the *sui generis* nature of Indian title renders impossible an inference of intention to dedicate. This court also held that s. 257 of the *Municipal Act* cannot mean that lands passing through Indian lands become public highways by the simple operation of that section because that would be legislation within the exclusive legislative jurisdiction of the Parliament of Canada and, as such, would be *ultra vires* the province. The section can do no more than declare public, for provincial purposes, those highways that have become public highways pursuant to the provisions of the *Indian Act*, R.S.C. 1985, c. I-5, which provides for the surrender to the Crown and transfer of administration and control of the lands to the provinces.

215 The only reference to the *Royal Proclamation* is in the holding by the court that the doctrine of dedication is inapplicable to unsurrendered Indian land. Putting the matter in historical perspective, the court stated at 399:

> The *Royal Proclamation,* the Robinson-Huron Treaty and the successive *Indian Acts* all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown.

216 As we understand this passage, it says no more than that the aboriginal rights of the Band have been recognised by the Crown over time starting with the *Royal Proclamation* and continuing with regard to this Band with the Robinson-Huron Treaty and with the *Indian Act* thereafter. While the court followed with quotes from both the *Royal Proclamation* and the Robinson-Huron Treaty, in its disposition of this issue, it confined its authorities to those applicable from 1850 to 1978 and relied solely on its interpretation of "treaties and the statutes relating to Indians".

217 In *Chippewas of Kettle & Stony Point v. Canada (Attorney General)*, *supra*, the Band surrendered reserve land to the Crown in 1927. The Band complained in 1992 that the voluntary surrender provisions of the *Indian Act*, R.S.C. 1906, c. 81 had not been complied with. Laskin J.A., in delivering the judgment of the court, reviewed the history of surrender provisions relating to Indian lands, starting with the *Royal Proclamation.* He stated that the "underlying rationale" for the Royal Proclamation and the Indian Act was to prevent aboriginal peoples from being exploited. He then held that the mere presence of one of the subsequent purchasers from the Crown at the surrender meetings conducted pursuant to the *Indian Act* did not violate the language of the *Indian Act* or the "rationale" of the *Royal Proclamation.* It has never been suggested that the surrender procedures in the *Royal Proclamation* survived once they were codified in the *Indian Act* or its predecessor statutes and that it was necessary for the Crown to comply with both the *Indian Act* and the *Royal Proclamation.* As stated, the issue in the case was whether the surrender provisions of the 1906 *Indian Act* had been complied with.

218 A further appeal to the Supreme Court of Canada was dismissed: [1998] 1 S.C.R. 756 (S.C.C.). Cory J. who, as a matter of interest, had been a member of the panel of this court that decided *Bear Island Foundation*, delivered the Court's brief reasons. He said at 757:

> On this appeal we are not concerned with the issue of the Crown's fiduciary duty. The sole question before us is the validity of the surrender and on this issue we are in agreement with the reasons of Laskin J.A.

219 We are not persuaded that this court or the Supreme Court of Canada has overruled Bear Island, implicitly or otherwise. However, we do not regard the fact that *Bear Island Foundation* remains a binding authority as dispositive of the issues raised in this appeal. Simply put, this is not a case where the validity of the surrender turns on whether the appropriate procedures, whatever their source, were followed. Here, there was no surrender at all. Since we accept the proposition that aboriginal title can be lost only by surrender to the Crown, the issues that remain are whether, in the absence of a surrender, the Chippewas have a right to the relief they seek, and whether their claims are barred by the application of any statutory limitation periods or equitable doctrines.

V. Statutory Limitation Periods

220 Canada and Ontario concede that no limitation period bars the Chippewas' claim against the Crown for breach of fiduciary duty, a cause of action for which there is no statutory limitation period in Ontario. The landowners, however, moved for summary judgment to dismiss the action on the basis, *inter alia*, that the claims asserted against them by the Chippewas were barred by the provisions of eighteen different statutes, as listed at paragraph 445 of the motions judge's reasons. The motions judge held that none of the statutes in question applied to bar the action, and the landowners and Ontario appeal from this aspect of the decision. For reasons that follow, however, we would not interfere with the motions judge's conclusions on this issue.

A. Issues on Appeal

221 The motions judge first determined that, for the purpose of any limitation period, the time started to run, subject to any question of capacity and discoverability, from the date of the issuance of the Cameron patent on August 13, 1853. No appeal is taken from this finding.

222 The motions judge then considered the scope and effect of a multitude of Ontario statutes and concluded that Ontario legislation, because of constitutional restrictions on provincial power, could not of its own force extinguish Indian title. Again, no appeal is taken from this finding.

223 The motions judge next considered the alternative argument that, if the Ontario statutes did not apply directly of their own force, they applied because they were incorporated in federal law by reference through various provisions. In the first instance, the landowners relied on s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5; s. 39(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7; and s. 22 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (as am. by S.C. 1990, c. 8). The motions judge considered each statutory provision and concluded, for various reasons, that none of them applied. The landowners take issue with this finding but restrict their appeal to the applicability of the *Crown Liability and Proceedings Act*.

224 Finally, the motions judge considered the effect of a number of pre-Confederation statutes: the English "*Nullum Tempus Act*" of 1769 [16] which applied to the disputed lands by virtue of the statutory reception of English law in 1792; the 1834 Upper Canada limitations statute; and the 1859 Province of Canada (Canada West) limitations statute. Although the motions judge did not deal specifically with the *Nullum Tempus Act* in his analysis, his reasoning with respect to the other two pre-Confederation statutes would necessarily apply to this statute as well.

225 The motions judge held that the 1834 and 1859 pre-Confederation statutes were continued as if they were laws of the Parliament of Canada in respect of matters within the constitutional authority of Parliament by virtue of s. 129

of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The question then became whether these statutes effectively extinguished the Chippewas' Indian title to the lands.

226 The motions judge recognized that Parliament had the power before 1982 to extinguish aboriginal title unilaterally by specific legislation plainly evidencing a clear specific intent to do so, but held that this power did not extend to the extinguishment of treaty rights. Even if Parliament had the power to extinguish both aboriginal and treaty rights unilaterally, the motions judge concluded that the 1834 and the 1859 pre-Confederation statutes did not evidence any specific intent to do so and hence that they were of no effect. He further held that, in any event, the colonial legislatures that enacted these statutes had no power to affect or extinguish either aboriginal or treaty rights as these were matters exclusively within the Imperial authority and beyond the colonial legislative power at the time.

227 The landowners and Ontario both appeal from the motions judge's finding with respect to pre-Confederation statutes. Canada does not rely on any statutory limitation defence and took no part in the argument of this issue.

228 The following questions are raised with respect to statutory limitation periods:

> 1. Does s. 22 of the *Crown Liability and Proceedings Act* incorporate any Ontario limitations statute in federal law?
>
> 2. Does the *Nullum Tempus Act* of 1769 have any application to this litigation?
>
> 3. Were the 1834 and 1859 pre-Confederation statutes continued under s. 129 of the *Constitution Act, 1867* as if they were statutes of the Parliament of Canada or as if they were provincial statutes?
>
> 4. Did Parliament before 1982 have the power to extinguish treaty rights unilaterally by statute?
>
> 5. Do the 1834 and 1859 pre-Confederation statutes evidence the required intention to extinguish the Chippewas' aboriginal or treaty rights?
>
> 6. Did the colonial legislatures that enacted the 1834 and 1859 statutes have the power to extinguish aboriginal or treaty rights?

229 It is only necessary to answer questions 1, 2 and 5 to dispose of the question of statutory limitation periods in this case. Our view, stated succinctly, is as follows. The applicability of the *Crown Liability and Proceedings Act* and the *Nullum Tempus Act* is dependent upon the argument that the Chippewas' claim against the landowners for the recovery of land is in effect a "proceeding by the Crown" within the meaning of either of these statutes. The simple answer is that it is not. In so far as the 1834 and 1859 limitation statutes are concerned, it is our view, regardless of the answers to the other questions, that the motions judge was correct in his conclusion that neither statute evidences the clear and plain intent necessary to extinguish aboriginal or treaty rights and that, consequently, the statutes do not affect the disputed lands.

B. The Crown Liability and Proceedings Act

230 Section 32 of the *Crown Liability and Proceedings Act*, first enacted in the *Crown Liability Act*, S.C. 1952-53, c. 30 in a slightly different form, incorporates by reference the Ontario limitations laws with respect to proceedings by or against the federal Crown. It reads as follows:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any *proceedings by or against the Crown* in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. [Emphasis added.]

231 Since this statute only extends to the federal Crown, Ontario does not rely on this provision and, as stated earlier, Canada does not raise any limitations defence. It is therefore not necessary to consider the application of this provision to the Chippewas' action "against the Crown". The landowners, however, argue that the Chippewas' action is, in effect, a claim made on behalf of the federal Crown and hence "a proceeding by the Crown" within the meaning of s. 32. In support of this argument, the landowners rely on the Chippewas' pleadings wherein, amongst other relief, they claim vesting orders in the Crown in trust for the Band.

232 The motions judge rejected this argument and, in our view, rightly so. The Chippewas' claim for recovery of the land is not "a proceeding by the Crown" regardless of the form of relief sought. Even if the fact that the Crown itself would be barred from claiming the same remedy from the landowners could arguably be relevant to the court's decision whether or not to grant the relief sought by the Chippewas, it does not turn the Chippewas' action into a " proceeding by" or on behalf of the Crown so as to trigger the application of s. 32.

C. The Nullum Tempus Act

233 The *Nullum Tempus Act* of 1769 is lengthy and is drafted in the cumbersome legislative language of the time. However, it is not necessary for the purpose of these reasons to reproduce its terms nor to consider any of its precise language because there is no dispute as to what its effect would be if it were applicable. The *Nullum Tempus Act* barred actions and other proceedings *by the Crown* with respect to any land claim commenced more than sixty years after the cause of action accrued. If applicable, it would therefore bar any action by the Crown for the recovery of land commenced after 1913, sixty years after the issuance of the Cameron patent.

234 Ontario and the landowners contend that the *Nullum Tempus Act* was in force in Upper Canada and Canada West from 1792 to the date of confederation and that it was continued thereafter by s. 129 of the *Constitution Act, 1867.* They argue that the Chippewas' action for recovery of land on behalf of the Crown is therefore barred, having been commenced after 1913. The Chippewas do not dispute that the *Nullum Tempus Act* provides for a sixty-year limitation period but they argue that the *Act* was not in force and that, in any event, it does not apply to their action.

235 We do not find it necessary to determine whether the *Nullum Tempus Act* was in force during any part of the relevant period because, in our view, it has no application to the proceeding brought by the Chippewas. As stated earlier, this action is not a proceeding brought by or on behalf of the Crown. It is therefore not affected by the *Act*'s provisions.

D. The 1834 and 1859 pre-Confederation limitation statutes

236 The 1859 statute re-enacted the earlier 1834 statute and the relevant provisions are identical. It is therefore only necessary to consider the language of the later statute. The relevant sections are 1 and 16, the first barring the remedy and the second extinguishing the right and title of ownership. They read as follows:

> s. 1 *And be it further enacted by the authority aforesaid,* That after the first day of July, one thousand eight hundred and thirty four, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same.
>
> s. 16 *And be it further enacted by the authority aforesaid,* That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing an action or suit, the right and title of such person to the Land or Rent, for the recovery whereof such entry, distress, action or suit, respectively, might have been made or brought within such period, shall be extinguished.

237 Hence, these provisions provide for a twenty-year limitation period with respect to actions for the recovery of land. The equivalent sections are found in sections 4 and 15 of the current Ontario *Limitations Act*, R.S.O. 1990, c. L.15, except that the period is now ten years.

238 It is common ground that, prior to 1982, Parliament could unilaterally extinguish aboriginal title by statute. It is also agreed that Parliament could only do so, however, by the use of clear and plain language. While it would appear from recent decisions of the Supreme Court of Canada that, contrary to the motions judge's finding, Parliament's power in this regard extended to the extinguishment of treaty rights as well (see *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at 496), it is not necessary to decide the matter because there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test. In our view, it does not.

239 The jurisprudence has evolved considerably in recent years in the direction of narrowing the concept of extinguishment of aboriginal rights. In *Delgamuukw*, *supra*, Lamer C.J.C., in considering whether provincial laws of general application could extinguish aboriginal rights, referred to the "clear and plain" test in these words (at 1120):

> . . . a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow, supra*, at p. 1099, as one of" clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been" necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown" use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone*, [[1996] 2 S.C.R. 723] at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

240 If the pre-Confederation statutes are considered to be continued as if they were laws of Parliament, of course no issue arises as to the constitutional division of powers. Nonetheless, these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right. McLachlin J.'s comments in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at 652 (dissenting, but not on this point) are also helpful to understand what is required to meet the "clear and plain" test:

> For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra* at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the " clear and plain" test'] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

241 While in an appropriate case a general limitations statute can bar a claim for damages arising from the loss of aboriginal or treaty rights (see *e.g.*, *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.)), different considerations apply where it is contended that the statute itself extinguished the aboriginal or treaty right. In this case, we agree with the motions judge's conclusion (at paras. 595-96) that the 1834 and 1859 pre-Confederation limitations statutes did not evidence any intent to affect or to extinguish the aboriginal title or treaty rights of the Chippewas in the disputed land. Consequently, we would not interfere with the motions judges' conclusions.

242 To summarize, we agree with the motions judge that there are no statutory limitations to bar the Chippewas' claims in this case.

VI. Remedies and Equitable Defences

A. Introduction

243 As we have concluded that there was no proper surrender and that the Chippewas' actions are not barred by any statutory limitation periods, the issue becomes whether, on the facts of this case, the Chippewas are entitled to the remedies they seek, namely, a declaration that the Cameron patent is void and a declaration that they are entitled to possession of the disputed lands. In particular, the issue is whether it is appropriate, in deciding whether or not to accord the Chippewas a remedy, for the court to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Cameron patent.

244 The issue of remedies and equitable defences, like the other issues in this case, has both public and private law dimensions. The aboriginal right asserted by the Chippewas has been described as *sui generis* in nature. The *sui generis* nature of aboriginal title reflects the interaction between traditional aboriginal values and those of European settlers and consequently, aboriginal title is not readily classified in the conventional categories of the English common law tradition. In some respects, aboriginal title draws upon the concepts of public law. The rights it embraces are communal in nature and can only be understood in the context of the unique relationship between the Crown and the aboriginal community asserting the right. At the same time, aboriginal title has been held on the highest authority to be a right of property and it cannot be described or understood except in relation to the concepts of traditional common law private property rights.

245 The remedies claimed by the Chippewas reflect the dual public and private law dimensions of aboriginal title. As against the Crown, the Chippewas impugn the validity of the exercise of the Crown prerogative, invoking the principles of public law and the remedies available to challenge the legality of governmental action. At the same time, the Chippewas assert a claim to a property right against the private citizens who are the present occupiers of the property, invoking the legal principles governing the reconciliation of competing claims to private property. It follows that defences bearing upon the availability of remedies in both the public and private law settings must be considered.

246 As we have already noted, the issue of the Chippewas' right to damages against the Crown for breach of its aboriginal rights is not before us. The damages claim was not the subject of the motions for summary judgment and it was common ground that it would proceed to trial. Accordingly, we confine our attention to the Chippewas' claim for a remedy related to the return of the lands themselves and we do so on the basis that the Chippewas have a right of action against the Crown for damages.

B. Public Law Remedies

247 The Cameron patent was in the usual form and, on its face, was apparently valid. As is apparent from the record before us, it required extensive archival research to determine that there was any reason to suspect that there had not been a proper surrender of the lands covered by the patent. For well over 100 years, no one could have had any reason to doubt its validity.

248 The patent was issued as an exercise of Crown prerogative. The issuance of Crown patents to land was a routine governmental act. A Crown patent has been accepted from the earliest days of European settlement until the present as the foundation for title to land. For almost 150 years, successive purchasers have bought lands that were included in the Cameron patent without having any reason to suspect that the patent, and consequently their root of title, was in any way defective.

249 Public law remedies are derived from both common law and equitable sources. The common law remedies were the prerogative writs. While the prerogative writs have now been replaced by the statutory application for judicial review,

the principles governing their availability continue to apply by analogy. Since the early years of the 20th century, the equitable remedy of the declaratory judgment has been an accepted public law remedy. Whatever their origin, public law remedies are discretionary in nature. As will be explained in greater detail below, delay in asserting a claim to a public law remedy, combined with reliance by innocent third parties on the impugned act or decision, is a well-established basis for refusing a remedy.

1. The Prerogative Writ of Scire Facias

250 The common law prerogative writ to challenge the validity of a Crown patent, grant, charter or franchise was the prerogative writ of *scire facias*: See Evans, *de Smith's Judicial Review of Administrative Action* 4th ed. (London: Stevens, 1980) at 585; Wade and Forsyth, *Administrative Law* 7th ed. (Oxford: Clarenden Press, 1994) at 615; 1(1) *Hals.* (4th) at para. 279. While today in Canada, the writ of *scire facias* is an unfamiliar relic of the common law's past, it was an accepted and recognized remedy in the 19th century. It was described in the following terms by the Judicial Committee of the Privy Council in *R. v. Hughes* (1865), L.R. 1 P.C. 81 (England P.C.), at 87-88 per Lord Chelmsford:

> The writ of *Scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record . . . .All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *Scire facias.* And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For as was said by Chief Justice Jervis, in the case of *The Eastern Archipelago Company v. The Queen* [2 E. & B. 94] "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by *Scire facias* by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General.

251 The writ of *scire facias* has fallen into disuse, but it is mentioned in *de Smith* and Wade, *supra*, as falling in the same category as the more familiar prerogative writs of *certiorari*, *mandamus*, prohibition and *habeas corpus.*

252 In modern times, in the domain of administrative law, the prerogative writs have been replaced by statutory remedies for judicial review, yet the principles they embrace continue to apply. A party may no longer seek a prerogative writ to challenge the validity of official or governmental acts, but the availability of the modern remedy of judicial review will be determined by reference to the foundational principles developed under the earlier regime of the prerogative writs.

253 One of those foundational principles is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs. The fact that the writ of *scire facias*, like the other prerogative writs, were said to issue "as of right" did not detract from the court's discretion to grant relief to the party invoking its jurisdiction. There is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case. A person aggrieved is entitled " as of right" to invoke the writ to bring the matter before the court. It remains for the court to decide how to dispose of the complaint, and in deciding the matter, the court does have a discretion to exercise. This point is explained by Wade, *supra* at 718: "the fact that a person aggrieved is entitled to *certiorari ex debito justitiae* does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy." Similarly, Beetz J. observed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at 575-6:

> The use of the expression *ex debito justitiae* in conjunction with the discretionary remedies of *certiorari* and *mandamus* is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.
>
> *Ex debito justitiae* literally means "as of right", by opposition to "as of grace" (P.G. Osborne, *A Concise Law Dictionary*, 5th ed.; *Black's Law Dictionary*, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue

> and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.

254 The statement in *Hughes*, *supra*, that the writ of *scire facias* issues "as of right" must be read together with the statement that the purpose of the remedy of *scire facias* is that grants of letters patent "*may* be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons." If the patent *may* be repealed on *scire facias*, it must equally be the case that it *may not* be repealed or revoked even " when contrary to law".

2. The Discretionary Nature of Public Law Remedies

255 From the discretionary nature of the prerogative remedies, there has developed and ripened a general principle of Canadian public and administrative law. That principle received clear expression in *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.). The case involved an action in nullity under the *Code of Civil Procedure*, R.S.Q., c. C-25, art. 33, to quash municipal by-laws that had adopted a loan scheme that also imposed a tax on property owners. The by-laws were attacked on the ground that the municipality had failed to give affected landowners the notice required by statute. It was argued that since the statutory procedure had not been followed, and the landowners had been denied the fundamental right to be heard, the by-laws had not been properly enacted and that they should be declared a nullity. The action was brought five years after the by-laws were enacted, after the municipal bonds had been issued and the improvements had been made. Writing for a unanimous Court, Gonthier J. accepted the submission that the municipality's failure to give the required notice violated the *audi alteram partem* rule, and thereby rendered the by-laws vulnerable to review, but he held that the court had a residual discretion to refuse the remedy of a declaration of nullity. While the case involved detailed considerations of the principles developed under the Quebec *Code of Civil Procedure*, Gonthier J. made it clear that the direct action in nullity derived from the same inherent power exercised by the superior courts to supervise the legality of the acts of all public authorities. At page 360, he described this inherent power of judicial review as "the cornerstone of the Canadian and Quebec system of administrative law" and as a "necessary consequence of the rule of law". At the same time, Gonthier J. emphasized that the power of judicial review was "essentially discretionary" in nature.

256 As Gonthier J. noted, the same point had been made in earlier decisions of the Supreme Court of Canada. In *Harelkin v. University of Regina*, *supra*, the Court upheld the discretion of the superior courts to refuse *certiorari* on grounds of delay. See also *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at 1034-35. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 77, La Forest J. put it as follows:

> There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case . . .

257 The underlying rationale for the discretionary nature of public and administrative law remedies in general, and the consideration of delay and its consequences for third parties in particular, reflects the polycentric nature of the rights and interests implicated. There is more at stake than the rights of the individual or group asserting the claim and the applicable legal principles must reflect that element. As explained by Brown and Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 1998) para. 3:1100:

> the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. The public interest in good government, including the principle that it should be conducted according to law, has always been an equally important factor in the development of the law of judicial review.

258 Apparently valid acts of public officials are relied upon by the members of the public at large in planning their affairs. Official documents are taken at face value. The purported exercise of a statutory or prerogative power

creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration. Accordingly, as explained by the *Immeubles Port Louis Ltée* case and by the leading texts, (see Brown and Evans, *supra* at para. 3:5100; de Smith, *supra*, at 579; Jones and de Villars, *Principles of Administrative Law* 3rd ed. (Scarborough, Ont.: Carswell, 1999) at 583), a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision.

259 A Crown patent, apparently granting the fee simple in land, provides a classic example of an official act that will be relied on by innocent third parties. A Crown patent is accepted by all as the basis for rights to real property and no purchaser would consider it necessary to go behind the patent to determine whether or not it had been validly granted. It is for this reason that the courts have for long hesitated to invalidate patents that have created third party reliance. See, for example, *Bailey v. Du Cailland* (1905), 6 O.W.R. 506 (Ont. Div. Ct.), at 508 per Falconbridge J.:

> It was held in *McIntyre v. Attorney-General*, 14 Gr. 86, that where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, although it may to some extent involve proof of a negative. 'Patents are not to be lightly disturbed. They lie at the foundation of every man's title to his property.'

260 To a similar effect is the following statement from *Fitzpatrick v. R.* (1926), 59 O.L.R. 331 (Ont. C.A.), at 342 quoting from *Boulton v. Jeffrey* (1845), 1 E. & A. 111 (U.C. Q.B.):

> It is difficult indeed to conceive a more prolific source of litigation than would be opened in this Province, if the patentees of the Crown were exposed to be attacked upon supposed equities acquired by other parties, while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the Crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this lies at the root of every man's title.

261 The motions judge analyzed this aspect of the case in terms of whether the Cameron patent was "void". He held that the Cameron patent was " void". A "void" patent is said to be one that has no legal effect whatsoever, while a "voidable" patent is one that does have effect unless and until it is set aside. Whatever its merits for other purposes, the language of "void" and "voidable" seems to us to be not a particularly apt or helpful analytic tool in the present context. From a remedial perspective, the inherent discretion of the court is always in play. As Wade has explained, *supra* at 343-4, the term" void" is "meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation." Wade adds, at 718, in relation to the discretionary nature of judicial review, " a void act is in effect a valid act if the court will not grant relief against it." See also Jones and de Villars, *supra* at 404. Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside. In our view, the issue is more clearly put and understood in terms of the discretion to grant or withhold a remedy and the factors that must be considered in relation to the exercise of that discretion. In fairness to the motions judge, it should be mentioned here that the arguments regarding the discretionary nature of public law remedies do not appear to have been presented to him with the same force and clarity as they were in this Court.

3. Discretion and Aboriginal Rights

262 The Chippewas submit that there is no place for the exercise of discretion in the present case. Aboriginal property rights are fundamental constitutionally protected rights. We fully accept that courts do not have an open-ended discretion to enforce or deny aboriginal property rights as seems to suit the convenience of the case. In particular, it would plainly be wrong to deny a remedy to vindicate a valid claim to aboriginal title purely on the grounds that recognition of the claim would be troublesome to others: see *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), at 565.

263 On the other hand, aboriginal rights are an integral aspect of the Canadian legal landscape. Their shape, definition and enforcement do not and cannot exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights: see *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), at 1057-1058; *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at 524. As the Supreme Court of Canada has made clear, aboriginal rights " must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (*R. v. Vanderpeet*, *supra*, at 539) and "with the rest of Canadian society" (*R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), at 775). See also *Delgamuukw*, *supra*, at 1065-1066, 1096, 1100, and 1107-1108. The same need for reconciliation between the aboriginal rights, and the rights of the Crown and third parties is applicable in the case of treaty rights: *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), at 1070-1072. In aboriginal title cases, the rules of the common law tradition must be adapted and applied by analogy. Accordingly, as explained by Lamer C.J.C. in *Vanderpeet*, *supra*, at 550-1, "a court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each". The accommodation is to be done in a manner that does not strain "the Canadian legal and constitutional structure".

264 Is it possible to reconcile the fundamental nature of aboriginal rights, and the overarching importance of according due recognition to those rights, on the one hand, with the discretionary nature of public law remedies, on the other? The answer lies in the nature of the discretion that is involved. Simply put, the discretion is narrowly circumscribed, only to be exercised on the basis of established legal principles. As explained by Wade, *supra*, the " discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care." The discretion to grant or withhold a public law remedy does not mean that the court is free to do as it pleases with the case, without regard to the governing legal principles. The principle of legality and the rule of law require that *a priori* consideration be given to the party whose rights have been taken, especially where the rights at issue are as fundamental in nature as the right of aboriginal title. However, it is a basic principle of our legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim. It is for this reason that the established principles governing the availability of public law remedies require that, before a remedy is granted, consideration be accorded to the rights and interests of others who may have had every reason to rely upon the apparent validity of the impugned act.

265 In *Immeubles Port Louis Ltée*, *supra* at 370, Gonthier J. provided the following helpful analysis of this point:

> I would point out that discretion and arbitrary action should not be confused. While arbitrary action means power exercised at will, just as the person likes, discretion, though it removes the strict duty to act, is subject to certain rules. A judge hearing a direct action in nullity does not decide to do what he feels like doing, but must exercise his power of review in a judicial manner, direct himself correctly in law and observe the applicable principles.

266 Gonthier J. went on, at 372, to explain the manner in which the discretion should be exercised:

> First, the judge must take into account the nature of the disputed act, the nature of the illegality committed and its consequences, and second, the causes of the delay between the disputed act and the bringing of the action. The nature of the right relied on is a factor relevant to the exercise of the discretion, but is not the only one. The court must also consider the plaintiff's behaviour.

267 In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

4. Application of Discretionary Factors

268 The first factor to consider is "the nature of the disputed act, the nature of the illegality committed and its consequences". See *Immeubles Port Louis Ltée*, *supra* at 372. As our review of the facts demonstrates, the circumstances both before and after the grant of the Cameron patent plainly demonstrate acceptance and acquiescence on the part of the Chippewas. The facts are flatly inconsistent with any suggestion that the lands were taken, either by Cameron or by the Crown, without the acquiescence of the Band members. While the Chippewas' acceptance of the Cameron transaction does not amount to a formal surrender, it is a fact that may be considered in the exercise of the court's discretion to grant or withhold a remedy.

269 In *Immeubles Port Louis Ltée*, *supra* at 372, Gonthier J. indicated that the discretion to refuse a remedy could be exercised " apart from situations where there is a total absence of jurisdiction". We do not accept the submission that the nature of the illegality committed here fell into that category or that it was sufficient to require a court to set aside the Cameron patent without taking into account third party interests. The Governor in Council had jurisdiction to grant patents and there was not" a total absence of jurisdiction". The error in failing to obtain a formal surrender was, in our view, akin to the failure of the municipality to provide its municipal electors with the required statutory notice. If anything, the error in the present case was less significant.

270 While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings.

271 The transaction did not occur without the interposition of the Crown between the Chippewas and Cameron to ensure that the Chippewas' interests were protected. The terms Cameron first negotiated with the Chippewas were not acceptable to Crown officials who insisted that provision be made for the payment of interest on the unpaid portion of the purchase price. The transaction was approved by the Governor in Council. The consideration did not flow between Cameron and the Chippewas, but rather the proceeds were paid by Cameron to the Crown, held in trust for the Chippewas, and Cameron acquired his title by way of Crown patent.

272 There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: " It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal for the Chippewas, and *simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy*" (para. 752) (emphasis added). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties.

273 The second factor is the nature of the delay and its consequences for third parties. We are not satisfied that there has been any adequate explanation for the delay that should lead us to excuse its impact. In assessing the delay, due consideration must be given to the motions judge's findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal claims until the late 1970s or early 1980s. However, the delay here went well beyond failure to take legal proceedings. The motions judge found that as early as 1851, the Chippewas knew that their lands had been taken without a formal surrender. The Chippewas knew that the lands had been sold, as confirmed by their inquiries about payment of the price. Despite the obvious fact that settlers were on what had formerly been reserve lands, there was not a whisper of complaint from the Chippewas. Moreover, with respect to other matters affecting their interests, the Chippewas demonstrated both the ability and the willingness to bring grievances to the attention of the appropriate officials. A court cannot ignore the fact that for more than 150 years, the Chippewas made no complaint whatsoever of the evident possession by others of lands formerly within their reserve. The Chippewas gave no indication of any dissatisfaction with that state of affairs and gave every indication that they fully accepted and acquiesced in the

transfer of their lands. A delay of this nature and length brings the Chippewas' situation squarely within the category of case where, on established legal principles, the court will refuse to grant a remedy.

274 The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third party reliance than that presented by the landowners.

275 We have found that there was no proper surrender of the aboriginal title to the lands. As already mentioned, aboriginal title is a fundamental and constitutionally protected right. It will require exceptional circumstances for a court to withhold a remedy to protect or vindicate aboriginal title. For the foregoing reasons, we are persuaded that exceptional circumstances exist in the present case. The interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.

C. Private Law Remedies

276 From the perspective of the private law of property, discretionary factors are traditionally associated with the determination of equitable claims and the availability of equitable remedies. Until the fusion of law and equity in the mid-19th century, a rigid line was drawn between law and equity, and discretion was associated with claims arising from equity as distinct from purely legal claims. That rigid dichotomy has since broken down, but historical factors continue to influence the applicability of equitable principles to claims traditionally associated with the common law. The issue to be addressed here is whether, from the private law perspective, the remedies claimed by the Chippewas are subject to the discretion traditionally associated with equity.

277 The Chippewas submit that a finding that there was no surrender of the lands covered by the Cameron patent must inevitably lead to the conclusion that their aboriginal title to the lands remains unextinguished and that they have a present entitlement to possession of the lands. The Chippewas rely on the *nemo dat quod non habet* principle - no one gives what he does not have. The Chippewas submit that as there was no surrender, the Crown had nothing to grant and that the Cameron patent did not and could not convey the fee simple to the lands unencumbered by the aboriginal title. The Chippewas contend that given the nature of aboriginal title, it is not subject to the discretionary factors governing the availability of equitable relief. There are two aspects to this submission. First, the Chippewas submit that aboriginal title is strictly legal rather than equitable in nature. Second, it is submitted that application of equitable doctrines to preclude the Chippewas' claim to the lands would constitute an unauthorized extinguishment of aboriginal title in favour of private interests, contrary to the fundamental rule that aboriginal title can only be surrendered to the Crown.

1. Equitable Nature of Remedies Sought

278 In our view, the Chippewas' position that equitable principles have no bearing upon their claim cannot be accepted. To the extent that the Chippewas claim the lands as distinct from damages, they assert a claim for an equitable remedy. Before the motions judge, the Chippewas asserted a claim for declaratory relief. In the factum filed on this appeal, the Chippewas reiterated that claim and sought as well an order requiring the Crown in right of both Canada and Ontario to enter negotiations with a view to resolving the Chippewas' claim. In oral argument before this court, Mr. Cherniak on behalf of the Chippewas maintained the position that the primary relief sought by the appellants was for a declaratory judgment, accompanied by a claim for an order directing the negotiations. However, Mr. Cherniak also pointed out that the statement of claim contained a claim for an immediate vesting order, and on behalf of his clients, he asserted that claim should this court consider that a declaratory order should not be granted on discretionary grounds.

279 It is well established, and not disputed before us, that the remedy of a declaratory judgment is equitable in origin and that its award is subject to the discretion of the court: see *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 (S.C.C.), at 189-92; Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988), in particular at 17-19; Zamir, *The Declaratory Judgment* (1962) at 7-9; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (U.K. H.L.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at 481-2; *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 (Eng. C.A.).

280 The power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100 which provides as follows:

> 100. A court *may* by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. (Emphasis added.)

281 Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42. As explained by Proudfoot V.C. in *Robertson, Re* (1875), 22 Gr. 449 (Ont. Ch.), at 456, the statute gives the court the power "to make a vesting order whenever it might have ordered a conveyance to be executed". Quite apart from its equitable origins, by the very terms of s. 100, the power to grant a vesting order lies in the discretion of the court. Cases decided under s. 100 explicitly refer to the power to grant a vesting order in discretionary terms: see *Ontario Housing Corp. v. Ong* (1988), 63 O.R. (2d) 799 (Ont. C.A.); *Holmsten v. Karson Kartage Konstruction Ltd.* (1997), 33 O.R. (3d) 54 (Ont. Gen. Div.).

282 Assuming, without deciding, that such an order could be made, an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right. However such a remedy should be classified in the traditional terms of law and equity; its award must therefore necessarily be subject to the discretion of the court.

283 In our view, the Chippewas cannot escape the fact that, from a private law perspective, they are claiming remedies that are discretionary in nature and subject to equitable defences.

2. Aboriginal Title and Equitable Principles

284 Nor do we accept the submission that a claim to aboriginal title is strictly legal in nature and immune from the overriding principles of equity, particularly where equitable remedies are being claimed.

285 The Chippewas rely on recent decisions of the Supreme Court of Canada elaborating the nature of aboriginal title as a *sui generis* legal property right: see for example *Guerin*, *supra*, at 382; *Delgamuukw*, *supra*, at 1081-97. These statements must not be taken out of context. They reflect the repudiation by the Supreme Court of Canada of the view that aboriginal title is a mere interest, held by grace and at the pleasure of the Crown. The important recognition of the legally enforceable nature of aboriginal title does not, however, reflect a rigid classification of aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of a common law origin. By insisting that aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify aboriginal title in terms more relevant to the 19th century, pre-*Judicature Act*, pre-fusion of law and equity phase of our legal development.

286 The submission that aboriginal title is a strictly legal interest, untouched and untouchable by equitable considerations, ignores several important factors. As stated above, the Supreme Court of Canada has insisted that

aboriginal title must not be considered in the strictly formal and traditional terms of the common law tradition, but rather that it must be seen as *sui generis* in nature. The Supreme Court has also held that in aboriginal title cases there is a "necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle" (*Guerin*, *supra* at 380). The court has also stated that "native land rights are in a category of their own, and as such, traditional real property rules do not aid" and that courts " do not approach [a case involving assertion of aboriginal title] as would an ordinary common law judge, by strict reference to intractable real property rules" (*St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 (S.C.C.), at 667). Moreover, in this area, courts "must ensure that form not trump substance" (*Delgamuukw*, *supra* at 1090).

287 There can be no doubt that the juridical character of aboriginal title has been influenced and shaped by equitable principles. The very nature of aboriginal title, in particular the core concept that aboriginal lands are inalienable except to the Crown, gives rise to a fiduciary duty. The fiduciary relationship imposed upon the Crown to deal with surrendered Indian lands for the benefit of the Indians is a central and fundamental aspect of aboriginal title. In *Guerin*, the case that identified and imposed the fiduciary duty upon the Crown, Dickson J. stated at 376 that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title".

288 It is difficult to see why a right having these characteristics and drawing so heavily upon the principles of equity for its shape and definition should be entirely immune from the principles of equity from a remedial perspective. Surely, a *sui generis* right should draw freely upon all otherwise relevant principles of our law, whatever their historic origin. An analogy may be drawn from *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), at 179 where the *sui generis* nature of breach of confidence was found to support the argument for modifying the remedial strictures of the categories of common law and equity. Referring to the line of authority, discussed in the next paragraph, to the effect that "[e]quity, like the common law, is capable of ongoing growth and development," Binnie J. held that the authority to award damages is "inherent in the exercise of general equitable jurisdiction" and is no longer dependent upon the " niceties" of specific statutory authority to award damages in lieu of an injunction. He added, at 179-80:

> This conclusion is fed, as well, by the *sui generis* nature of the action. The objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach. To that end, the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation.

289 To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law and equity by this Court, the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at 9 with reference to the legislative direction that the courts " shall administer concurrently all rules of equity and the common law" (now found in the *Courts of Justice Act*, s. 96(1)), "the fusion of law and equity is now real and total". In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at 582 La Forest J. adopted Lord Diplock's assertion in *United Scientific Holdings Ltd. v. Burnley Borough Council* (1977), [1978] A.C. 904 (U.K. H.L.), at 924-5 that the merger of law and equity is complete and that " the waters of the confluent streams of law and equity have surely mingled now."

290 While no doubt the categories that were shaped by the historical influences of common law and equity of law remain relevant for certain purposes, the spirit of the fusion of the two streams is the dominant theme and influence in the modern era. In our view, the modern conception of our private law as a fusion of equitable and legal principles provides added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. For these reasons, we reject the contention that the *sui generis* right of aboriginal title should be rigidly classified as falling exclusively into one of the historic streams of our legal history, completely immune from the influence of the other. Accordingly, as the Chippewas seek remedies that are discretionary in nature to vindicate a *sui generis* right that draws upon both common law and equitable sources, we conclude that it is appropriate to consider the effect of the Chippewas' 150-year delay in asserting a remedy and the consequent impact upon third parties of granting the Chippewas the remedies they seek.

291 On the facts of this case, we do not accept the submission that holding the Chippewas bound by the rules that govern the availability of equitable remedies constitutes an unauthorized extinguishment of aboriginal title. First of all, it is the Chippewas who invoke the principles of equity by their claim for the remedies described above. It is difficult to see a case for granting those remedies other than on the well-established principles governing their availability. Second, as indicated in our analysis of public law remedies, we are satisfied that although formal surrender procedures were not followed, the purpose of the surrender procedure - to protect the aboriginal interest - was fully met by the interposition of the Crown in the Cameron transaction.

3. The Nemo Dat Principle

292 The Chippewas submit that as there was no surrender of aboriginal title to the Crown, the Crown had nothing it could grant to Cameron by way of patent. It follows, in the submission of the Chippewas, that the Cameron patent was void and that nothing was conveyed. We have already dealt with the submission that the patent was "void" and concluded that established legal principles require the court to take into account the interests of innocent third parties before declaring a patent "void". In our view, the *nemo dat* principle, as it was applied to Crown patents, is entirely consistent with that view.

293 An early Canadian case, *Doe d. Malloch v. Principal Officers of Her Majesty's Ordinance* (1847), 3 U.C.Q.B. 387 at 394 dealt with a patent of land already set aside for another purpose. The judgment of Robinson C.J. was to the effect that at common law, the question whether such a patent was void or voidable was unsettled, although he was inclined to the view that it was merely voidable.

294 Other cases show that the *nemo dat* principle did not render void all Crown patents of lands to which the Crown lacked title. *Alcock v. Cooke* (1829), 5 Bing. 340 (Eng. C.P.) states that in the case of the Crown, the *nemo dat* rule was based on the notion that in making a subsequent grant of lands the Crown had already conveyed to another, the Crown must have been deceived. As Crown grants were "enrolled", in other words, officially recorded, the subject had the means of determining what grants had been made and was under a duty to inform the King of the existence of the prior grant before accepting a subsequent grant. It followed that the recipient of the grant previously made to another could assert no claim under the subsequent grant. However, where the Crown granted lands that were not subject to an " enrolled" grant, the court stated that the doctrine had no application. The following example was given by Best C.J. at 349:

> The attention of the court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where the subject cannot be deceived, and he must be deceiving the king; for if the king's prior lease be enrolled, the subject has the means of knowing of the existence of that lease, and it is his duty to inform the king of its existence.

295 These authorities show that competing claims between subjects were reconciled according to concepts akin to modern registry systems and equitable doctrines of constructive notice. The *nemo dat* principle did not automatically invalidate Crown patents. As we have already explained, where the validity of a patent is impugned, established legal principles require that the interests of innocent third parties must be considered.

4. Nature of Discretion to be Exercised

296 Accordingly, it is our view that whether the case is considered from the perspective of public law principles or from the perspective of private law, the discretion of the court is engaged. The discretionary factors bearing upon the availability of public law remedies is closely paralleled by equitable considerations applicable as between private parties in respect of proprietary claims. As with public law remedies, the discretion to grant or withhold an equitable remedy is constrained and is closely defined by established principles. Although the tradition of equity requires that the decision-

making process be described as discretionary, upon analysis, it is apparent that there are well-defined rules and doctrines that shape the decision and control the result. Discretion is, as Lord Mansfield explained in *R. v. Wilkes* (1770), 4 Burr. 2527 (Eng. K.B.), at 2539, a " sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful but legal and regular." Birks, "Rights, Wrongs and Remedies" (2000), 20 *Oxford Journal of Legal Studies* 1 at 16 aptly describes the orders rooted in the Court of Chancery as "weakly discretionary" in that the court acts upon firm discretionary rules that have "been settled over the centuries".

5. Laches and Acquiescence

297 Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The test for these defences was explained in the following terms by La Forest J. in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at 77-8:

> A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, [*Equitable Doctrines and Remedies*, (1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb . . . .
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as in the case with any equitable doctrine.

298 The doctrine of laches has been applied to bar the claims of an Indian band asserting aboriginal land rights: *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (Ont. H.C.), at 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (Ont. C.A.); [1991] 2 S.C.R. 570 (S.C.C.)); *Roberts v. R.* (1995), 99 F.T.R. 1 (Fed. T.D.), at 77 and 79. There are also *dicta* in two decisions of the Supreme Court of Canada considering, without rejecting, arguments that laches may bar claims to aboriginal title: *R. v. Smith*, [1983] 1 S.C.R. 554 (S.C.C.), at 570; *Guerin*, *supra* at 390.

299 The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here. In our view, those facts bring this case squarely within the principles governing laches set out in *M. (K.) v. M. (H.)*, *supra*. The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the *status quo*. This is a situation that would be unjust to disturb.

300 The motions judge refused to apply the defence of laches on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction and that "[i]t is clear from *Guerin* that laches cannot bar an aboriginal claim unless the claimant has knowledge of the actual terms of the disputed transaction." The relevant passage from Dickson J.'s judgment in *Guerin* appears at 390:

> Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March 1970; and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

301 On the facts of *Guerin*, the terms of the transaction were essential elements of the claim and without knowing the specific terms, which had been concealed by the Crown, the Band would not know it had a claim. The specific terms of the Cameron transaction are not an integral element of the Chippewas' claim in the present case. The claim is not based on the terms of the transaction, but on the assertion that the lands were transferred without a proper surrender. At para. 653, the motions judge found that the Chippewas had full knowledge of the facts essential to their claim in the 1850s:

> The Chippewas knew by 1851 that their unsurrendered land was occupied openly and notoriously by disagreeable settlers. They confirmed this knowledge, and more, in 1855 by their inquiries about the price and terms of payment. About the actual loss of their land, as opposed to the particulars of the Cameron transaction, there was nothing hidden or unknown. By January 9, 1851 at the latest their loss was clear and obvious. They knew with certainty that the disputed lands had been taken from them without a surrender. There is no evidence as to the point in time that this knowledge was lost to the plaintiffs.

302 In our view, this amounts to a finding that the Chippewas had knowledge of the facts necessary to assert a claim, and in view of that knowledge, *Guerin* is distinguishable. As we have already noted in the discussion of delay in relation to public law remedies, we are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds. On these facts, we can see no reason why the equitable defences of laches and acquiescence should not apply.

6. Good Faith Purchaser for Value

303 The second equitable doctrine that bears upon the claim advanced by the Chippewas is the protection accorded a good faith purchaser for value. As the motions judge held: "the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner." The motions judge described the defence in the following way (at paras 686-7):

> The defence of good faith purchaser for value without notice has been a fundamental element of our law for centuries. It protects the security of title to land acquired without notice of claim. It reflects a basic social value that protects the rights of innocent parties. Based in simple fairness, it provides a strong defence for the truly innocent purchaser. As Lord Justice James said over a hundred years ago in the case of *Pilcher v. Rawlins* [(1872), L.R. 7 Ch. App. 259 per Sir W. M. James, L.J. at p. 268]:
>
> > . . . according to my view of the established law of this Court, such a purchaser's plea of purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in his plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence of the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

304 Mellish L.J. in the same case said [at 273]:

> The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice....

305 The motions judge found that while it was arguable that Cameron had knowledge of the failure of the Crown to secure a proper surrender of the lands, there was no evidence to suggest that any subsequent owner knew or ought to

have known that the Cameron lands were unsurrendered Indian lands. Moreover, the motions judge found that there was no evidence of equitable fraud on the part of Cameron that would defeat the operation of the defence in favour of those who acquired title from Cameron. He found that a prudent purchaser and conveyancer would consider that the Cameron patent, regular on its face, was a good root of title and would make no further inquiry.

306 The good faith purchaser defence is an equitable doctrine and the Chippewas assert that their interest in the lands is a purely legal one not caught by purely equitable defences. For reasons already given, we do not accept this argument. To the extent that the Chippewas assert a claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences.

307 The good faith purchaser for value defence applies to the benefit of any purchaser who satisfies its requirements. On the findings of the motions judge, all purchasers from Cameron, the last of whom acquired lands in 1861, were good faith purchasers for value. However, the motions judge held that a rigid and unqualified application of the defence to cut off the Chippewas' claims in 1861 was too drastic given the nature of the aboriginal claim that was being asserted. He concluded that the need to reconcile the aboriginal and treaty rights with the rights of the landowners precluded the immediate application of the defence as of 1861, and, relying on *M. (K.) v. M. (H.) supra*, he imposed an "equitable limitation period" of sixty years, during which the aboriginal right would survive. The practical implication of this finding was that the Chippewas' damages claim against the Crown would have crystallized in 1921 rather than in 1861.

308 In our view, the imposition of a strict sixty-year "equitable limitation period", extending the time within which the Chippewas could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence, is not supportable in law. A limitation period prescribes the time within which a claim must be brought. *M. (K.) v. M. (H.)* goes no further than affirming that, in some circumstances, to prescribe a claim that was concurrently legal and equitable, a court of equity would apply by analogy a legal limitation period. Properly understood, the sixty-year period created by the motions judge is not a limitation period at all. On the findings of the motions judge, the good faith purchaser defence would have defeated the Chippewas' claim in 1861. The sixty-year period he imposed was an " extension period", suspending the operation of a valid defence, and allowing a claim to be asserted after the point at which, by operation of ordinary legal principles, it would have been defeated. There is nothing in *M. (K.) v. M. (H.) supra*, that would support this.

309 On the other hand, we accept that the factors that motivated the creation of the sixty-year "equitable limitation period", namely the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right. It is unnecessary to consider that possibility on the facts of the case before us. As we have concluded that the Chippewas accepted the terms of the Cameron transaction at the time it was entered, we can see no reason why the good faith purchaser for value defence should not be applied to preclude the Chippewas from asserting their claim against the landowners.

D. Conclusion on Remedies

310 For these reasons, we conclude that established rules governing the availability of public and private law remedies require the court to take into consideration the Chippewas' delay in asserting its claim and the reliance of innocent third parties on the apparent validity of the Cameron patent. On the facts of this case, it is our view that the Chippewas' delay, combined with the reliance of the landowners, is fatal to the claims asserted by the Chippewas.

VII. Disposition

311 For these reasons, we would allow the appeals and cross-appeals by Canada, Ontario and the landowners and we would dismiss the appeal by the Chippewas. Consequently, paragraphs 1, 2, 5 and 6 of the motions judge's order dated April 30, 1999 are set aside, and in substitution therefor, this court orders that:

1. The landowners' motion for summary judgment dismissing the Chippewas' claim in respect of the invalidity of the Cameron patent is allowed.

2. The Chippewas' motion for summary judgment in respect of the invalidity of the Cameron patent is dismissed.

312 In all other respects, the judgment of the motions judge is confirmed. The parties can submit written submissions on costs and they are directed to confer with Goudge J.A. to make the necessary arrangements.

Appeal by Crown allowed in part and appeal by band dismissed; cross-appeal by owners allowed in part.

Footnotes

1 The white man had various names for the Chippewas (Ojibway, Saulteux). In their own language, the Nation is referred to as Anishnabek. We will use the name Chippewas as it appears to be the appellation most commonly used in the record. We also use the words Indian, aboriginal and First Nations people interchangeably as did the parties to the appeal.

2 *Chippewas of Sarnia Band v. Canada (Attorney General)* (January 27, 2000), Doc. CA M24443, M24616, M24617, C32170 (Ont. C.A.).

3 There is a dispute over whether Cameron paid the full amount of the principal owed and whether he paid all of the interest owed. The affidavit of James Wells traces the documentary record of the payments. This dipute will figure in the outstanding damages by the Chippewas against the federal and provincial Crowns.

4 In 1860, the imperial government approved provincial legislation transferring control over the Indian Department to the provincial government: An Act respecting the management of the Indian lands and property, S.C. 1860, 23 Vict. C. 151.

5 Some eighty years later in the Bagot Report (1844), it was observed that the First Nations had kept a copy of the Proclamation and described it as their " Charter".

6 The continued Crown policy against sale of Indian land to individuals is exemplified by Superintendent Jarvis' refusal to sanction a private sale of 100 acres of the Upper Reserve in 1841 despite the fact that the chiefs supported the sale.

7 It appears that these two chiefs were allies of Wawanosh in November 1839, although at other times they were opposed in interest to Wawanosh.

8 Jarvis also overstated the amount of land involved, indicating that Cameron had agreed to buy some 4,000 acres. In fact he had agreed to buy 2,540 acres. There is no explanation for the mistake.

9 There is evidence that the policy of establishing permanent farming settlements on the reserves had the support of some 39 Chippewa chiefs in 1840. The Chippewas on the Upper Reserves had cleared some 100 acres for farming by 1841.

10 There is a reference in a letter written by Cameron in February 1850 to a Council having been held. The motions judge dismissed this letter as a self-serving characterization of events some eleven years after the fact. That finding is not unreasonable.

11 See, *supra*, n. 3.

12 The only document authored by a Chippewa was an August 22, 1840 letter from David Wawanosh, the teenage son of Chief Wawanosh. He went to school at Upper Canada College and spoke and wrote English. The letter expressed regret that the Chippewas had sold so much of their land to the white man, but also affirmed commitment to the "civilization" policy.

13 There is no indication in the evidence that Wawanosh favoured a survey of the entire reserve or would have agreed to the request that the entire reserve be surveyed.

14 The Lords of Trade formed the committee of the Privy Council responsible for the conception, drafting and making of the *Royal Proclamation.*

15 Section 25 provides in part:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763 . . .

16 *An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, entitled, An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever* (1769), 9 Geo. III, c. 16 (U.K.).

Tab 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air

Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain*

> *arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not

been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with

> the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical .*

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor

would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A. :

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer

did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald

J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45

days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the

final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material

filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

Falconbridge on Mortgages

Fifth Edition

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take-back mortgage as having received all cash on closing. The first account would be the original mortgage account and all cash proceeds would be applied to reduce the outstanding mortgage debt as and when received from time to time. The net amount owing under this account would continue to accrue and compound interest based on the original mortgage rate until repaid in full by the proceeds of the vendor take-back mortgage.

The vendor take-back mortgage would constitute its own account between the selling mortgagee and the new purchaser/mortgagor. Payments would be made under this mortgage based on the new vendor take-back mortgage rate and any default under this mortgage would permit the mortgagee to exercise its usual remedies against the new purchaser.

Once the original mortgage has been repaid in full by the proceeds of the vendor take-back mortgage, the vendor take-back mortgage would be held in trust by the selling mortgagee for all subsequent encumbrancers and the original mortgagor. All amounts received from the purchaser under the vendor-take back mortgage thereafter would be received on behalf of the subsequent encumbrancers and original mortgagor and must be paid over to them in accordance with their relative priorities.

In order to avoid maintaining these two accounts and managing the vendor take-back mortgage account even after the original mortgage is repaid in full, many institutional mortgagees treat the vendor take-back mortgage as having been paid in full on closing and the vendor take-back mortgage constituting an entirely fresh loan. This however would require the selling mortgagee to account for these deemed proceeds to subsequent encumbrancers and the original mortgagor as if they had been received in cash. Presumably no selling mortgagee would go this route if there were proceeds available from the sale including the vendor take-back mortgage amount, which exceed the outstanding mortgage debt. Otherwise, the selling mortgagee would be required to come out of pocket to subsequent encumbrancers or the original mortgagor as the case may be.

The one advantage of maintaining the two separate mortgage accounts is that if there is a default under the vendor take-back mortgage, which results in a further sale and deficiency arising, the selling mortgagee could look both to the original mortgagor under the first mortgage and the purchaser under the vendor take-back mortgage for the deficiencies, subject to the respective outstanding amounts owing under each of the mortgage accounts.

§35:130 Who May Purchase

In the case of a sale by or on behalf of the mortgagee under the direction of a court, the mortgagee is not at liberty to bid unless it obtains the leave of the court to do so.[189] In the case of a sale for taxes, the mortgagee is entitled to purchase the mortgaged property for its own benefit unless disentitled by any circumstance other

[189] Only in special circumstances will such leave be given, and if leave is given the conduct of the sale is usually transferred to some other person: *Sayre and Gilfoy v. Security Trust Co.* (1920), 56 D.L.R. 463 (S.C.C.), at p. 469. As to this case, see §27:40. For a comprehensive review of earlier authorities see *Traders Group Ltd. v. Mason* (1974), 53 D.L.R. (3d) 103 (N.S.S.C. App. Div.).

than that of being mortgagee.[190] If, however, the mortgagee is itself selling under the power of sale,[191] the mortgagee cannot sell to itself either alone or with others; nor can the mortgagee sell to a trustee for itself, or to any person employed by the mortgagee to conduct the sale.[192]

A sale by a person to himself or herself is not a sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price he or she has fixed, even though such price may be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.[193]

In one case, mortgagee sold the mortgaged premises under his power of sale ostensibly to a third person but in reality to himself. Shortly afterwards he sold a portion of the lands for a sum exceeding the amount due on the mortgage, and he also received rents for the remaining portion. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus received from the second sale and for the rents, together with interest on both amounts; the mortgagee was ordered to pay the costs of the action.[194]

Where the first mortgagee after making preliminary arrangements to ensure an advantageous sale of the mortgaged property bought the second mortgagee's security at a discount without informing him of such arrangements, the court refused to set aside the sale.[195]

Where a person has acted as agent for the mortgagee as, for example, in negotiating the loan, receiving the interest for the mortgagee or conducting the sale, the person cannot purchase from the mortgagee under the power of sale.[196] The solicitor for a mortgagee could not purchase even though the proceedings for sale were not taken in his name, and it was not shown that any loss had occurred by reason of his being the purchaser.[197]

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[190] *Clary v. Boulay*, [1928] 2 D.L.R. 144 (Ont. S.C. App. Div.), approving *Kelly v. Macklem* (1867), 14 Gr. 29; *Farrow v. Massey Harris Co. Ltd.*, [1927] 3 D.L.R. 997 (Ont. C.A.); *cf.*, *Servais v. Shear*, [1929] 2 D.L.R. 633 (Ont. S.C. App. Div.)..

[191] It is submitted that the power given to a mortgagee by s. 24, para. 1 of the Ontario *Mortgages Act* (re-enacting in effect the English *Conveyancing and Law of Property Act, 1881*, s. 19) to "buy in at an auction" (see §35:120.20.10) does not include the power to buy for its own benefit, but means merely that the mortgagee may buy in the property for the purpose of reselling under the power of sale, or of having recourse to any other remedy available to a mortgagee. It has, however, been otherwise decided in New Brunswick: *Gauvin v. Dionne* (1919), 51 D.L.R. 294 (N.B.S.C. App. Div.); *Ryan v. O'Donnell* (1921), 48 N.B.R. 148 (Ch. Div.).

[192] *Farrar v. Farrars Ltd.* (1888), 40 Ch. D. 395 (C.A.). See also *Downes v. Grazebrook* (1817), 3 Mer. 200, 36 E.R. 77; *Robertson v. Norris* (1858), 1 Giff. 421, 65 E.R. 983; *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391 (P.C.); *Re Bloye's Trust* (1849), 1 Mac. & G. 488, 41 E.R. 1354; *Henderson v. Astwood*, [1894] A.C. 150 (P.C.); *Hodson v. Deans*, [1903] 2 Ch. 647; *Downer v. Boughner* (1930), 66 O.L.R. 279 (S.C.); *Crown Life Ins. Co. v. Clark* (1915), 25 D.L.R. 519 (Alta. S.C. App. Div.); *Smith v. Hunt* (1901), 2 O.L.R. 134 (Comm. Pls.), vard 4 O.L.R. 653 (C.A.); *Murchie v. Theriault* (1898), 1 N.B. Eq. 588; *King v. Keith* (1898), 1 N.B. Eq. 538; *Ingalls v. McLaurin* (1886), 11 O.R. 380 (Ch. Div.).

[193] *Farrar v. Farrars Ltd.*, *supra*, at p. 409, *per* Lindley L.J.

[194] *Mitchell v. Kinnear* (1897), 1 N.B. Eq. 427; *Ellis v. Dellabough* (1869), 15 Gr. 583.

[195] *Dolman v. Nokes* (1855), 22 Beav. 402, 52 E.R. 1163.

[196] *Orme v. Wright* (1839), 3 Jur. 19; *Whircomb v. Minchin* (1820), 5 Madd. 91, 56 E.R. 830; *Re Bloye's Trust*, *supra*, footnote 192; *Lawrance v. Galsworthy* (1857), 3 Jur. N.S. 1049; *Martinson v. Clowes* (1882), 21 Ch. D. 857.

A receiver appointed by the court cannot purchase the property of which he or she is receiver without the leave of the court, even where the sale is made, not in the action in which the receiver was appointed, but by a mortgagee selling with leave outside the action.[198]

Where, under the power of sale in a mortgage, a mortgagee went through the form of making a sale of the mortgaged premises to a person who on the same day reconveyed to the mortgagee, it was held that the sale was invalid and did not extinguish the right to redeem.[199]

A sale by a mortgagee in good faith to a corporation of which he or she is a shareholder is not voidable by the mortgagor, but where the mortgagee sold under the power of sale to a company of which he was a promoter and also solicitor, the onus was thrown upon those supporting the sale, of proving that the sale was made in good faith and not at an undervalue. Compliance with the requirements under the *Mortgages Act* and sale proceedings will be strictly adhered to in these circumstances.[200]

A subsequent encumbrancer, whether the mortgage is in the ordinary form or by way of trust for sale, may, in the absence of fraud, purchase from the first mortgagee, and the subsequent encumbrancer so purchasing will acquire as absolute a title to the lands as a stranger would.[201] Where a second mortgagee purchases on a sale under the power of sale contained in the first mortgage, the second mortgagee is notwithstanding such purchase entitled to collect, by virtue of the covenant contained in the second mortgage, the principal and interest due under the second mortgage[202] giving credit, of course, for the amount, if any, which he or she as second mortgagee has received back out of the surplus realized on the sale.

If the mortgagor purchases from the mortgagee selling under the power of sale, this operates only as a redemption of the first mortgage, and the mortgagor cannot set up the purchase against a second mortgage made by himself or herself before the purchase. The purchase in such case enures to the benefit of the second mortgagee.[203]

There is no fiduciary relation between co-mortgagors, tenants in common of the mortgaged lands, and therefore one of the co-mortgagors may purchase the lands from the mortgagee, if the exercise of the power of sale is *bona fide*, even though the price paid by the purchaser does not exceed the exact amount due for principal, interest and costs.[204] There is no prohibition against the spouse of the mortgagee

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[197] *Howard v. Harding* (1871), 18 Gr. 181; *cf., Nutt v. Easton*, [1900] 1 Ch. 29 (C.A.).

[198] *Nugent v. Nugent*, [1908] 1 Ch. 546 (C.A.).

[199] *Carter v. Bell* (1915), 21 D.L.R. 243 (C.A.).

[200] *Farrar v. Farrars Ltd., supra*, footnote 192; *Ostrander v. Niagara Helicopter Ltd.* (1973), 1 O.R. (2d) 281 (H.C.J.); *Lay v. 1222055 Ont. Inc.* (2005), 35 R.P.R. (4th) 79 *sub nom. Lay v. 1222055 Ontario Inc.*, 8 P.P.S.A.C. (3d) 144 (Ont. S.C.J.).

[201] *Parkinson v. Hanbury* (1867), L.R. 2 H.L. 1, affg 2 De G. J. & S. 450, 46 E.R. 449; *cf., Shaw v. Bunny* (1865), 2 De G. J. & S. 468, 46 E.R. 456; *Kirkwood v. Thompson* (1865), 2 H. & M. 392, 71 E.R. 515, affd 2 De G. J. & S. 613, 46 E.R. 513; *Watkins v. McKellar* (1859), 7 Gr. 584; *Brown v. Woodhouse* (1868), 14 Gr. 682; *N.S. Central Ry. Co. v. Halifax Banking Co.* (1891), 23 N.S.R. 172 (S.C.), affd 21 S.C.R. 536; *Uren v. Confederation Life Ass'n* (1917), 40 O.L.R. 536.

[202] *Harron v. Yemen* (1883), 3 O.R. 126 (Q.B.); *Union Bank of Canada v. Bates* (1914), 18 D.L.R. 269 (Man. K.B.).

[203] *Otter v. Lord Vaux* (1856), 2 K. & J. 650, 69 E.R. 943, affg 6 De G. M. & G. 638, 43 E.R. 1381; *Box v. Bridgman* (1875), 6 P.R. 234 (Ch. Chamb.); *Mitchell v. Rutherford* (1909), 12 W.L.R. 55.

[204] *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (C.A.), affd [1897] A.C. 180 (H.L. (E.)); *Fleet v. Fleet* (1925),

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If the mortgage was made in pursuance of the *Short Forms of Mortgages Act* and contains a power of sale in the form provided by that statute, the mortgagee is empowered to sell and absolutely dispose of the mortgaged lands, and "to convey and assure the same when so sold unto the purchaser or purchasers thereof, his or their heirs, successors or assigns, or as he or they shall direct and appoint".[209]

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The author of *Falconbridge on Mortgages,* 4th ed., §35.12 at p. 742; 5th ed., §35.130 at p. 35.33, have expressed the view in footnote 8 on that page that the words "to buy in at an auction" contained in para. 1 of s. 24 of the Mortgages Act do not mean that the mortgagee has the power to buy the mortgaged property. No authority is given for this proposition. In *Hagley, Re; Ex parte Davis* (1833), 3 Deac. & Ch. 504 (Eng.), the court held that the mortgagee must waive the right to the power of sale under the mortgage as a condition precedent to making application for an order permitting the mortgagee to bid. Two New Brunswick cases are cited as having decided otherwise: *Gauvin v. Dionne* (1919), 51 D.L.R. 294 at p. 302 (N.B. C.A.); *Ryan v. O'Donnell* (1921), 48 N.B.R. 148 (Ch. D.). In *Gauvin v. Dionne,* above, the New Brunswick Supreme Court, Appeal Division, considered the provisions of s. 41 of the Property Act, R.S.N.B. 1903, c. 152, which followed in many respects the provisions of s. 19 of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict., c. 41. Both Acts provided that the mortgagee in an absolute sale of the mortgaged property might buy in and resell the mortgaged property. The language "to buy in at an auction" was inserted in the section in 1881. Grimmer J. expressed the opinion that the language:

> . . . was intended to and did confer upon a mortgagee not only the power to vary a proposed sale under the mortgage, but also, if he so wished, to buy in and purchase for himself the property at the sale, or if he so decided to rescind altogether the contract for sale and to resell under his power of sale without being answerable to the mortgagor for any loss occasioned thereby. The language quoted is clear to me, definite and purposeful, and I cannot discover any other meaning to be applied to it save as stated, nor can I conceive any other reason for the inclusion of the words "and to buy in at an auction."

But see *Henderson v. Astwood,* [1894] A.C. 150 (P.C.) where the Privy Council, although expressing the view that the mortgagee may not purchase the

Tab 3

Falconbridge on Mortgages

Fifth Edition

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take-back mortgage as having received all cash on closing. The first account would be the original mortgage account and all cash proceeds would be applied to reduce the outstanding mortgage debt as and when received from time to time. The net amount owing under this account would continue to accrue and compound interest based on the original mortgage rate until repaid in full by the proceeds of the vendor take-back mortgage.

The vendor take-back mortgage would constitute its own account between the selling mortgagee and the new purchaser/mortgagor. Payments would be made under this mortgage based on the new vendor take-back mortgage rate and any default under this mortgage would permit the mortgagee to exercise its usual remedies against the new purchaser.

Once the original mortgage has been repaid in full by the proceeds of the vendor take-back mortgage, the vendor take-back mortgage would be held in trust by the selling mortgagee for all subsequent encumbrancers and the original mortgagor. All amounts received from the purchaser under the vendor-take back mortgage thereafter would be received on behalf of the subsequent encumbrancers and original mortgagor and must be paid over to them in accordance with their relative priorities.

In order to avoid maintaining these two accounts and managing the vendor take-back mortgage account even after the original mortgage is repaid in full, many institutional mortgagees treat the vendor take-back mortgage as having been paid in full on closing and the vendor take-back mortgage constituting an entirely fresh loan. This however would require the selling mortgagee to account for these deemed proceeds to subsequent encumbrancers and the original mortgagor as if they had been received in cash. Presumably no selling mortgagee would go this route if there were proceeds available from the sale including the vendor take-back mortgage amount, which exceed the outstanding mortgage debt. Otherwise, the selling mortgagee would be required to come out of pocket to subsequent encumbrancers or the original mortgagor as the case may be.

The one advantage of maintaining the two separate mortgage accounts is that if there is a default under the vendor take-back mortgage, which results in a further sale and deficiency arising, the selling mortgagee could look both to the original mortgagor under the first mortgage and the purchaser under the vendor take-back mortgage for the deficiencies, subject to the respective outstanding amounts owing under each of the mortgage accounts.

§35:130 Who May Purchase

In the case of a sale by or on behalf of the mortgagee under the direction of a court, the mortgagee is not at liberty to bid unless it obtains the leave of the court to do so.[189] In the case of a sale for taxes, the mortgagee is entitled to purchase the mortgaged property for its own benefit unless disentitled by any circumstance other

[189] Only in special circumstances will such leave be given, and if leave is given the conduct of the sale is usually transferred to some other person: *Sayre and Gilfoy v. Security Trust Co.* (1920), 56 D.L.R. 463 (S.C.C.), at p. 469. As to this case, see §27:40. For a comprehensive review of earlier authorities see *Traders Group Ltd. v. Mason* (1974), 53 D.L.R. (3d) 103 (N.S.S.C. App. Div.).

than that of being mortgagee.[190] If, however, the mortgagee is itself selling under the power of sale,[191] the mortgagee cannot sell to itself either alone or with others; nor can the mortgagee sell to a trustee for itself, or to any person employed by the mortgagee to conduct the sale.[192]

A sale by a person to himself or herself is not a sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price he or she has fixed, even though such price may be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.[193]

In one case, mortgagee sold the mortgaged premises under his power of sale ostensibly to a third person but in reality to himself. Shortly afterwards he sold a portion of the lands for a sum exceeding the amount due on the mortgage, and he also received rents for the remaining portion. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus received from the second sale and for the rents, together with interest on both amounts; the mortgagee was ordered to pay the costs of the action.[194]

Where the first mortgagee after making preliminary arrangements to ensure an advantageous sale of the mortgaged property bought the second mortgagee's security at a discount without informing him of such arrangements, the court refused to set aside the sale.[195]

Where a person has acted as agent for the mortgagee as, for example, in negotiating the loan, receiving the interest for the mortgagee or conducting the sale, the person cannot purchase from the mortgagee under the power of sale.[196] The solicitor for a mortgagee could not purchase even though the proceedings for sale were not taken in his name, and it was not shown that any loss had occurred by reason of his being the purchaser.[197]

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[190] *Clary v. Boulay*, [1928] 2 D.L.R. 144 (Ont. S.C. App. Div.), approving *Kelly v. Macklem* (1867), 14 Gr. 29; *Farrow v. Massey Harris Co. Ltd.*, [1927] 3 D.L.R. 997 (Ont. C.A.); *cf., Servais v. Shear*, [1929] 2 D.L.R. 633 (Ont. S.C. App. Div.)..

[191] It is submitted that the power given to a mortgagee by s. 24, para. 1 of the Ontario *Mortgages Act* (re-enacting in effect the English *Conveyancing and Law of Property Act, 1881*, s. 19) to "buy in at an auction" (see §35:120.20.10) does not include the power to buy for its own benefit, but means merely that the mortgagee may buy in the property for the purpose of reselling under the power of sale, or of having recourse to any other remedy available to a mortgagee. It has, however, been otherwise decided in New Brunswick: *Gauvin v. Dionne* (1919), 51 D.L.R. 294 (N.B.S.C. App. Div.); *Ryan v. O'Donnell* (1921), 48 N.B.R. 148 (Ch. Div.).

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[193] *Farrar v. Farrars Ltd., supra*, at p. 409, *per* Lindley L.J.

[194] *Mitchell v. Kinnear* (1897), 1 N.B. Eq. 427; *Ellis v. Dellabough* (1869), 15 Gr. 583.

[195] *Dolman v. Nokes* (1855), 22 Beav. 402, 52 E.R. 1163.

[196] *Orme v. Wright* (1839), 3 Jur. 19; *Whircomb v. Minchin* (1820), 5 Madd. 91, 56 E.R. 830; *Re Bloye's Trust, supra*, footnote 192; *Lawrance v. Galsworthy* (1857), 3 Jur. N.S. 1049; *Martinson v. Clowes* (1882), 21 Ch. D. 857.

A receiver appointed by the court cannot purchase the property of which he or she is receiver without the leave of the court, even where the sale is made, not in the action in which the receiver was appointed, but by a mortgagee selling with leave outside the action.[198]

Where, under the power of sale in a mortgage, a mortgagee went through the form of making a sale of the mortgaged premises to a person who on the same day reconveyed to the mortgagee, it was held that the sale was invalid and did not extinguish the right to redeem.[199]

A sale by a mortgagee in good faith to a corporation of which he or she is a shareholder is not voidable by the mortgagor, but where the mortgagee sold under the power of sale to a company of which he was a promoter and also solicitor, the onus was thrown upon those supporting the sale, of proving that the sale was made in good faith and not at an undervalue. Compliance with the requirements under the *Mortgages Act* and sale proceedings will be strictly adhered to in these circumstances.[200]

A subsequent encumbrancer, whether the mortgage is in the ordinary form or by way of trust for sale, may, in the absence of fraud, purchase from the first mortgagee, and the subsequent encumbrancer so purchasing will acquire as absolute a title to the lands as a stranger would.[201] Where a second mortgagee purchases on a sale under the power of sale contained in the first mortgage, the second mortgagee is notwithstanding such purchase entitled to collect, by virtue of the covenant contained in the second mortgage, the principal and interest due under the second mortgage[202] giving credit, of course, for the amount, if any, which he or she as second mortgagee has received back out of the surplus realized on the sale.

If the mortgagor purchases from the mortgagee selling under the power of sale, this operates only as a redemption of the first mortgage, and the mortgagor cannot set up the purchase against a second mortgage made by himself or herself before the purchase. The purchase in such case enures to the benefit of the second mortgagee.[203]

There is no fiduciary relation between co-mortgagors, tenants in common of the mortgaged lands, and therefore one of the co-mortgagors may purchase the lands from the mortgagee, if the exercise of the power of sale is *bona fide*, even though the price paid by the purchaser does not exceed the exact amount due for principal, interest and costs.[204] There is no prohibition against the spouse of the mortgagee

[197] *Howard v. Harding* (1871), 18 Gr. 181; *cf., Nutt v. Easton*, [1900] 1 Ch. 29 (C.A.).

[198] *Nugent v. Nugent*, [1908] 1 Ch. 546 (C.A.).

[199] *Carter v. Bell* (1915), 21 D.L.R. 243 (C.A.).

[200] *Farrar v. Farrars Ltd., supra*, footnote 192; *Ostrander v. Niagara Helicopter Ltd.* (1973), 1 O.R. (2d) 281 (H.C.J.); *Lay v. 1222055 Ont. Inc.* (2005), 35 R.P.R. (4th) 79 *sub nom. Lay v. 1222055 Ontario Inc.*, 8 P.P.S.A.C. (3d) 144 (Ont. S.C.J.).

[201] *Parkinson v. Hanbury* (1867), L.R. 2 H.L. 1, affg 2 De G. J. & S. 450, 46 E.R. 449; *cf., Shaw v. Bunny* (1865), 2 De G. J. & S. 468, 46 E.R. 456; *Kirkwood v. Thompson* (1865), 2 H. & M. 392, 71 E.R. 515, affd 2 De G. J. & S. 613, 46 E.R. 513; *Watkins v. McKellar* (1859), 7 Gr. 584; *Brown v. Woodhouse* (1868), 14 Gr. 682; *N.S. Central Ry. Co. v. Halifax Banking Co.* (1891), 23 N.S.R. 172 (S.C.), affd 21 S.C.R. 536; *Uren v. Confederation Life Ass'n* (1917), 40 O.L.R. 536.

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Although there is no bar against a customer of the mortgagee purchasing the mortgaged property under power of sale, the mortgagee must be careful to ensure that no fiduciary relationship exists between the mortgagee in the mortgagee's capacity as the purchaser's banker so as to give rise to any claim that there was a breach of fiduciary duty or confidence: see *Wagner v. Bank of Montreal* (1991), 20 A.C.W.S. (3d) 402 (Ont. C.A.), leave to appeal to S.C.C. refused (1992), 138 N.R. 414 (note).

The fact that a mortgagee may share in the profits of the mortgaged property pursuant to a participation agreement does not give the mortgagee the right to sell the mortgaged property to the mortgagee where no right to ownership or control exists: see *822706 Ontario Ltd. v. Settlers Savings and Mortgage Corp.* (1991), 28 A.C.W.S. (3d) 421 (Ont. Gen. Div.).

The author of *Falconbridge on Mortgages,* 4th ed., §35.12 at p. 742; 5th ed., §35.130 at p. 35.33, have expressed the view in footnote 8 on that page that the words "to buy in at an auction" contained in para. 1 of s. 24 of the Mortgages Act do not mean that the mortgagee has the power to buy the mortgaged property. No authority is given for this proposition. In *Hagley, Re; Ex parte Davis* (1833), 3 Deac. & Ch. 504 (Eng.), the court held that the mortgagee must waive the right to the power of sale under the mortgage as a condition precedent to making application for an order permitting the mortgagee to bid. Two New Brunswick cases are cited as having decided otherwise: *Gauvin v. Dionne* (1919), 51 D.L.R. 294 at p. 302 (N.B. C.A.); *Ryan v. O'Donnell* (1921), 48 N.B.R. 148 (Ch. D.). In *Gauvin v. Dionne,* above, the New Brunswick Supreme Court, Appeal Division, considered the provisions of s. 41 of the Property Act, R.S.N.B. 1903, c. 152, which followed in many respects the provisions of s. 19 of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict., c. 41. Both Acts provided that the mortgagee in an absolute sale of the mortgaged property might buy in and resell the mortgaged property. The language "to buy in at an auction" was inserted in the section in 1881. Grimmer J. expressed the opinion that the language:

> . . . was intended to and did confer upon a mortgagee not only the power to vary a proposed sale under the mortgage, but also, if he so wished, to buy in and purchase for himself the property at the sale, or if he so decided to rescind altogether the contract for sale and to resell under his power of sale without being answerable to the mortgagor for any loss occasioned thereby. The language quoted is clear to me, definite and purposeful, and I cannot discover any other meaning to be applied to it save as stated, nor can I conceive any other reason for the inclusion of the words "and to buy in at an auction."

But see *Henderson v. Astwood,* [1894] A.C. 150 (P.C.) where the Privy Council, although expressing the view that the mortgagee may not purchase the

Tab 5

1973 CarswellOnt 325
Ontario High Court of Justice

Ostrander v. Niagara Helicopters Ltd.

1973 CarswellOnt 89, 19 C.B.R. (N.S.) 5, 1 O.R. (2d) 281, 40 D.L.R. (3d) 161

Ostrander v. Niagara Helicopters Ltd. et al.

Stark, J.

Judgment: October 30, 1973

Counsel: *B. B. Papazian*, for plaintiff
A. McN. Austin, for defendant, C. R. Bawden
W. G. Charlton, for defendants, New Unisphere Resources Limited, Baltraco Limited and Toprow Investments Limited
R. M. Loudon, Q.C., for defendants, Roynat Limited, Canada Trust Company and Niagara Helicopters Limited

Subject: Corporate and Commercial; Insolvency

***Stark, J.*:**

1 In spite of the lengthy evidence that was taken in these proceedings continuing over many days, I am satisfied that the real questions involved have become quite narrowed and confined. This result was mainly achieved by the very careful and thorough arguments of all counsel and by their careful review of the evidence. Summarily stated the facts are briefly these. The company known as Niagara Helicopters Limited (hereinafter referred to for convenience as "Niagara"), was founded by the plaintiff Paul S. Ostrander who was the owner of 90% of the stock of the company. This company operated out of the City of Niagara Falls providing charter commercial air services, a flight school, tourist operations and various other services using helicopters. While Ostrander was an experienced helicopter pilot he proved to be an inept financial manager and when the company experienced serious financial difficulties the defendant Roynat was approached for a substantial loan by way of bond mortgage. A debenture dated October 1, 1969, (ex. 1) was entered into between Niagara Helicopters Limited and the Canada Trust Company as trustee, as a result of which Roynat became the single debenture holder. An initial advance of $125,000 was made on November 4, 1969. Two or three months later Niagara defaulted on the loan and the insurance on its aircraft was cancelled. On January 16, 1970, the defendant, C. R. Bawden, was appointed as receiver-manager by virtue of the default provisions contained in the deed of trust. It was admitted by counsel for the plaintiff and was placed on the record that all powers of the trustee were properly delegated to Roynat pursuant to s. 9.2 of the debenture and, in effect, Bawden was appointed receiver and manager as the agent of Roynat for the purpose of protecting and enforcing its security. The defendant Bawden was considered by Roynat to be an experienced receiver-manager, having acted in that capacity on many previous occasions. Bawden took immediate steps to reinstate the insurance, came to the conclusion that the company was a viable operation, although it lacked working capital, and a further $15,000 was advanced under the debenture. Bawden's duties as receiver-manager were then terminated but Roynat insisted that the company retain a financial adviser; and with the consent of Ostrander, indeed it appears with the urging of Ostrander, Bawden acted in this capacity. However, during this period the financial position of Niagara deteriorated mainly because of Ostrander's inability to operate the company efficiently and due also to his frequent absences from the company for various reasons and Roynat became increasingly concerned as to the safety of its security. Thus, ex. 50 indicated that during the year ending December 31, 1970, a loss of $84,000 had been incurred as opposed to a net loss the previous year of $65,000. By February 24, 1971, it was necessary to again call in the loan and once again Bawden was appointed receiver-manager in accordance with the terms of the debenture and was instructed by Roynat to find a buyer for the shares as being the best possibility for all concerned. Bawden had had some previous satisfactory dealings with principals in the defendant company New Unisphere and this company displayed

interest in Niagara. Negotiations were opened between New Unisphere and Ostrander, both parties being represented by independent counsel, and an agreement was formalized. The agreement was finally negotiated and signed and appears herein as ex. 20. No evidence was presented to indicate undue influence by Bawden or anyone else with respect to the negotiations and execution of this agreement. Indeed, from Ostrander's standpoint it was a highly desirable agreement in which Ostrander would have received a substantial payment for his shares. It appears from the evidence that Bawden did all he could reasonably do to assist in the completion of this deal and in postponing public sale of the assets as long as this could be done. However, delays occurred, probably caused by both parties in meeting the terms of the agreement, and as the fall of 1971 approached Roynat became increasingly concerned about the position of its security and urged and instructed Bawden to proceed with preparations for the sale of the assets by public tender. Conditions for sale were prepared, advertisements were duly inserted in the newspapers and a closing date fixed for the receipt of bids. The final date for the receipt of bids was September 24, 1971. An attempt was made by one White, a well-known entrepreneur in Niagara Falls resort properties whom Ostrander had succeeded in interesting in his company before the hour when the bids were to be opened to persuade Roynat to accept a sum of money which he believed would be sufficient to pay off the debenture indebtedness. The amount mentioned was in the approximate sum of $150,000 but it was quickly explained to White and his advisers that there were other liabilities to be taken care of and that a total amount exceeding $200,000 would be needed. White's suggestion that he make up the difference by providing some form of security on his other holdings did not appeal to Roynat and it was decided to proceed with the tenders.

2 Only two tenders for the working assets of the company as listed in the conditions of sale were received. One of these tenders was a hastily written offer which turned out to be ambiguous in meaning, made by White and prepared in the few moments that preceded the opening. The other tender was the Toprow tender, the benefits of which were later assigned to Baltraco. It was admitted by all parties that since the defendant New Unisphere is the sole owner of its subsidiaries Baltraco Limited and Toprow Investments Limited, that the Toprow bid may fairly be regarded as in fact the bid of New Unisphere Limited. After two or three days' consideration, the Toprow tender was accepted, the decision being made by Roynat's representatives acting on its own views and acting as well on the advice of Bawden. I have considered the details of the Toprow tender, which appears herein as ex. 7, and the White tender, ex. 23. In effect, White tendered for the "complete package and as a going concern of Niagara Helicopters Limited Parcels 1-10 of the conditions of sale inclusive, subject to approval of transfer of licences and lease as per your terms of conditions of sale the sum of $151,000." The Toprow tender offered the sum of $150,000 cash for all of the assets offered with the exception of the accounts receivable. These accounts receivable were variously estimated at from $50,000 to $80,000. Under the Toprow tender, Toprow proposed to assume full responsibility for the pilot school and for the student contracts and these obligations were estimated to represent some $30,000. While the Toprow tender made clear that it desired the transfer of the lease and the licences it expressly made its offer not conditional on these being obtained. The White offer, however, expressly conditioned the offer upon approval of the transfer of licences and lease. There was considerable controversy both in the evidence and in the argument as to which of these two offers was the better. Thus, it was submitted that although the White offer did not expressly mention liabilities, that since the words "as a going concern" were included that White would have to assume all liabilities. It was also contended that since the Toprow offer did not require as a condition the transfer of the licences and the lease that Bawden had improperly acted in arranging for the transfer of the licences and lease or attempting to obtain the transfer without receiving consideration for so doing. For the reasons given later I do not consider it necessary to attempt to interpret the true meaning of each of these tenders or to determine which in fact was the better offer. That determination was the sole responsibility of Roynat and in the absence of fraud or bad faith its decision is not open to question.

3 Basically this action is brought by Ostrander in an attempt to regain possession of Niagara which he has always regarded as his company. He asks that the agreement to sell to New Unisphere or its subsidiaries following the opening of the bid be declared null and void. He asks that Niagara be permitted to discharge the charge on its assets placed as a result of the deed of trust. In effect he asks that the sale be reopened and that a new receiver-manager be appointed. He asks also for damages. He also claims that the fees paid to the receiver are excessive and he asks for a full accounting. He bases all these claims for relief on his allegations that the defendants have conspired against him, have wrongfully converted assets and have committed fraud and breaches of trust. In my view the evidence convincingly shows that all

these charges are unfounded and without merit. On the other hand, certain suspicious circumstances and events occurred which required explanation, which threw an aura of suspicion over the event and which in my view placed a burden upon the defendants to provide appropriate answers. I now turn to a consideration of these circumstances.

4 In the month of August, 1971, Bawden acting as a receiver-manager did three things upon which the plaintiff laid great stress: first, he issued a cheque for $2,000 to New Unisphere on August 3rd which appears to have been cashed later in September. Bawden justified this payment by reason of para. 5 of the agreement between Ostrander and New Unisphere which permitted the receiver-manager to pay the costs of investigation of the assets of the company being conducted by the proposed purchaser up to a maximum of $3,000 subject to certain conditions including a proviso that the purchaser exercise its right to terminate the agreement. This payment appears to have been made prematurely but is justifiable on the grounds that Bawden was doing his best to retain the continued interest of New Unisphere in the agreement. In any event, that deal did abort and in my view this payment then became justifiable. Two other payments were made by Bawden at around this same period of time which in my view were not justifiable, and which should be recredited to Niagara in the final accounting. One was an account in the sum of $307.25 (ex. 102) paid to New Unisphere to reimburse that company for certain aircraft valuations which it had arranged; and the other item which in my view was improper was to relieve New Unisphere of an account receivable of $1,500 for the use of aircraft for experiment with respect to that company's gas and oil operations. In my view these items can be properly adjusted after completion of the sale and the rendering of a final accounting including the fixing of Bawden's own fees and disbursements.

5 The three matters which I have just mentioned above are of relatively minor significance but a fourth incident occurred which has given me much concern. Commencing in June, 1971, and continuing until November of the same year, Bawden began purchasing for his own personal account through his broker shares in New Unisphere. The total of his purchases amounted to 42,000 shares for a total purchase price of approximately $20,000. These shares represented a 2% interest in the total issued shares of New Unisphere. The shares of that company are listed on the public exchanges. Bawden admitted quite frankly in his evidence that under the circumstances this was a "stupid" thing to do. His own counsel admitted to the Court that, "of all the matters brought before this Court by the plaintiff, this was the only one which has any appearance of substance. There is no question, whatever, that Mr. Bawden should not in the circumstances have been purchasing shares in New Unisphere." Bawden in his evidence contended that his decision to purchase New Unisphere shares had no connection whatever with Niagara, that he does speculate in the market to a considerable extent and that he was interested in this company because of its holdings in certain well known oil producing companies. In placing great stress upon these dealings, the plaintiff submits that Bawden, acting as receiver-manager was in a fiduciary position, that even if there was no actual fraud involved there was constructive fraud, that Bawden had created a conflict between his interests and his duty and that these dealings must vitiate the ultimate deal with Toprow. He argues also that Roynat must be responsible for the misdeeds of its agents. I should hasten to point out that there is not one shred of evidence to indicate that Roynat, Canada Trust or New Unisphere or its subsidiaries had any knowledge of these purchases by Bawden. However, because of the suspicious nature of these circumstances it appeared to me that there was an onus thrown upon the defendants to uphold the validity of the Toprow sale and to satisfy the Court that the decision to make that sale was not in any way affected or influenced by Bawden's foolish purchase of these shares.

6 My decision might well be otherwise if I had come to the conclusion that Bawden as receiver-manager was acting in a fiduciary capacity. I am satisfied that he was not. His role was that of agent for a mortgagee in possession. The purpose of his employment was to protect the security of the bondholder. Subsequently his duty was to sell the assets and realize the proceeds for the benefit of the mortgagee. Of course he owed a duty to account in due course to the mortgagor for any surplus; and in order to be sure there would be a surplus he was duty bound to comply with the full terms of the conditions of sale set out in the debenture, to advertise the property and to take reasonable steps to obtain the best offer possible. Certainly he owed a duty to everybody to act in good faith and without fraud. But this is not to say that his relations to Ostrander or to Niagara or to both were fiduciary in nature. A very clear distinction must be drawn between the duties and obligations of a receiver-manager, such as Bawden, appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he

is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest. The borrower, in consideration of the receipt by him of the proceeds of the loan agrees in advance to the terms of the trust deed and to the provisions by which the security may be enforced. In this document he accepts in advance the conditions upon which a sale is to be made, the nature of the advertising that is to be done, the fixing of the amount of the reserve bid and all the other provisions contained therein relating to the conduct of the sale. In carrying on the business of the company pending the sale, he acts as agent for the lender and he makes the decisions formerly made by the proprietors of the company. Indeed, in the case at hand, Mr. Bawden found it necessary to require that Ostrander absent himself completely from the operations of the business and this Ostrander consented to do. As long as the receiver-manager acts reasonably in the conduct of the business and of course without any ulterior interest, and as long as he ensures that a fair sale is conducted and that he ultimately makes a proper accounting to the mortgagor, he has fulfilled his role which is chiefly of course to protect the security for the benefit of the bondholder. I can see no evidence of any fiduciary relationship existing between Ostrander and Bawden. Mr. Papazian in his able argument put it very forcibly to the Court that the duties and obligations of a receiver-manager appointed by the Court and a receiver-manager appointed under the terms of a bond mortgage without a Court order, were in precisely the same position, each being under fiduciary obligations to the mortgagor. I do not accept that view and I am satisfied that the cases clearly distinguish between them. A good example of the obligation placed upon the Court-appointed receiver-manager is provided by *Re Newdigate Colliery, Ltd.*, [1912] 1 Ch. 468. That case was authority for the proposition that it is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment. At p. 477 Buckley, L.J., described the duties of the Court-appointed receiver and manager in this way:

> The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business, and has standing behind him — I do not know what word to use that will not create a misapprehension, but I will call them "constituents" — the persons to whom he is responsible in the matter, namely, the mortgagees and the mortgagor, being the persons entitled respectively to the mortgage and the equity of redemption. If we were to accede to the application which is made to us, and to allow the receiver and manager to sell the coal at an enhanced price, the result would be that the enhanced price would fall within the security of the mortgagees and they would have the benefit of it; but, on the other hand, there would be created in favour of the persons who had originally contracted to purchase the coal a right to damages against the mortgagor, the company, with the result that there would be large sums of damages owing.

Lord Justice Buckley then continued with language which further accentuates the difference between the two classes of receiver-managers:

> It has been truly said that in the case of a legal mortgage the legal mortgagee can take possession if he choose of the mortgaged property, and being in possession can say "I have nothing to do with the mortgagor's contracts. I shall deal with this property as seems to me most to my advantage." No doubt that would be so, but he would be a legal mortgagee in possession, with both the advantages and the disadvantages of that position. This appellant is not in that position. He is an equitable mortgagee who has obtained an order of the Court under which its officer takes possession of assets in which the mortgagee and mortgagor are both interested, with the duty and responsibility of dealing with them fairly in the interest of both parties.

7 It appears to me unfortunate that the same terms "receiver-manager" are customarily applied to both types of offices, when in fact they are quite different. The difference is well pointed out in the case of *Re B. Johnson & Co. (Builders) Ltd.*, [1955] 1 Ch. 634, where it was held that a receiver and manager of a company's property appointed by a debenture holder was not an officer of the company within the meaning of the *Companies Act*. The language of Evershed, M.R., at p. 644 is in point:

> The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager — as it is said, "out of court" — is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession

> of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment ...

Again, at p. 662, Lord Justice Jenkins stated:

> The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. But the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.
>
> .....
>
> The duties of a receiver and manager for debenture holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous.
>
> In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realized.

8 Similar principles are to be found in the case of *Deyes v. Wood et al.*, [1911] 1 K.B. 806.

9 A similar situation to the case at hand arose in the decision in *Farrar v. Farrars, Ltd.* (1889), 40 Ch.D. 395. In that case three mortgagees in possession were selling under powers of sale in their mortgage to a company formed for the purpose of buying the property. This company was to some extent promoted by one of the mortgagees who had a substantial interest as a shareholder. It was held in that case the sale could not be set aside on the simple ground that F. was a shareholder in the company since the sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people. But it was also held that there was such a conflict of interest and duty in F., of which the company had notice, as to throw upon them the burden of upholding the sale. It was held that the company had discharged themselves of this burden by showing that F. had taken all reasonable pains to secure a purchaser at the best price. Again in that case the rights and duties of a mortgagee in possession, which is our situation, are dealt with. Chitty, J., at p. 398 said this:

> The first question then is, was the sale a dishonest transaction? A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt.... The mortgagor has no right after the power has arisen to insist that the mortgagee shall wait for better times before selling.

That case went to appeal and Lord Lindley, L.J., at p. 410 used this pertinent language:

> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed.

10 While I find that the purchase by Mr. Bawden of the shares in New Unisphere, in the amounts and at the times when he did, were purchases which he should better not have made, I cannot find anything in these transactions to impugn the validity of the final sale by tender. I am satisfied that Mr. Bawden and his principal Roynat did the very best they could to protect their own security but at the same time went out of their way to assist Ostrander in so far as his private negotiations had any hopes of success. Other than the tactless purchase of these shares and the minor misjudgment with respect to certain payments with which I have already dealt, I can find nothing censurable in Mr. Bawden's conduct. I am satisfied that the power of sale was exercised in a fair and proper manner and that in the opinion of Roynat and its advisers the better offer was obtained. I do not consider it necessary to analyse in detail the nature of the offers that were being considered because no evidence has been placed before the Court to show that the Toprow offer was a disadvantageous one or that the White offer was a better one. Certainly as far as New Unisphere and its subsidiaries are concerned there is no evidence to indicate that they had the slightest knowledge of the purchases by Bawden and they are in the position of purchasers in good faith without notice of any such wrongdoing, if such it were, and accordingly the sale must stand. No legal or moral stigma of any kind should be attached to any defendant in this action and the most that can be said against Mr. Bawden is that he was guilty of misjudgment in certain respects. There was an aura of suspicion which had to be dispelled by the defendants and which they have succeeded in doing. I do not think the plaintiff should be further penalized than by dismissing his action against the defendants with costs, except that in the case of the proceedings against Bawden who was separately represented, the action should be dismissed without costs. As already indicated, there should be a reference to pass accounts and to fix the receiver-manager's costs. If any questions arise as to the drawing up of the judgment, I may of course be spoken to.

TAB 6

2004 CarswellOnt 2653
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

2004 CarswellOnt 2653, [2004] O.J. No. 2744, 132 A.C.W.S. (3d) 215, 188 O.A.C. 97, 23 R.P.R. (4th) 64, 242 D.L.R. (4th) 689, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, 71 O.R. (3d) 355

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.
Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited
Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.
James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

Blair J.A.:

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership. [1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal

Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and

approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working our of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some

other jurisdictions[2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,
>
> (a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or
>
> (b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.
>
> 78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.[3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

> The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

[40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

[41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

[42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,

"Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,[4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

> Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available

at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

69 These amounts are inclusive of fees, disbursements and GST.

Laskin J.A.:

I agree.

Feldman J.A.:

I agree.

Appeal dismissed.

Footnotes

1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

TAB 7

2008 CarswellOnt 3523
Ontario Superior Court of Justice [Commercial List]

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 3523, [2008] O.J. No. 2265, 168 A.C.W.S. (3d) 244, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74

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 and Arrangement Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto

The Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper Listed in Schedule "B" Hereto (Applicants) and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III, Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI, Corp., Metcalfe & Mansfield Alternative Investments XII, Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto (Respondents)

C. Campbell J.

Heard: May 12-13, 2008; June 3, 2008
Judgment: June 5, 2008
Docket: 08-CL-7440

Counsel: B. Zarnett, F. Myers, B. Empey, for Applicants
Donald Milner, Graham Phoenix, Xeno C. Martis, David Lemieux, Robert Girard, for Respondents, Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp.
Aubrey Kauffman, Stuart Brotman, for Respondents, 4446372 Canada Inc., 6932819 Canada Inc., as Issuer Trustees

Subject: Insolvency; Corporate and Commercial

APPLICATION for approval of Plan of Compromise and Arrangement under *Companies' Creditors Arrangement Act* to address liquidity crisis in market for Asset Backed Commercial Paper.

C. Campbell J.:

1 This decision follows a sanction hearing in parts in which applicants sought approval of a Plan under the *Companies Creditors Arrangement Act* ("CCAA.") Approval of the Plan as filed and voted on by Noteholders was opposed by a number of corporate and individual Noteholders, principally on the basis that this Court does not have the jurisdiction under the CCAA or if it does should not exercise discretion to approve third party releases.

History of Proceedings

2 On Monday, March 17, 2008, two Orders were granted. The first, an Initial Order on essentially an *ex parte* basis and in a form that has become familiar to insolvency practitioners, granted a stay of proceedings, a limitation of rights and remedies, the appointment of a Monitor and for service and notice of the Order.

3 The second Order made dated March 17, 2008 provided for a meeting of Noteholders and notice thereof, including the sending of what by then had become the Amended Plan of Compromise and Arrangement. Reasons for Decision were issued on April 8, 2008 elaborating on the basis of the Initial Order.

4 No appeal was taken from either of the Orders of March 17, 2008. Indeed, on the return of a motion made on April 23, 2008 by certain Noteholders (the moving parties) to adjourn the meeting then scheduled for and held on April 25, 2008, no challenge was made to the Initial Order.

5 Information was sought and provided on the issue of classification of Noteholders. The thrust of the Motions was and has been the validity of the releases of various parties provided for in the Plan.

6 The cornerstone to the material filed in support of the Initial Order was the affidavit of Purdy Crawford, O.C., Q.C., Chairman of the Applicant Pan Canadian Investors Committee. There has been no challenge to Mr. Crawford's description of the Asset Backed Commercial Paper ("ABCP") market or in general terms the circumstances that led up to the liquidity crisis that occurred in the week of August 13, 2007, or to the formation of the Plan now before the Court.

7 The unchallenged evidence of Mr. Crawford with respect to the nature of the ABCP market and to the development of the Plan is a necessary part of the consideration of the fairness and indeed the jurisdiction, of the Court to approve the form of releases that are said to be integral to the Plan.

8 As will be noted in more detail below, the meeting of Noteholders (however classified) approved the Plan overwhelmingly at the meeting of April 25, 2008.

Background to the Plan

9 Much of the description of the parties and their relationship to the market are by now well known or referred to in the earlier reasons of March 17 or April 4, 2008.

10 The focus here will be on that portion of the background that is necessary for an understanding of and decision on, the issues raised in opposition to the Plan.

11 Not unlike a sporting event that is unfamiliar to some attending without a program, it is difficult to understand the role of various market participants without a description of it. Attached as Appendix 2 are some of the terms that describe the parties, which are from the Glossary that is part of the Information Statement, attached to various of the Monitor's Reports.

12 A list of these entities that fall into various definitional categories reveals that they comprise Canadian chartered banks, Canadian investment houses and foreign banks and financial institutions that may appear in one or more categories of conduits, dealers, liquidity providers, asset providers, sponsors or agents.

13 The following paragraphs from Mr. Crawford's affidavit succinctly summarize the proximate cause of the liquidity crisis, which since August 2007 has frozen the market for ABCP in Canada:

> [7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.

[8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."

[9] Some of these supporting assets were mid-term, but most were long-term, such as pools of residential mortgages, credit card receivables or credit default swaps (which are sophisticated derivative products). Because of the generally long-term nature of the assets backing the ABCP, the cash flow they generated did not match the cash flow required to repay maturing ABCP. Before mid-August 2007, this timing mismatch was not a problem because many investors did not require repayment of ABCP on maturity; instead they reinvested or "rolled" their existing ABCP at maturity. As well, new ABCP was continually being sold, generating funds to repay maturing ABCP where investors required payment. Many of the trustees of the Conduits also entered into back-up liquidity arrangements with third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.

[10] In the week of August 13, 2007, the ABCP market froze. The crisis was largely triggered by market sentiment, as news spread of significant defaults on U.S. sub-prime mortgages. In large part, investors in Canadian ABCP lost confidence because they did not know what assets or mix of assets backed their ABCP. Because of this lack of transparency, existing holders and potential new investors feared that the assets backing the ABCP might include sub-prime mortgages or other overvalued assets. Investors stopped buying new ABCP, and holders stopped "rolling" their existing ABCP. As ABCP became due, Conduits were unable to fund repayments through new issuances or replacement notes. Trustees of some Conduits made requests for advances under the back-up arrangements that were intended to provide liquidity; however, most Liquidity Providers took the position that the conditions to funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, and with long-term underlying assets whose cash flows did not match maturing short-term ABCP, payments due on the ABCP could not be made — and no payments have been made since mid-August.

14 Between mid-August 2007 and the filing of the Plan, Mr. Crawford and the Applicant Committee have diligently pursued the object of restructuring not just the specific trusts that are part of this Plan, but faith in a market structure that has been a significant part of the broader Canadian financial market, which in turn is directly linked to global financial markets that are themselves in uncertain times.

15 The previous reasons of March 17, 2008 that approved for filing the Initial Plan, recognized not just the unique circumstances facing conduits and their sponsors, but the entire market in Canada for ABCP and the impact for financial markets generally of the liquidity crisis.

16 Unlike many CCAA situations, when at the time of the first appearance there is no plan in sight, much less negotiated, this rescue package has been the product of painstaking, complicated and difficult negotiations and eventually agreement.

17 The following five paragraphs from Mr. Crawford's affidavit crystallize the problem that developed in August 2007:

[45] Investors who bought ABCP often did not know the particular assets or mix of assets that backed their ABCP. In part, this was because ABCP was often issued and sold before or at about the same time the assets were acquired. In addition, many of the assets are extremely complex and parties to some underlying contracts took the position that the terms were confidential.

[46] Lack of transparency became a significant problem as general market fears about the credit quality of certain types of investment mounted during the summer of 2007. As long as investors were willing to roll their ABCP or buy new ABCP to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the "sub-prime" lending crisis.

[47] U.S. sub-prime lending had an impact in Canada because ABCP investors became concerned that the assets underlying their ABCP either included U.S. sub-prime mortgages or were overvalued like the U.S. sub-prime mortgages. The lack of transparency into the pools of assets underlying ABCP made it difficult for investors to know if their ABCP investments included exposure to U.S. sub-prime mortgages or other similar products. In the week of August 13, that concern intensified to the point that investors stopped rolling their maturing ABCP, and instead demanded repayment, and new investors could not be found. Certain trustees of the Conduits then tried to draw on their Liquidity Agreements to repay ABCP. Most of the Liquidity Providers did not agree that the conditions for liquidity funding had occurred and did not provide funding, so the ABCP could not be repaid. Deteriorating conditions in the credit market affected all the ABCP, including ABCP backed by traditional assets not linked to sub-prime lending.

[48] Some of the Asset Providers made margin calls under LSS swaps on certain of the Conduits, requiring them to post additional collateral. Since they could not issue new ABCP, roll over existing ABCP or draw on their Liquidity Agreements, those Conduits were not able to post the additional collateral. Had there been no standstill arrangement, as described below, these Asset Providers could have unwound the swaps and ultimately could have liquidated the collateral posted by the Conduits.

[49] Any liquidation of assets under an LSS swap would likely have further depressed the LSS market, creating a domino effect under the remaining LSS swaps by triggering their "mark-to-market" triggers for additional margin calls, ultimately leading to the sale of more assets, at very depressed prices. The standstill arrangement has, to date, through successive extensions, prevented this from occurring, in anticipation of the restructuring.

18 The "Montreal Accord," as it has been called, brought together various industry representatives, Asset Providers and Liquidity Providers who entered into a "Standstill Agreement," which committed to the framework for restructuring the ABCP such that (a) all outstanding ABCP would be converted into term floating rate notes maturing at the same time as the corresponding underlying assets. This was intended to correct the mismatch between the long-term nature of the financial assets and the short-term nature of the ABCP; and (b) margin provisions under certain swaps would be changed to create renewed stability, reducing the likelihood of margin calls. This contract was intended to reduce the risk that the Conduits would have to post additional collateral for the swap obligations or be subject to having their assets seized and sold, thereby preserving the value of the assets and of the ABCP.

19 The Investors Committee of which Mr. Crawford is the Chair has been at work since September to develop a Plan that could be implemented to restore viability to the notes that have been frozen and restore liquidity so there can be a market for them.

20 Since the Plan itself is not in issue at this hearing (apart from the issue of the releases), it is not necessary to deal with the particulars of the Plan. Suffice to say I am satisfied that as the Information to Noteholders states at p. 69, "The value of the Notes if the Plan does not go forward is highly uncertain."

The Vote

21 A motion was held on April 25, 2008, brought by various corporate and individual Noteholders seeking:

a) changing classification each in particular circumstances from the one vote per Noteholder regime;

b) provision of information of various kinds;

c) adjourning the vote of April 25, 2008 until issues of classification and information were fully dealt with;

d) amending the Plan to delete various parties from release.

22 By endorsement of April 24, 2008 [2008 CarswellOnt 2653 (Ont. S.C.J. [Commercial List])] the issue of releases was in effect adjourned for determination later. The vote was not postponed, as I was satisfied that the Monitor would be able to tally the votes in such a way that any issue of classification could be dealt with at this hearing.

23 I was also satisfied that the Applicants and the Monitor had or would make available any and all information that was in existence and pertinent to the issue of voting. Of understandable concern to those identified as the moving parties are the developments outside the Plan affecting Noteholders holding less than $1 million of Notes. Certain dealers, Canaccord and National Bank being the most prominent, agreed in the first case to buy their customers' ABCP and in the second to extend financing assistance.

24 A logical conclusion from these developments outside the Plan is that they were designed (with apparent success) to obtain votes in favour of the Plan from various Noteholders.

25 On a one vote per Noteholder basis, the vote was overwhelmingly in favour of the Plan approximately 96%. At a case conference held on April 29, 2008, the Monitor was asked to tabulate votes that would isolate into Class A all those entities in any way associated with the formulation of the Plan, whether or not they were Noteholders or sold or advised on notes, and into Class B all other Noteholders.

26 The results of the vote on the Restructuring Resolution, tabulated on the basis set out in paragraph 30 of the Monitor's 7th Report and using the Class structure referred to in the preceding paragraph, are summarized below:

	Number		Dollar Value	
Class A				
Votes FOR the Restructuring Resolution	1,572	99.4%	$23,898, 232,639	100.0%
Votes AGAINST the Restructuring —Resolution	9	0.6%	$867,666	0.0%
CLASS B				
Votes FOR the Restructuring Resolution	289	80.5%	$5,046, 951,989	81.2%
Votes AGAINST the Restructuring— Resolution	70	19.5%	$1,168, 136,123	18.8%

27 I am satisfied that reclassification would not alter the strong majority supporting the Restructuring. The second request made at the case conference on April 29 was that the moving parties provide the Monitor with information that would permit a summary to be compiled of the claims that would have been made or anticipated to be made against so-called third parties, including Conduits and their trustees.

28 The information compiled by the Monitor reveals that the primary defendants are or are anticipated to be banks, including four Canadian chartered banks and dealers (many associated with Canadian banks). In the case of banks, they and their employees may be sued in more than one capacity.

29 The claims against proposed defendants are for the most part claims in tort, and include negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/adviser, acting in conflict of interest and in a few instances, fraud or potential fraud.

30 Again in general terms, the claims for damages include the face value of notes plus interest and additional penalties and damages that may be allowable at law. It is noteworthy that the moving parties assume that they would be able to mitigate their claim for damages by taking advantage of the Plan offer without the need to provide releases.

31 The information provided by the potential defendants indicates the likelihood of claims over against parties such that no entity, institution or party involved in the Restructuring Plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

32 The chart prepared by the Monitor that is Appendix 3 to these Reasons shows graphically the extent of those entities that would be involved in future litigation.

Law and Analysis

33 Some of the moving parties in their written and oral submissions assumed that this Court has the power to amend the Plan to allow for the proposed lawsuits, whether in negligence or fraud. The position of the Applicants and supporting parties is that the Plan is to be accepted on the basis that it satisfies the criteria established under the CCAA, or it will be rejected on the basis that it does not.

34 I am satisfied that the Court does not have the power to amend the Plan. The Plan is that of the Applicants and their supporters. They have made it clear that the Plan is a package that allows only for acceptance or rejection by the Court. The Plan has been amended to address the concerns expressed by the Court in the May 16, 2008 [2008 CarswellOnt 2820 (Ont. S.C.J. [Commercial List])] endorsement.

35 I am satisfied and understand that if the Plan is rejected by the Court, either on the basis of fairness (i.e., that claims should be allowed to proceed beyond those provided for in the Plan) or lack of jurisdiction to compel compromise of claims, there is no reliable prospect that the Plan would be revised.

36 I do not consider that the Applicants or those supporting them are bluffing or simply trying to bargain for the best position for themselves possible. The position has been consistent throughout and for what I consider to be good and logical reasons. Those parties described as Asset or Liquidity Providers have a first secured interest in the underlying assets of the Trusts. To say that the value of the underlying assets is uncertain is an understatement after the secured interest of Asset Providers is taken into account.

37 When one looks at the Plan in detail, its intent is to benefit ALL Noteholders. Given the contribution to be made by those supporting the Plan, one can understand why they have said forcefully in effect to the Court, 'We have taken this as far as we can, particularly given the revisions. If it is not accepted by the Court as it has been overwhelmingly by Noteholders, we hold no prospect of another Plan coming forward.'

38 I have carefully considered the submissions of all parties with respect to the issue of releases. I recognize that to a certain extent the issues raised chart new territory. I also recognize that there are legitimate principle-based arguments on both sides.

39 As noted in the Reasons of April 8, 2008 and as reflected in the March 17, 2008 Order and May 16 Endorsement, the Plan represents a highly complex unique situation.

40 The vehicles for the Initial Order are corporations acting in the place of trusts that are insolvent. The trusts and the respondent corporations are not directly related except in the sense that they are all participants in the Canadian market for ABCP. They are each what have been referred to as issuer trustees.

41 There are a great number of other participants in the ABCP market in Canada who are themselves intimately connected with the Plan, either as Sponsors, Asset Providers, Liquidity Providers, participating banks or dealers.

42 I am satisfied that what is sought in this Plan is the restructuring of the ABCP market in Canada and not just the insolvent corporations that are issuer trustees.

43 The impetus for this market restructuring is the Investors Committee chaired by Mr. Crawford. It is important to note that all of the members of the Investors Committee, which comprise 17 financial and investment institutions (see Schedule B, attached), are themselves Noteholders with no other involvement. Three of the members of that Committee act as participants in other capacities.

44 The Initial Order, which no party has appealed or sought to vary or set aside, accepts for the purpose of placing before all Noteholders the revised Plan that is currently before the Court.

45 Those parties who now seek to exclude only some of the Release portions of the Plan do not take issue with the legal or practical basis for the goal of the Plan. Indeed, the statement in the Information to Noteholders, which states that

> ...as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately $116.8 billion (excluding medium-term and floating rate notes), approximately $83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately $33 billion was issued by non-bank administered conduits) [1]

is unchallenged.

46 The further description of the ABCP market is also not questioned:

> ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling". Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption", ABCP would readily be saleable without the need for extraordinary funding measures. However, to protect investors in case of a market disruption, ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP outstanding. In the event that an ABCP issuer is unable to issue new ABCP, it may be able to draw down on the liquidity facility to ensure that proceeds are available to repay any maturing ABCP. As discussed below, there have been important distinctions between different kinds of liquidity agreements as to the nature and scope of drawing conditions which give rise to an obligation of a liquidity provider to fund [2]

47 The activities of the Investors Committee, most of whom are themselves Noteholders without other involvement, have been lauded as innovative, pioneering and essential to the success of the Plan. In my view, it is entirely inappropriate to classify the vast majority of the Investors Committee, and indeed other participants who were not directly engaged in the sale of Notes, as third parties.

48 Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

49 In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

50 The insolvency is of the ABCP market itself, the restructuring is that of the market for such paper - restructuring that involves the commitment and participation of all parties. The Latin words *sui generis* are used to mean something that is "one off" or "unique." That is certainly the case with this Plan.

51 The Plan, including all of its constituent parts, has been overwhelmingly accepted by Noteholders no matter how they are classified. In the sense of their involvement I do not think it appropriate to label any of the participants as Third Parties. Indeed, as this matter has progressed, additions to the supporter side have included for the proposed releases the members of the Ad Hoc Investors' Committee. The Ad Hoc group had initially opposed the release provisions. The Committee members account for some two billion dollars' worth of Notes.

52 It is more appropriate to consider all participants part of the market for the restructuring of ABCP and therefore not merely third parties to those Noteholders who may wish to sue some or all of them.

53 The benefit of the restructuring is only available to the debtor corporations with the input, contribution and direct assistance of the Applicant Noteholders and those associated with them who similarly contribute. Restructuring of the ABCP market cannot take place without restructuring of the Notes themselves. Restructuring of the Notes cannot take place without the input and capital to the insolvent corporations that replace the trusts.

54 A hearing was held on May 12 and 13 to hear the objections of various Noteholders to approval of the Plan insofar as it provided for comprehensive releases.

55 On May 16, 2008, by way of endorsement the issue of scope of the proposed releases was addressed. The following paragraphs from the endorsement capsulize the adjournment that was granted on the issue of releases:

> [10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.
>
> [11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

56 The endorsement went on to elaborate on the particular concerns that I had with releases sought by the Applicants that could in effect exonerate fraud. As well, concern was expressed that the Plan might unduly bring hardship to some Noteholders over others.

57 I am satisfied that based on Mr. Crawford's affidavit and the statements commencing at p. 126 of the Information to Noteholders, a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

> The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forebearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated

with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.

In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

58 The questions raised by moving parties are (a) does the Court have jurisdiction to approve a Plan under the CCAA that provides for the releases in question?; and if so, (b) is it fair and reasonable that certain identified dealers and others be released?

59 I am also satisfied that those parties and institutions who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

Restructuring under the CCAA

60 This Application has brought into sharp focus the purpose and scope of the CCAA. It has been accepted for the last 15 years that the issue of releases beyond directors of insolvent corporations dates from the decision in *Canadian Airlines Corp., Re*[3] where Paperny J. said:

> [87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:
>
> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

61 The following paragraphs from that decision are reproduced at some length, since, in the submission principally of Mr. Woods, the releases represent an illegal or improper extension of the wording of the CCAA. Mr. Woods takes issue with the reasoning in the *Canadian Airlines* decision, which has been widely referred to in many cases since. Mme Justice Paperny continued:

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly.

...

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception. [Emphasis added.]

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.* [4] at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd., supra*:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*[5], Blair J. (as he then was) has been referred to with approval in later cases:

> [45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
> >
> > [Emphasis added]

63 In a 2006 decision in *Muscletech Research & Development Inc., Re*[6], which adopted the *Canadian Airlines* test, Ground J. said:

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

64 This decision is also said to be beyond the Court's jurisdiction to follow.

65 In a later decision[7] in the same matter, Ground J. said in 2007:

> [18] It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.
>
> [19] In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no. Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.
>
> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of Muscle Tech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest, Re*, [8], there has been no direct opposition to the releases in those cases. The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction release of third parties where the factual circumstances are deemed appropriate for the success of a Plan. [9]

67 The moving parties rely on the decision of the Ontario Court of Appeal in *NBD Bank, Canada v. Dofasco Inc.* [10] for the proposition that compromise of claims in negligence against those associated with a debtor corporation within a CCAA context is not permitted.

68 The claim in that case was by NBD as a creditor of Algoma Steel, then under CCAA protection against its parent Dofasco and an officer of both Algoma and Dofasco. The claim was for negligent misrepresentation by which NBD was induced to advance funds to Algoma shortly before the CCAA filing.

69 In the approved CCAA order only the debtor Algoma was released. The Court of Appeal held that the benefit of the release did not extend to officers of Algoma or to the parent corporation Dofasco or its officers.

70 Rosenberg J.A. writing for the Court said:

> [51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:
>
> > **6.03 Releases**
> >
> > From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]
>
> ...
>
> [54] In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L. W. Houlden and C. H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent

> statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Reference omitted]

71 In my view, there is little factual similarity in *NBD* to the facts now before the Court. In this case, I am not aware of any claims sought to be advanced against directors of Issuer Trustees. The release of Algoma in the *NBD* case did not on its face extend to Dofasco, the third party. Accordingly, I do not find the decision helpful to the issue now before the Court. The moving parties also rely on decisions involving another steel company, Stelco, in support of the proposition that a CCAA Plan cannot be used to compromise claims as between creditors of the debtor company.

72 In *Stelco Inc., Re*, [11] Farley J., dealing with classification, said in November 2005:

> [7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

73 The Ontario Court of Appeal dismissed the appeal from that decision. [12] Blair J.A., quoting Paperny J. in *Canadian Airlines Corp., Re*, *supra*, said:

> [23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> >
> > 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
> >
> > 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
> >
> > 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
> >
> > 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
> >
> > 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.
>
> [24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.)

166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines decision: Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

. . . . .

[32] First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association - Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra*, at para. 27; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Re Woodwards Ltd., supra.*

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Re Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

74 In 2007, in *Stelco Inc., Re* [13], the Ontario Court of Appeal dismissed a further appeal and held:

> [44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the *CCAA*. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:

> The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.
>
> [45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

75 I have quoted from the above decisions at length since they support rather than detract from the basic principle that in my view is operative in this instance.

76 I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

77 This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes. The only contract between creditors in this case relates directly to the Notes.

U.S. Law

78 Issue was taken by some counsel for parties opposing the Plan with the comments of Justice Ground in *Muscletech* [2007][14] at paragraph 26, to the effect that third party creditor Releases have been recognized under United States bankruptcy law. I accept the comment of Mr. Woods that the U.S. provisions involve a different statute with different language and therefore different considerations.

79 That does not mean that the U.S. law is to be completely ignored. It is instructive to consideration of the release issue under the CCAA to know that there has been a principled debate within judicial circles in the United States on the issue of releases in a bankruptcy proceeding of those who are not themselves directly parties in bankruptcy.

80 A very comprehensive article authored by Joshua M. Silverstein of Emory University School of Law in 2006, 23 Bank. Dev. J. 13, outlines both the line of U.S. decisions that hold that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights, and those that hold that non-bankruptcy law is not an absolute bar to the exercise of equitable powers, particularly with respect to third party releases.

81 The author concludes at paragraph 137 that a decision of the Supreme Court of the United States in *U.S. v. Energy Resources Co.*, 495 U.S. 545 (U.S. Sup. Ct. 1990) offers crucial support for the pro-release position.

82 I do not take any of the statements to referencing U.S. law on this topic as being directly applicable to the case now before this Court, except to say that in resolving a very legitimate debate, it is appropriate to do so in a purposive way but also very much within a case-specific fact-contextual approach, which seems to be supported by the United States Supreme Court decision above.

Steinberg Decision

83 Against the authorities referred to above, those opposed to the Plan releases rely on the June 16, 1993 decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*[15]

84 Mr. Woods for some of the moving parties urges that the decision, which he asserts makes third party releases illegal, is still good law and binding on this Court, since no other Court of Appeal in Canada has directly considered or derogated from the result. (It appears that the decision has not been reported in English, which may explain some of the absence of comment.)

85 The Applicants not surprisingly take an opposite view. Counsel submits that undoubtedly in direct response to the *Steinberg* decision, Parliament added s. 5.1 (see above paragraph [60]) thereby opening the door for the analysis that has followed with the decisions of *Canadian Airlines, Muscletech* and others. In other words, it is urged the caselaw that has developed in the 15 years since *Steinberg* now provide a basis for recognition of third party releases in appropriate circumstances.

86 The *Steinberg* decision dealt directly with releases proposed for acts of directors. The decision appears to have focused on the nature of the contract created and binding between creditors and the company when the plan is approved. I accept that the effect of a Court-approved CCAA Plan is to impose a contract on creditors.

87 Reliance is placed on the decision of Deschamps J.A. (as she then was) at the following paragraphs of the *Steinberg* decision:

> [54] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> [57] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.
>
> [59] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.
>
> [68] The Act offers the respondent a way to arrive at a compromise with its creditors It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> [74] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

88 If it were necessary to do so, I would accept the position of the Applicants that the history of judicial interpretation of the CCAA at both the appellate and trial levels in Canada, along with the change to s. 5.1, leaves the decision in *Steinberg* applicable to a prior era only.

89 I do not think it necessary to go that far, however. One must remember that *Steinberg* dealt with release of claims against directors. As Mme. Justice Deschamps said at paragraph 54, "[A] plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement."

90 In this case, all the Noteholders have a common claim, namely to maximize the value obtainable under their notes. The anticipated increase in the value of the notes is directly affected by the risk and contribution that will be made by asset and liquidity providers.

91 In my view, depriving all Noteholders from achieving enhanced value of their notes to permit a few to pursue negligence claims that do not affect note value is quite a different set of circumstances from what was before the Court in *Steinberg*. Different in kind and quality.

92 The sponsoring parties have accepted the policy concern that exempting serious claims such as some frauds could not be regarded as fair and reasonable within the context of the spirit and purpose of the CCAA.

93 The sponsoring parties have worked diligently to respond to that concern and have developed an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a Whole.

Statutory Interpretation of the CCAA

94 Reference was made during argument by counsel to some of the moving parties to rules of statutory interpretation that would suggest that the Court should not go beyond the plain and ordinary words used in the statute.

95 Various of the authorities referred to above emphasize the remedial nature of the legislation, which leaves to the greatest extent possible the stakeholders of the debtor corporation to decide what Plan will or will not be accepted with the scope of the statute.

96 The nature and extent of judicial interpretation and innovation in insolvency matters has been the subject of recent academic and judicial comment.

97 Most recently, Madam Justice Georgina R. Jackson and Dr. Janis Sarra in "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[16] wrote:

> The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that it is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial tool box. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.[17]
>
> Second, we suggest that inherent jurisdiction is a misnomer for much of what has occurred in decision making under the CCAA. Appeal court judgments in cases such as *Skeena Cellulose Inc.* and *Stelco* discussed below, have begun to articulate this view. As part of this observation, we suggest that for the most part, the exercise of the court's authority is frequently, although not exclusively, made on the basis of statutory interpretation.[18]

Third, in the context of commercial law, a driving principle of the courts is that they are on a quest to do what makes sense commercially in the context of what is the fairest and most equitable in the circumstances. The establishment of specialized commercial lists or rosters in jurisdictions such as Ontario, Quebec, British Columbia, Alberta and Saskatchewan are aimed at the same goal, creating an expeditious and efficient forum for the fair resolution of commercial disputes effectively and on a timely basis. Similarly, the standards of review applied by appellate courts, in the context of commercial matters, have regard to the specialized expertise of the court of first instance and demonstrate a commitment to effective processes for the resolution of commercial disputes.[19] [cities omitted]

98 The case now before the Court does not involve confiscation of any rights in Notes themselves; rather the opposite: the opportunity in the business circumstances to maximize the value of the Notes. The authors go on to say at p. 45:

Iacobucci J., writing for the Court in *Rizzo Shoes*, reaffirmed Driedger's Modern Principle as the best approach to interpretation of the legislation and stated that "statutory interpretation cannot be founded on the wording of the legislation alone". He considered the history of the legislation and the benefit-conferring nature of the legislation and examined the purpose and object of the Act, the nature of the legislation and the consequences of a contrary finding, which he labeled an absurd result. Iacobucci J. also relied on s. 10 of the *Interpretation Act*, which provides that every Act "shall be deemed to be remedial" and directs that every Act "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The Court held:

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

...

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction.

Thus, in *Rizzo Shoes* we see the Court extending the legislation or making explicit that which was implicit only, as it were, by reference to the Modern Principle, the purpose and object of the Act and the consequences of a contrary result. No reference is made to filling the legislative gap, but rather, the Court is addressing a fact pattern not explicitly contemplated by the legislation and extending the legislation to that fact pattern.

Professor Cote also sees the issue of legislative gaps as part of the discussion of "legislative purpose", which finds expression in the codification of the mischief rule by the various Canadian interpretation statutes. The ability to extend the meaning of the provision finds particular expression when one considers the question posed by him: "can the purposive method make up for lacunae in the legislation". He points out, as does Professor Sullivan, that the courts have not provided a definitive answer, but that for him there are two schools of thought. One draws on the "literal rule" which favours judicial restraint, whereas the other, the "mischief rule", "posits correction of the text to make up for lacunae." To temper the extent of the literal rule, Professor Cote states:

First, the judge is not legislating by adding what is already implicit. The issue is not the judge's power to actually add terms to a statute, but rather whether a particular concept is sufficiently implicit in the words of an enactment for the judge to allow it to produce effect, and if so, whether there is any principle preventing the

> judge from making explicit what is already implicit. Parliament is required to be particularly explicit with some types of legislation such as expropriation statutes, for example.
>
> Second, the Literal Rule suggests that as soon as the courts play any creative role in settling a dispute rather than merely administering the law, they assume the duties of Parliament. But by their very nature, judicial functions have a certain creative component. If the law is silent or unclear, the judge is still required to arrive at a decision. In doing so, he [she] may quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit.
>
> In certain situations, the courts may refuse to correct lacunae in legislation. This is not necessarily because of a narrow definition of their role, but rather because general principles of interpretation require the judge, in some areas, to insist on explicit indications of legislative intent. It is common, for example, for judges to refuse to fill in the gaps in a tax statute, a retroactive law, or legislation that severely affects property rights. [Emphasis added. Footnotes omitted.][20]

99 The modern purposive approach is now well established in interpreting CCAA provisions, as the authors note. The phrase more than any other with which issue is taken by the moving parties is that of Paperny J. that s. 5 of the CCAA does not preclude releases other than those specified in s. 5.1.

100 In this analysis, I adopt the purposive language of the authors at pp 55-56:

> It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.
>
> The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights- based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress.
>
> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Quebec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in

> relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

101 I accept the hierarchy suggested by the authors, namely statutory interpretation (which in the case of the CCAA has inherent in it "gap filling"), judicial discretion and thirdly inherent jurisdiction.

102 It simply does not make either commercial, business or practical common sense to say a CCAA plan must inevitably fail because one creditor cannot sue another for a claim that is over and above entitlement in the security that is the subject of the restructuring, and which becomes significantly greater than the value of the security (in this case the Notes) that would be available in bankruptcy. In CCAA situations, factual context is everything. Here, if the moving parties are correct, some creditors would recover much more than others on their security.

103 There may well be many situations in which compromise of some tort claims as between creditors is not directly related to success of the Plan and therefore should not be released; that is not the case here.

104 I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap-filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the notes themselves within the Plan.

105 I adopt the authors' conclusion at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

Fraud Claims

106 I have concluded that claims of fraud do fall into a category distinct from negligence. The concern expressed by the Court in the endorsement of May 16, 2008 resulted in an amendment to the Plan by those supporting it. The Applicants amended the release provisions of the Plan to in effect "carve out" some fraud claims.

107 The concern expressed by those parties opposed to the Plan — that the fraud exemption from the release was not sufficiently broad — resulted in a further hearing on the issue on June 3, 2008. Those opposed continue to object to the amended release provisions.

108 The definition of fraud in a corporate context in the common law of Canada starts with the proposition that it must be made (1) knowingly; (2) without belief in its truth; (3) recklessly, careless whether it be true or false. [21] . It is my understanding that while expressed somewhat differently, the above-noted ingredients form the basis of fraud claims in the civil law of Quebec, although there are differences.

109 The more serious nature of a civil fraud allegation, as opposed to a negligence allegation, has an effect on the degree of probability required for the plaintiff to succeed. In *Continental Insurance Co. v. Dalton Cartage Co.* [22], Laskin J. wrote:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater, supra*, at p. 459, as follows:
>
> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
> >
> > I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

110 The distinction between civil fraud and negligence was further explained by Finch J.A. in *Kripps v. Touche Ross & Co.*: [23]

> [101] Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases however, as the authorities point out, it would be reasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.
>
> [102] The distinction between cases of negligent and fraudulent misrepresentation is that proof of a dishonest or fraudulent frame of mind on the defendant's part is required in actions of deceit. That, too, is an issue of fact and one which may also, of necessity, fall to be resolved by way of inference. There is, however, nothing in that which touches on the issue of the plaintiff's reliance. I can see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud.

111 In *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* [24], Winkler J. (as he then was) reviewed the leading common law cases:

> [477] Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved. The main distinction between the elements of fraudulent misrepresentation and negligent misrepresentation has been touched upon above, namely the dishonest state of mind of the representor. The state of mind was described in the seminal case *Derry v. Peek (1889)*, 14 App. Cas. 337 (H.L.) which held fraud is proved where it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false. The intention to deceive, or reckless disregard for the truth is critical.

[478] Where fraudulent misrepresentation is alleged against a corporation, the intention to deceive must still be strictly proved. Further, in order to attach liability to a corporation for fraud, the fraudulent intent must have been held by an individual person who is either a directing mind of the corporation, or who is acting in the course of their employment through the principle of *respondeat superior* or vicarious liability. In *B. G. Checo v. B. C. Hydro* (1990), 4 C.C.L.T. (2d) 161 at 223 (Aff'd, [1993] 1 S.C.R. 12), Hinkson J.A., writing for the majority, traced the jurisprudence on corporate responsibility in the context of a claim in fraudulent misrepresentation at 222-223:

> Subsequently, in *H.L. Bolton (Engineering) Co. v. T.J Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.), Denning L.J. said at p. 172:
>
> > A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear by Lord Haldane's speech in *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*
>
> It is apparent that the law in Canada dealing with the responsibility of a corporation for the tort of deceit is still evolving. In view of the English decisions and the decision of the Supreme Court of Canada in the *Dredging* case, supra, it would appear that the concept of vicarious responsibility based upon *respondent superior* is too narrow a basis to determine the liability of a corporation. The structure and operations of corporations are becoming more complex. However, the fundamental proposition that the plaintiff must establish an intention to deceive on the part of the defendant still applies.
>
> See also: *Standard Investments Ltd. et al. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) (Leave to appeal to Supreme Court of Canada refused Feb. 3, 1986).

[479] In the case of fraudulent misrepresentation, there are circumstances where silence may attract liability. If a material fact which was true at the time a contract was executed becomes false while the contract remains executory, or if a statement believed to be true at the time it was made is discovered to be false, then the representor has a duty to disclose the change in circumstances. The failure to do so may amount to a fraudulent misrepresentation. See: P. Perell, "False Statements" (1996), 18 Advocates' Quarterly 232 at 242.

[480] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 54 D.L.R. (4th) 43 (B.C.C.A.) (Aff'd on other grounds [1991] 3 S.C.R. 3), the British Columbia Court of Appeal overturned the trial judge's finding of fraud through non-disclosure on the basis that the defendant did not remain silent as to the changed fact but was simply slow to respond to the change and could only be criticized for its "communications arrangements." In so doing, the court adopted the approach to fraud through silence established by the House of Lords in *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950. Esson J.A. stated at 67-68:

> There is much emphasis in the plaintiffs submissions and in the reasons of the trial judge on the circumstance that this is not a case of fraud "of the usual kind" involving positive representations of fact but is, rather, one concerned only with non-disclosure by a party which has become aware of an altered set of circumstances. It is, I think, potentially misleading to regard these as different categories of fraud rather than as a different factual basis for a finding of fraud. Where the fraud is alleged to arise from failure

to disclose, the plaintiff remains subject to all of the stringent requirements which the law imposes upon those who allege fraud. The authority relied upon by the trial judge was the speech of Lord Blackburn in *Brownlie v. Campbell*.... The trial judge quoted this excerpt:

> ... when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has not now retracted when he has become aware that it can be no long honestly perservered [sic] in.

The relationship between the two bases for fraud appears clearly enough if one reads that passage in the context of the passage which immediately precedes it:

> I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such. I further agree in this: that when a statement or representation...

[481] Fraud through "active non-disclosure" was considered by the Court of Appeal for Ontario in *Abel v. McDonald*, [1964] 2 O.R. 256 (C.A.) in which the court held at 259: "By active non-disclosure is meant that the defendants, with knowledge that the damage to the premises had occurred actively prevented as far as they could that knowledge from coming to the notice of the appellants.

112 I agree with the comment of Winkler J. in *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) supra*, that the law in Canada for corporate responsibility for the tort of deceit is evolving. Hence the concern expressed by counsel for Asset Providers that a finding as a result of fraud (an intentional tort) could give rise to claims under the *Negligence Act* to extend to all who may be said to have contributed to the "fault." [25]

113 I understand the reasoning of the Plan supporters for drawing the fraud "carve out" in a narrow fashion. It is to avoid the potential cascade of litigation that they fear would result if a broader "carve out" were to be allowed. Those opposed urged that quite simply to allow the restrictive fraud claim only would be to deprive them of a right at law.

114 The fraud issue was put in simplistic terms during the oral argument on June 3, 2008. Those parties who oppose the restrictions in the amended Release to deal with only some claims of fraud, argue that the amendments are merely cosmetic and are meaningless and would operate to insulate many individuals and corporations who *may* have committed fraud.

115 Mr. Woods, whose clients include some corporations resident in Quebec, submitted that the "carve out," as it has been called, falls short of what would be allowable under the civil law of Quebec as claims of fraud. In addition, he pointed out that under Quebec law, security for costs on a full indemnity basis would not be permitted.

116 I accept the submission of Mr. Woods that while there is similarity, there is no precise equivalence between the civil law of Quebec and the common law of Ontario and other provinces as applied to fraud.

117 Indeed, counsel for other opposing parties complain that the fraud carve out is unduly restrictive of claims of fraud that lie at common law, which their clients should be permitted in fairness to pursue.

118 The particular carve out concern, which is applicable to both the civil and common law jurisdictions, would limit causes of actions to authorized representatives of ABCP dealers. "ABCP dealers" is a defined term within the Plan. Those actions would proceed in the home province of the plaintiffs.

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

120 That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

121 The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

122 The particular concern was to allow for those claims that might arise from knowingly false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffered damage as a result.

123 The Release as drafted accomplishes that purpose. It does not go as far as to permit all possible fraud claims. I accept the position of the Applicants and supporters that as drafted, the Releases are in the circumstances of this Plan fair and reasonable. I reach this conclusion for the following reasons:

> 1. I am satisfied that the Applicants and supporters will not bring forward a Plan that is as broad in permitting fraud claims as those opposing urge should be permitted.
>
> 2. None of the Plan opponents have brought forward particulars of claims against persons or parties that would fall outside those envisaged within the carve out. Without at least some particulars, expanded fraud claims can only be regarded as hypothetical or speculative.
>
> 3. I understand and accept the position of the Plan supporters that to broaden fraud claim relief does risk extensive complex litigation, the prevention of which is at the heart of the Plan. The likelihood of expanded claims against many parties is most likely if the fraud issue were open-ended.
>
> 4. Those who wish to claim fraud within the Plan can do so in addition to the remedies on the Notes that are available to them and to all other Noteholders. In other words, those Noteholders claiming fraud also obtain the other Plan benefits.

124 Mr. Sternberg on behalf of Hy Bloom did refer to the claims of his clients particularized in the Claim commenced in the Superior Court of Quebec. The Claim particularizes statements attributed to various National Bank representatives both before and after the August 2007 freeze of the Notes. Mr. Sternberg asked rhetorically how could the Court countenance the compromise of what in the future might be found to be fraud perpetrated at the highest levels of the Canadian and foreign banks.

125 The response to Mr. Sternberg and others is that for the moment, what is at issue is a liquidity crisis that affects the ABCP market in Canada. The Applicants and supporters have brought forward a Plan to alleviate and attempt to fix that liquidity crisis.

126 The Plan does in my view represent a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud.

127 I leave to others the questions of all the underlying causes of the liquidity crisis that prompted the Note freeze in August 2007. If by some chance there is an organized fraudulent scheme, I leave it to others to deal with. At the moment, the Plan as proposed represents the best contract for recovery for the vast majority of Noteholders and hopefully restoration of the ABCP market in Canada.

Hardship

128 As to the hardship issue, the Court was apprised in the course of submissions that the Plan was said by some to act unfairly in respect of certain Noteholders, in particular those who hold Ironstone Series B notes. It was submitted that unlike other trusts for which underlying assets will be pooled to spread risk, the underlying assets of Ironstone Trust are being "siloed" and will bear the same risk as they currently bear.

129 Unfortunately, this will be the case but the result is not due to any particular directive purpose of the Plan itself, but rather because the assets that underlie the trust have been determined to be totally "Ineligible Assets," which apparently have exposure to the U.S. residential sub-prime mortgage market.

130 I have concluded that within the context of the Plan as a whole it does not unfairly treat the Ironstone Noteholders (although their replacement notes may not be worth as much as others'.) The Ironstone Noteholders have still voted by a wide majority in favour of the Plan.

131 Since the Initial Order of March 17, there have been a number of developments (settlements) by parties outside the Plan itself of which the Court was not fully apprised until recently, which were intended to address the issue of hardship to certain investors. These efforts are summarized in paragraphs 10 to 33 of the Eighth Report of the Monitor.

132 I have reviewed the efforts made by various parties supporting the Plan to deal with hardship issues. I am satisfied that they represent a fair and reasonable attempt to deal with issues that result in differential impact among Noteholders. The pleas of certain Noteholders to have their individual concerns addressed have through the Monitor been passed on to those necessary for a response.

133 Counsel for one affected Noteholder, the Avrith family, which opposes the Plan, drew the Court's attention to their particular plight. In response, counsel for National Bank noted the steps it had taken to provide at least some hardship redress.

134 No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

135 The information available satisfies me that business judgment by a number of supporting parties has been applied to deal with a number of inequities. The Plan cannot provide complete redress to all Noteholders. The parties have addressed the concerns raised. In my view, the Court can ask nothing more.

Conclusion

136 I noted in the endorsement of May 16, 2008 my acceptance and understanding of why the Plan Applicants and sponsors required comprehensive releases of negligence. I was and am satisfied that there would be the third and fourth claims they anticipated if the Plan fails. If negligence claims were not released, any Noteholder who believed that there was value to a tort claim would be entitled to pursue the same. There is no way to anticipate the impact on those who support the Plan. As a result, I accept the Applicants' position that the Plan would be withdrawn if this were to occur.

137 The CCAA has now been accepted as a statute that allows for judicial flexibility to enable business people by the exercise of majority vote to restructure insolvent entities.

138 It would defeat the purpose of the statute if a single creditor could hold a restructuring Plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

139 One can only speculate on what response might be made by any one of the significant corporations that are moving parties and now oppose confirmation of this Plan, if any of those entities were undergoing restructuring and had their Plans in jeopardy because a single creditor sought to sue a financing creditor, which required a release as part of its participation.

140 There are a variety of underlying causes for the liquidity crisis that has given rise to this restructuring.

141 The following quotation from the May 23, 2008 issue of The Economist magazine succinctly describes the problem:

> If the crisis were simply about the creditworthiness of underlying assets, that question would be simpler to answer. The problem has been as much about confidence as about money. Modern financial systems contain a mass of amplifiers that multiply the impact of both losses and gains, creating huge uncertainty.

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal.

143 I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?

2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?

3. Can the Court be satisfied that without the releases the Plan cannot succeed?

4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?

5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?

6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?

7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

144 I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

145 The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

146 One of the unfortunate aspects of CCAA real time litigation is that it produces a tension between well-represented parties who would not be present if time were not of the essence.

147 Counsel for some of those opposing the Plan complain that they were not consulted by Plan supporters to "negotiate" the release terms. On the other side, Plan supporters note that with the exception of general assertions in the action on behalf of Hy Bloom (who claims negligence as well), there is no articulation by those opposing of against whom claims would be made and the particulars of those claims.

148 It was submitted on behalf of one Plan opponent that the limitation provisions are unduly restrictive and should extend to at least two years from the date a potential plaintiff becomes aware of an Expected Claim.

149 The open-ended claim potential is rejected by the Plan supporters on the basis that what is needed now, since Notes have been frozen for almost one year, is certainty of claims and that those who allege fraud surely have had plenty of opportunity to know the basis of their evidence.

150 Other opponents seek to continue a negotiation with Plan supporters to achieve a resolution with respect to releases satisfactory to each opponent.

151 I recognize that the time for negotiation has been short. The opponents' main opposition to the Plan has been the elimination of negligence claims and the Court has been advised that an appeal on that issue will proceed.

152 I can appreciate the desire for opponents to negotiate for any advantage possible. I can also understand the limitation on the patience of the variety of parties who are Plan supporters, to get on with the Plan or abandon it.

153 I am satisfied that the Plan supporters have listened to some of the concerns of the opponents and have incorporated those concerns to the extent they are willing in the revised release form. I agreed that it is time to move on.

154 I wish to thank all counsel for their cooperation and assistance. There would be no Plan except for the sustained and significant effort of Mr. Crawford and the committee he chairs.

155 This is indeed hopefully a unique situation in which it is necessary to look at larger issues than those affecting those who feel strongly that personal redress should predominate.

156 If I am correct, the CCAA is indeed a vehicle that can adequately balance the issues of all those concerned.

157 The Plan is a business proposal and that includes the releases. The Plan has received overwhelming creditor support. I have concluded that the releases that are part of the Plan are fair and reasonable in all the circumstances.

158 The form of Order that was circulated to the Service List for comment will issue as signed with the release of this decision.

Schedule "A'

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule "B"

Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

APPENDIX 1

Parties & Their Counsel

Counsel	*Party Represented*
Benjamin Zarnett Fred Myers Brian Empey	Applicants: Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper
Donald Milner Graham Phoenix, Xeno C. Martis David Lemieux Robert Girard	Respondents: Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp.
Aubrey Kauffman Stuart Brotman	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees
Craig J. Hill Sam P. Rappos Marc Duchesne	Monitor: Ernst & Young Inc.
Jeffrey Carhart Joseph Marin Jay Hoffman	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor
Arthur O. Jacques Thomas McRae	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Henry Juroviesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Jay A. Swartz Nathasha MacParland	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and Symphony Trust
James A. Woods Mathieu Giguere Sébastien Richemont Marie-Anne Paquette	Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro Inc., Vetements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Services Hypothécaires La Patremoniale Inc. and Jazz Air LLP
Peter F.C. Howard Samaneh Hosseini William Scott	Asset Providers/Liquidity Suppliers: Bank of America, N.A.; Citibank, N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
George S. Glezos Lisa C. Munro	Becmar Investments Ltd, Dadrex Holdings Inc. and JTI-Macdonald Corp.
Jeremy E. Dacks	Blackrock Financial Management, Inc.
Virginie Gauthier Mario Forte	Caisse de Dépôt et Placement du Québec
Kevin P. McElcheran Malcolm M. Mercer Geoff R. Hall	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank
Harvey Chaiton	Canadian Imperial Bank of Commerce
S. Richard Orzy Jeffrey S. Leon	CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
Margaret L. Waddell	Cinar Corporation, Cinar Productions (2004) and Cookie Jar Animation Inc., ADR Capital Inc. and GMAC Leaseco Corporation
Robin B. Schwill James Rumball	Coventree Capital Inc. and Nereus Financial Inc.
J. Thomas Curry Usman M. Sheikh	Coventree Capital Inc.
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond Lamek Ian D. Collins	Desjardins Group
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen Fitterman	Ivanhoe Mines Inc.

Kenneth T. Rosenberg Lily Harmer Massimo Starnino	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
Joel Vale	I. Mucher Family
John Salmas	Natcan Trust Company, as Note Indenture Trustee
John B. Laskin Scott Bomhof	National Bank Financial Inc. and National Bank of Canada
Robin D. Walker Clifton Prophet Junior Sirivar	NAV Canada
Timothy Pinos	Northern Orion Canada Pampas Ltd.
Murray E. Stieber	Paquette & Associés Huissiers en Justice, s.e.n.c. and André Perron
Susan Grundy	Public Sector Pension Investment Board
Dan Dowdall	Royal Bank of Canada
Thomas N.T. Sutton	Securitus Capital Corp.
Daniel V. MacDonald Andrew Kent	The Bank of Nova Scotia
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada
Sam R. Sasso	Travelers Transportation Services Inc.
Scott A. Turner	WebTech Wireless Inc. and Wynn Capital Corporation Inc.
Peter T. Linder, Q.C. Edward H. Halt, Q.C.	West Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., UTS Energy Corporation, Nexstar Energy Ltd., Sabre Tooth Energy Ltd., Sabre Energy Ltd., Alliance Pipeline Ltd., Standard Energy Inc. and Power Play Resources Limited
Steven L. Graff	Woods LLP
Gordon Capern Megan E. Shortreed	Xceed Mortgage Corporation

APPENDIX 2

Terms

"*ABCP Conduits*" means, collectively, the trusts that are subject to the Plan, namely the following: Apollo Trust, Apsley Trust, Aria Trust, Aurora Trust, Comet Trust, Encore Trust, Gemini Trust, Ironstone Trust, MMAI-I Trust, Newshore Canadian Trust, Opus Trust, Planet Trust, Rocket Trust, SAT, Selkirk Funding Trust, Silverstone Trust, SIT III, Slate Trust, Symphony Trust and Whitehall Trust, and their respective satellite trusts, where applicable.

"*ABCP Sponsors*" means, collectively, the Sponsors of the ABCP Conduits (and, where applicable, such Sponsors' affiliates) that have issued the Affected ABCP, namely, Coventree Capital Inc., Quanto Financial Corporation, National Bank Financial Inc., Nereus Financial Inc., Newshore Financial Services Inc. and Securitus Capital Corp.

"*Ad Hoc Committee*" means those Noteholders, represented by the law firm of Miller Thomson LLP, who sought funding from the Investors Committee to retain Miller Thomson and PricewaterhouseCoopers Inc., to assist it in starting to form a view on the restructuring. The Investors Committee agreed to fund up to $1 million in fees and facilitated the entering into of confidentiality agreements among Miller Thomson, PwC, the Asset Providers, the Sponsors, JPMorgan and E&Y so that Miller Thomson and PwC, could carry out their mandate. Chairman Crawford met with representatives of Miller Thomson and PwC, and the Committee's advisors answered questions and discussed the proposed restructuring with them.

"*Applicants*" means, collectively, the 17 member institutions of the Investors Committee in their respective capacities as Noteholders.

"*CCAA Parties*" means, collectively, the Issuer Trustees in respect of the Affected ABCP, namely 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative

Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp. and the ABCP Conduits.

"*Conduit*" means a special purpose entity, typically in the form of a trust, used in an ABCP program that purchases assets and funds these purchases either through term securitizations or through the issuance of commercial paper.

"*Issuer Trustees*" means, collectively, the issuer trustees of each of the ABCP Conduits, namely, 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp. and Metcalfe & Mansfield Alternative Investments XII Corp. and "*Issuer Trustee*" means any one of them. The Issuer Trustees, together with the ABCP Conduits, are sometimes referred to, collectively, as the "*CCAA Parties*".

"*Liquidity Provider*" means like asset providers, dealer banks, commercial banks and other entities often the same as the asset providers who provide liquidity to ABCP, or a party that agreed to provide liquidity funding upon the terms and subject to the conditions of a liquidity agreement in respect of an ABCP program. The Liquidity Providers in respect of the Affected ABCP include, without limitation: ABN AMRO Bank N.V., Canada Branch; Bank of America N.A., Canada Branch; Canadian Imperial Bank of Commerce; Citibank Canada; Citibank, N.A.; Danske Bank A/S; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA National Association; Merrill Lynch Capital Services, Inc.; Merrill Lynch International; Royal Bank of Canada; Swiss Re Financial Products Corporation; The Bank of Nova Scotia; The Royal Bank of Scotland plc and UBS AG.

"*Noteholder*" means a holder of Affected ABCP.

"*Sponsors*" means, generally, the entities that initiate the establishment of an ABCP program in respect of a Conduit. Sponsors are effectively management companies for the ABCP program that arrange deals with Asset Providers and capture the excess spread on these transactions. The Sponsor approves the terms of an ABCP program and serves as administrative agent and/or financial services (or securitization) agent for the ABCP program directly or through its affiliates.

"*Traditional Assets*" means those assets held by the ABCP Conduits in non-synthetic securitization structures such as trade receivables, credit card receivables, RMBS and CMBS and investments in CDOs entered into by third-parties.

APPENDIX 3

[Missing text]

Footnotes

1 Information Statement, p. 18

2 Information Statement, p. 18

3 *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Alta. Q.B.).

4 *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)

5 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Ont. Gen. Div. [Commercial List])

6 *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16, 2006 CarswellOnt 6230 (Ont. S.C.J.)

7 *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])

8 *Vicwest, Re* (Ont. S.C.J. [Commercial List]) per Pepall J. at paragraph 23

9 The Court was provided with copies of 12 Plan approvals under the CCAA in which releases were granted. In various instances these included officers, directors and creditors. The moving parties note that no objection to the nature or extent of release was taken.

10 *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749, 46 O.R. (3d) 514, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (Ont. C.A.)

11 *Stelco Inc., Re*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623, 2005 CarswellOnt 6483 (Ont. S.C.J. [Commercial List])

12 *Stelco Inc., Re*, [2005] O.J. No. 4883 (Ont. C.A.)

13 *Stelco Inc., Re*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, 2007 CarswellOnt 4108 (Ont. C.A.)

14 *Muscletech Research & Development Inc., Re*, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])

15 *Steinberg Inc. c. Michaud*, 1993 CanLII 3991, [1993 CarswellQue 229 (Que. C.A.)]

16 Annual Review of Insolvency Law, 2007 Thomson, Carswell. Janis Sarra edition

17 Ibid, p. 42

18 Ibid, pp. 44-45

19 Ibid, p. 45

20 Ibid pp 49-51

21 *Peek v. Derry* (1889), 14 A.C. 337 (U.K. H.L.)

22 *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559 (S.C.C.)

23 *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, 89 B.C.A.C. 288 (B.C. C.A.)

24 *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) 1, 63 O.T.C. 1 (Ont. Gen. Div. [Commercial List]).

25 See *Ecolab Ltd. v. Greenspace Services Ltd.*, [1996] O.J. No. 3528 (Ont. Gen. Div.) per Ground J.

TAB 8

2005 CarswellOnt 1963
Ontario Superior Court of Justice

Fiber Connections Inc. v. SVCM Capital Ltd.

2005 CarswellOnt 1963, [2005] O.J. No. 3899, 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271

In the Matter of the Ontario Business Corporations Act, R.S.O. 1990, c. B-16

Fiber Connections Inc. (Applicant) and SVCM Capital Ltd. (Respondent)

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, Section 47.1, as Amended

In the Matter of the Proposal of Fiber Connections Inc. of the Town of Schomberg, in the Province of Ontario

C. Campbell J.

Heard: February 25, 2005
Judgment: March 10, 2005
Docket: 04-CL-5680, 31-OR-437021

Proceedings: allowed leave to appeal *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 2005 CarswellOnt 1834 (Ont. C.A. [In Chambers]) [Ontario]

Counsel: Raymond S. Slattery, Timothy R. Dunn for Applicant, Fiber Connections Inc.
Jonathan H. Wigley for SVCM Capital Ltd., Russell Shoemaker
Martin Greenglass for SF Partners Inc. (Proposal Trustee)

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

APPLICATION by corporation for oppression remedy under *Ontario Business Corporations Act*; MOTION by corporation for order terminating USA.

C. Campbell J.:

1 Two inter-related motions were heard together. One, under the *Bankruptcy & Insolvency Act*, R.S.C. 1985 c. B-3 (the "BIA"), seeks approval of a Proposal made by Fiber Connections Inc. ("Fiber.") The second, an application under the *Ontario Business Corporations Act*, R.S.O. 1990 c. B-16 (the "OBCA"), seeks termination of a Unanimous Shareholders Agreement ("USA") among Fiber and its current shareholders.

2 Both sets of relief are opposed by SVCM Capital Ltd. ("SVCM") and its president Russell J. Shoemaker, essentially because they believe the proposal will fail and that the only value of Fibre is in a patent application that will be better realized if sold in bankruptcy.

Background Facts

3 Most of the underlying facts are not in dispute. The Amended Proposal, dated September 15, 2004, was presented to the Court by the Proposal Trustee. It has been approved by 25 of the 26 creditors of Fiber representing approximately 98% of its indebtedness.

4 The Proposal also has the support of the Business Development Bank ("BDB"), the major secured lender, and of the Government of Prince Edward Island, and preserves employment there and in Schomberg, Ontario. Aside from the

need to deal with the position of SVCM and Mr. Shoemaker, I am satisfied that the proposal represents a conscientious and realistic effort on the part of both creditors and shareholders.

5 There is no issue that Fiber is insolvent and has been for some months, during which time the Proposal has been initiated, negotiated, amended and finalized.

6 The proximate cause(s) of the insolvency are not directly relevant to the relief sought, given the strong support of all creditors and shareholders with the exception of Mr. Shoemaker and his company. There is no question but that the high tech industry crash in 2000 and the events of September 11, 2001 both contributed.

7 As of January 2004, it was clear to all concerned that Fiber was insolvent. Mr. Shoemaker was sufficiently concerned with events that on February 5, 2004, he resigned as financial manager of Fiber, and in March 2004 as a director.

8 SVCM advanced a claim in response to the Notice to Creditors in support of the Proposal, which was disallowed by the Trustee by Notice dated October 5, 2004.

9 The claim, which was advanced by proof of claim in the sum of $1,712,048, was valued at Nil pursuant to s. 135(1.1) of the BIA, on the following grounds:

> (A) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have determined that your unliquidated claim reflected on your proof of claim at $1,712,048, has been valued at NIL and therefore, there is no amount that has been a proved claim pursuant to subsection 135(1.1) of the Act.
>
> (B) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have further disallowed your claim in the sum of $1,712,048 pursuant to s. 135(2) of the Act for the following reasons;
>
> > (i) The said claim is an unliquidated damage claim based upon allegations of misrepresentation and/or fraudulent non-disclosure. The trustee understands that Fiber Connections Inc. disputes the allegations made and no proof has been provided to the trustee of the allegations which would entitle the trustee to determine if the claim is a valid claim.
> >
> > (ii) The claim as presented clearly indicates that the primary allegation is as against directors, and therefore, the claim may be a claim properly made as against someone other than Fiber Connections Inc.

10 The disallowance has been appealed. In addition, I am satisfied that any claim that SVCM or Mr. Shoemaker has against directions personally for misrepresentation or misappropriation survive and can be pursued.

11 In its Amended Report, the Proposal Trustee advises that in its opinion, the value of the assets of Fiber, less the secured claim of BDB, are approximately $275,000. Hence it is urged the terms of the Amended Proposal are reasonable and calculated to benefit the general body of creditors, if approved, particularly as both BDB and the Province of Prince Edward Island are in support.

The Patent Application

12 The opposition of Mr. Shoemaker and SVCM to the Amended Proposal came from their view of the potential value of an outstanding patent application for a device that converts electrical signals to optical signals and back, to allow configured devices to use a fibre optic link.

13 The mechanism for advancing opposition to the Proposal is the terms of the USA.

14 The effect of paragraph 4.4 set out below, to which Fiber is a signatory, is that the company shall not make any changes in the authorized or issued capital in the company or declare dividends without the written consent of Mr.

Shoemaker. There is also what is known as a "drag along" provision that provides for a deemed consent to sell to a third party, if approved by 50% of the shareholders. Paragraph 4.4 reads as follows:

> 4.4 Notwithstanding anything else contained in this agreement, and in addition to any other approval that may be required at law, so long as Russellco owns five percent (5%) of the outstanding Common Shares, the Corporation shall not;
>
> (a) make any change in the authorized or issued capital of the Corporation, save and except that the Corporation may issue such number of Common Shares as are properly issuable pursuant to the due exercise, in whole or in part, of the Warrant; or
>
> (b) declare dividends or other distributions in respect of the Common Shares or the Class "A" Preference Shares
>
> in either case, without the prior written consent of Russell Shoemaker on behalf of Russellco, in its sole discretion. In the event of an assignment or transfer of any of the Common Shares owned by Russellco, the provisions of Section 4.4 shall not apply to the Common Shares acquired by the subsequent transferee(s).

15 Mr. Shoemaker's opposition comes from his belief that the Proposal Trustee has not appropriately valued the patent application in assigning an amount of $200,000 to it. In his affidavit, he attests to the possibility that the application (which is in the names of officers of Fiber) could be worth anywhere from $1,000,000 to $8,000,000 based on internal projections or in excess of $50,000,000 based on statements by Fiber's CEO.

16 If the events of the last few years and the high tech bubble have taught anything, it is that the value of technological innovations, whether devices, software or services, are at best risky and highly speculative.

17 In my view, the only evidence that the Court has or should have regard to is the amount attributed by the Proposal Trustee, namely $200,000. I have no doubt that all the creditors and shareholders hope that the patent, if approved, is worth more than $200,000. Indeed, that is implicit in the Amended Proposal and is in the future.

18 Mr. Shoemaker is alone in believing the Patent Application will realize greater value through bankruptcy than the Amended Proposal. There is simply no reliable evidence before me to support this conclusion. Indeed, there is the suggestion that through bankruptcy, Mr. Shoemaker or his company could acquire the Patent Application for themselves to exploit.

19 As noted, the preferable "valuation" recognizing its inherent flaws, is that of the Proposal Trustee.

20 Without assigning a very significant value to the Patent Application, which I have not, there is no economic value to the shares of Fiber.

The Issue

21 The question then arises: can a shareholder who has no effective value to his shares successfully oppose a Proposal under the BIA simply because the variation of Agreement to implement the Proposal requires his consent to a revised share structure?

22 Mr. Wigley on behalf of Mr. Shoemaker and SVCM submits that the answer to the above is yes. He submits that the USA permits a shareholder, obstinate as some might think him, to withhold consent (a) because there can be no oppression of the applicant Fiber under s. 248 of the OBCA; and (b) absent an oppression finding, there is no authority in the Court under the BIA to set aside a unanimous shareholder agreement to permit alteration of share structure.

23 The position of Fiber is that the Court should grant its approval order and terminate the USA, either pursuant to its inherent jurisdiction to enable successful restructuring under the BIA or the specific jurisdiction provided in s. 248 of the OBCA.

24 Section 245 of the OBCA provides that for the purpose of among other matters s. 248 "complainant" means... "(c) any other person who, in the discretion of the Court, is a proper person to make an application..."

25 Counsel for SVCM submits that in this case, Fiber should not be accorded status as a complainant since under s. 248, conduct complained of must be "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the Corporation."

26 It is submitted that since the interests of the Corporation are not mentioned in the section, the Corporation cannot be a proper complainant.

27 I disagree with the proposition advanced by SVCM. In this case, I find that Fiber is a proper complainant, since as a party to the USA the contemplated re-organization cannot be carried out without change to the share structure, which requires actions on the part of the Company. See *Gainers Inc. v. Pocklington* (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.) and *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 665.

28 This is not an oppression application brought by SVCM as a minority shareholder. I conclude that when all of the other creditors and shareholders consent to the remedy sought in the name of the company, it would unduly technical to say that the remedy could not be brought in the name of the company, when it is a necessary party to the remedy.

29 In addition, it would be oppressive to the Corporation and its stakeholders to end its existence when virtually all of the shareholders, directors, creditors and employees believe it has a future. In that sense, creditors and directors, among others, are oppressed.

30 Counsel for SVCM relies on language from the decision of the Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), which delineates the importance of shareholder expectation as part of shareholder interest. Reference is made in the decision to the decision of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 113, where at p. 123 speaking of shareholder expectation, there appears the following:

> They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

31 Applying the language to the facts of this case, can it be said that it was the expectation of all the shareholders of Fiber, whose shares currently have no economic value, that one shareholder could deprive them of the possibility of achieving some value by employing a veto the effect of which is to put the company in bankruptcy? I think the answer is clear. That would not have been the reasonable expectation of the shareholders as a group.

32 I have not been referred to any authority that would suggest that shareholder expectation would necessarily exclude consideration of the majority, when one single shareholder seeks to be obstinate for his own purpose, which is not that of the rest of the stakeholders, not just the other shareholders.

33 I conclude that the purported exercise of a veto of the amendments to the share structure proposal is oppressive of the Corporation, its shareholders and directors.

34 The remedy is an order permitting the Company to amend its articles and/or by-laws and/or the USA including the power to create a new unanimous shareholders' agreement in the terms set forth in the Company's proposal under s. 248 and s. 168 of the OBCA. See *Bury v. Bell Gouinlock Ltd.* (1984), 12 D.L.R. (4th) 451 (Ont. H.C.) and *Walsh v. Erectoweld Co.* (1992), [1993] O.J. No. 24 (Ont. S.C.J. [Commercial List]).

The BIA

35 In the event I am found in error in respect of the ability to find Fiber a complainant oppressed under the OBCA, it is necessary to consider the submission of SVCM that there is no jurisdiction in the BIA that would expressly permit termination of the USA and that it would be inappropriate to draw on the "inherent jurisdiction" of the Court to do so.

36 Part of the submission under the BIA is that since the matter of the USA is specifically regulated under the OBCA, the Court should not stretch to do so under the BIA.

37 I agree with counsel for SVCM that much of the law regarding inherent jurisdiction and cases under the *Companies Creditors Arrangement Act* are as a result of the general language in that statute, as opposed to the more specific language of the BIA. As a result, I agree that the use of "inherent jurisdiction" under the BIA, which is a much more detailed statute, must be used with caution.

38 Much of the recent focus on the duties of directors is to recognize that there may be duties that extend beyond shareholders, to other stakeholders. See *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 (S.C.C.).

39 For the purposes of this case, it is not in my view an extension of the concept of inherent jurisdiction, but rather the prevention of one shareholder, with no economic value of his equity, holding all the stakeholders hostages. In this respect, I conclude that the considerations expressed for the exercise of the Court's inherent jurisdiction under the CCAA are applicable under the BIA to the facts of this case. See *Algoma Steel Inc., Re* (2001), [2002] O.J. No. 66 (Ont. S.C.J. [Commercial List]) at paragraph 5; *Doman Industries Ltd., Re*, [2004] B.C.J. No. 1402 (Ont. S.C.J. [Commercial List])

40 There is no practical reason for a distinction to be made for the consideration of "inherent jurisdiction" on the facts of this case, since it is only insolvency that prevents this having been a CCAA application. This is a proposal, not a bankruptcy. It would indeed be scandalous if the use of "inherent jurisdiction" under one statute of the CCAA would prevent bankruptcy but a proposal to achieve the same purpose under the BIA could not.

41 Where the corporation is insolvent and the shareholders would, upon liquidation, get nothing, it would be unfair to creditors and other stakeholders to permit one shareholder with no economic interest to block a reorganization. The alternative would be bankruptcy and nothing for most of the creditors and all of the shareholders. (See *Loewen Group Inc., Re*, [2001] O.J. No. 5640 (Ont. S.C.J. [Commercial List]), paragraph 8 and *Canadian Airlines Corp., Re*, [2000] A.J. No. 771 (Alta. Q.B.) at p. 74-79.

42 For the foregoing reasons, I conclude that there is power under the BIA in these circumstances to set aside the USA and approve the proposal of the company, as set forth in the Report of the Proposal Trustee, and it is so ordered. Pursuant to s. 186 of the OBCA an order will issue amending the share structure of Fiber in accordance with its Proposal.

43 If it is necessary to deal with the issue of costs, written submissions should be made within the next 10 days.

Motion and application granted.

TAB 9

2002 SCC 7, 2002 CSC 7
Supreme Court of Canada

Bank of Montreal v. Dynex Petroleum Ltd.

2002 CarswellAlta 54, 2002 CarswellAlta 55, 2002 SCC 7, 2002 CSC 7, [2001] S.C.J. No. 70, [2002] 1 S.C.R. 146, [2002] A.W.L.D. 52, 111 A.C.W.S. (3d) 156, 19 B.L.R. (3d) 159, 1 R.P.R. (4th) 1, 208 D.L.R. (4th) 155, 266 W.A.C. 1, 281 N.R. 113, 299 A.R. 1, 30 C.B.R. (4th) 168, J.E. 2002-230, REJB 2002-27593

Bank of Montreal, Appellant v. Enchant Resources Ltd. and D. S. Willness, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel JJ.

Heard: November 9, 2001
Judgment: January 24, 2002
Docket: 27766

Proceedings: additional reasons to 2001 CarswellAlta 1461 (S.C.C.); affirming (1999), 182 D.L.R. (4th) 640, 74 Alta. L.R. (3d) 219, [2000] 2 W.W.R. 693, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, (*sub nom.* Bank of Montreal v. Enchant Resources Ltd.) 255 A.R. 116, (*sub nom.* Bank of Montreal v. Enchant Resources Ltd.) 220 W.A.C. 116 (Alta. C.A.); reversing (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291 (Alta. Q.B.); and reversing (1997), 50 Alta. L.R. (3d) 44, [1997] 6 W.W.R. 104, 31 B.L.R. (2d) 44, 46 C.B.R. (3d) 36, 145 D.L.R. (4th) 499, 202 A.R. 331, 12 P.P.S.A.C. (2d) 183 (Alta. Q.B.)

Counsel: *Richard B. Jones*, for Appellant
James C. Crawford, Q.C., *Frank R. Dearlove*, *Scott H.D. Bower*, for Respondents

Subject: Natural Resources; Property; Corporate and Commercial; Insolvency

ADDITIONAL REASONS to judgment reported at 2001 CarswellAlta 1461, 2001 CarswellAlta 1462 (S.C.C.), dismissing appeal by bank from judgment reported at 182 D.L.R. (4th) 640, 1999 CarswellAlta 1271, 74 Alta. L.R. (3d) 219, [2000] 2 W.W.R. 693, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, (sub nom. *Bank of Montreal v. Enchant Resouces Ltd.)* 255 A.R. 116, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 220 W.A.C. 116, 1999 ABCA 363 (Alta. C.A.), allowing appeal from judgments granting applications for determination that overriding royalty was incapable of being interest in land.

MOTIFS SUPPLÉMENTAIRES au jugement publié à 2001 CarswellAlta 1461, 2001 CarswellAlta 1462 (S.C.C.), qui a rejeté le pourvoi de la banque à l'encontre du jugement publié à 182 D.L.R. (4th) 640, 1999 CarswellAlta 1271, 74 Alta. L.R. (3d) 219, [2000] 2 W.W.R. 693, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, (sub nom. *Bank of Montreal v. Enchant Resouces Ltd.)* 255 A.R. 116, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 220 W.A.C. 116, 1999 ABCA 363 (Alta. C.A.) qui a accueilli le pourvoi à l'encontre des jugements accueillant les demandes présentées afin qu'il soit statué qu'une redevance dérogatoire ne pouvait constituer un intérêt foncier.

Major J.:

I. Introduction

1 This appeal arises from an application made by the appellant Bank of Montreal before the chambers judge in the Alberta Court of Queen's Bench for a determination that, as a matter of law, an overriding royalty is incapable of being an interest in land. The application was opposed by several defendants including the respondents in this Court, Enchant

Resources Ltd. ("Enchant") and D. S. Willness ("Willness"), each holders of overriding royalties who claim their interests to be interests in land. The learned chambers judge allowed the Bank's application which the Alberta Court of Appeal reversed, holding that an overriding royalty is capable of being an interest in land. This appeal to the Supreme Court of Canada was dismissed with reasons to follow.

II. Facts

2 The material filed and submissions of counsel indicated that royalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying). G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233. The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted.

3 The appellant Bank of Montreal was a secured creditor of Dynex Petroleum Ltd. ("Dynex"), a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of Dynex. One issue was whether any such sale would be subject to overriding royalties arising out of the working interest held by Dynex. Also, there were several competing claims against the appellant, which by the time of this appeal had narrowed to the overriding royalties of the respondents Enchant and Willness, who claimed a preference by way of a caveat filed in the South Alberta Land Registration District, claiming an interest in Dynex's working interest as a result of services performed for Dynex and/or its predecessors. The respondents claimed their royalty rights comprised interests in land and claimed priority over the appellant because their interests, as protected by caveats, preceded the appellant's loans to Dynex and its predecessors. The appellant submitted that at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest.

4 This case pits this ancient common law rule against a common practice in the oil and gas industry. The Court is asked to resolve the apparent conflict.

III. Judicial History

5 The appellant applied to the Court of Queens Bench of Alberta ((1995), 39 Alta. L.R. (3d) 66 (Alta. Q.B.)) for a preliminary determination that the overriding royalty interests do not constitute interests in land. The learned chambers judge, Rooke J. in allowing the application held at para. 3 that:

> ... as a matter of law, a lessee of an oil and gas lease (which is a profit à prendre), which is in itself an interest in land, obtained from a lessor (whether the Crown or freehold), cannot in law pass on an interest in land to a third party.

He also concluded that if an interest in land could issue from a *profit à prendre*, which he held that it could not, the matter could not be determined summarily as evidence would be necessary to examine the language of the instruments and the intentions of the parties.

6 After a review of policy considerations, industry practice and Canadian and United States case law, the Alberta Court of Appeal ((1999), 74 Alta. L.R. (3d) 219 (Alta. C.A.)) concluded that overriding royalty interests can constitute interests in land if intended by the parties. For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land.

IV. Issue

7 Can an overriding royalty issued from a working interest (an incorporeal hereditament) be an interest in land?

V. Analysis

8 At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament. 'Corporeal hereditament' is defined by *The Dictionary of Canadian Law* (2nd ed., 1995) as:

> 1. A material object in contrast to a right. It may include land, buildings, minerals, trees or fixtures. ...
>
> 2. Land.

'Incorporeal hereditament' is defined as:

> 1. "[A right] ... in land, which [includes] such things as rent charges, annuities, easements, profits à prendre, and so on."...
>
> 2. Property which is not tangible but can be inherited.

9 In *Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.), at p. 392, Rand J. held that an oil and gas lease, the interest from which an overriding royalty is created, can be a *profit à prendre*, an interest in land. A *profit à prendre* is an incorporeal hereditament. The appellant has submitted that at common law, an interest in land could not issue from an incorporeal hereditament and therefore overriding royalties cannot be interests in land.

10 Canadian case law suggests otherwise. In *Saskatchewan Minerals v. Keyes* (1971), [1972] S.C.R. 703 (S.C.C.), the majority declined to decide whether an overriding royalty could be an interest in land. However, Laskin J. in dissent specifically addressed that issue. He did not find the distinction between corporeal and incorporeal hereditaments to be useful in this context and discussed the difficulty of conforming new commercial concepts to anachronistic categories at p. 722:

> The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases (as in *Re Dawson and Bell, supra*, the *Berkheiser* case, *supra*, and cf. *Attorney-General of Ontario v. Mercer*, at p.777) but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

11 Laskin J. referred to *Berkheiser*, *supra*, where Rand J. held that a royalty was analogous to rent. While that case involved a lessor's royalty, Laskin J. found that although theoretically the holder of a lessor's royalty holds an interest in reversion, whereas the holder of an overriding royalty does not, since in essence the two interests are identical, there should be no distinction between the two royalty interests in their treatment as interests in land. The effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests.

12 Laskin J. concluded that the overriding royalty was an interest in land, analogous to a rent-charge. It is significant that he did not find all overriding royalty interests to be interests in land. He held that the intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.

13 In *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321 (Alta. Q.B.), aff'd (1994), 157 A.R. 65 (Alta. C.A.), and in *Canco Oil & Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Sask. Q.B.), Hunt J. and Matheson J.

respectively relied upon the dissent in *Keyes* , *supra*, to find that lessor royalties can be interests in land depending on the intentions of the parties and the language used to create the interest. The Court of Appeal in *Scurry-Rainbow* did not base its decision on this issue.

14 The appellant referred to cases that held royalty interests not to be interests in land. (See *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482 (S.C.C.); *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. T.D.); *Isaac v. Cook* (1982), 44 C.B.R. (N.S.) 39 (N.W.T. S.C.); *Guaranty Trust Co. of Canada v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Alta. Q.B.), aff'd in part [1989] 5 W.W.R. 340 (Alta. C.A.); *Vandergrift v. Caseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Alta. Q.B.); *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (N.S. S.C.).) Although each of these cases held that the royalty therein is not an interest in land, they do not support the proposition that a royalty cannot be an interest in land. In each case the court found that the language used by the parties in creating the interest did not evidence the intention to create an interest in land.

15 That royalties can be interests in land finds support in W. H. Ellis' "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev.* 1 at p. 10:

> Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

16 In *Oil and Gas Agreements Update* (1989), J. F. Newman in his article "Can a Gross Overriding Royalty Be an Interest in Land?"concludes that most parties to an overriding royalty interest intend for such interest to be an interest in land. Evidence of this is the common practice of registering caveats in the Land Titles Office of Alberta seeking to protect that interest.

17 The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

18 The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

19 The Alberta Court of Appeal offered compelling insight into the evolution of the law at para. 52:

> The principles inherent in the above argument need not be applied to prevent an overriding royalty from being an interest in land for a number of reasons. First, royalties and ORRs need not be classified into a traditional common law property category unsuited to the realities of the oil and gas industry and need not be subject to the arcane strictures of traditional categories. Second, some authorities suggest it is possible to have an incorporeal interest (an overriding royalty) created from an incorporeal interest. Third, even if it is not possible, the rule need not be blindly adhered to because, as stated by Mr. Justice Holmes in "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 469, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," and, "still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past."

20 In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34 (S.C.C.), at para. 42, Bastarache J. outlined when changes to the rules of common law are necessary:

> (1) to keep the common law in step with the evolution of society,

(2) to clarify a legal principle, or

(3) to resolve an inconsistency.

In addition, the change should be incremental, and its consequences must be capable of assessment.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

22 Virtue J. in *Vandergrift* , *supra*, at p. 26 succinctly stated:

> ... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

23 The appeal is dismissed with costs to the respondents.

***Major J.*:**

I. Introduction

1 Le présent pourvoi vise une demande que la Banque de Montréal, appelante, a présentée à un juge de la Cour du Banc de la Reine de l'Alberta siégeant en chambre afin qu'il statue, en droit, qu'une redevance dérogatoire ne peut constituer un intérêt foncier. Plusieurs défendeurs se sont opposés à la demande. Au nombre des opposants figuraient les intimés devant notre Cour, Enchant Resources Ltd. (« Enchant ») et D.S. Willness (« Willness »), titulaires de redevances dérogatoires qui prétendaient détenir un intérêt foncier. Le juge a fait droit à la demande de la Banque. La Cour d'appel de l'Alberta a infirmé cette décision, statuant qu'une redevance dérogatoire peut être un intérêt foncier. Notre Cour a rejeté le pourvoi, avec motifs à suivre.

II. Les faits

2 Les pièces produites et les plaidoiries des avocats révèlent que les arrangements en matière de redevances sont de pratique courante en Alberta dans le secteur de l'exploration et de la production pétrolières et gazières. D'ordinaire, le propriétaire des minéraux *in situ* donne à bail à un producteur potentiel le droit d'extraire ces minéraux. Pour désigner ce droit, on utilise l'expression « participation directe ». Une redevance est une part ou participation fractionnaire non grevée dans la production brute issue de cette participation directe. La redevance du bailleur est une redevance accordée au bailleur initial (ou qu'il se réserve). Une redevance dérogatoire ou redevance dérogatoire brute est une redevance accordée normalement par le titulaire d'une participation directe à un tiers en échange d'une contrepartie qui peut comprendre notamment une somme d'argent ou des services (par exemple, le forage ou les études géologiques). G. J. Davies, « The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev.* 232, p. 233. Les mêmes droits et obligations se rattachent aux deux types de redevance. Seul les différencie le fait que la redevance n'est pas accordée initialement à la même personne.

3 La Banque de Montréal, appelante, était un créancier garanti de Dynex Petroleum Ltd. (« Dynex »), société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de Dynex. La question se posait

donc de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par Dynex. De plus, l'appelante se voyait opposer plusieurs réclamations concurrentes dont ne subsistaient plus, au moment du présent pourvoi, que les redevances dérogatoires des intimés Enchant et Willness, qui revendiquaient un rang prioritaire en invoquant une opposition déposée au bureau d'enregistrement foncier du district du sud de l'Alberta, faisant valoir un intérêt dans la participation directe détenue par Dynex par suite de la fourniture de services à Dynex ou à ses prédécesseurs. Les intimés soutenaient que leurs droits de redevance comportaient des intérêts fonciers et prétendaient prendre rang avant l'appelante parce que leurs intérêts protégés par les oppositions étaient antérieurs aux prêts consentis par l'appelante à Dynex et à ses prédécesseurs. L'appelante a soutenu que, en common law, un intérêt foncier ne pouvait dériver d'un héritage incorporel et que, partant, les redevances dérogatoires des intimés (dérivées d'une participation directe et, donc, d'un héritage incorporel) ne prenaient pas rang avant la sûreté qu'elle détenait.

4 La présente affaire oppose cette ancienne règle de common law et une pratique courante du secteur pétrolier et gazier. La Cour est appelée à trancher ce conflit apparent.

III. Historique des procédures judiciaires

5 L'appelante a demandé à la Cour du Banc de la Reine de l'Alberta ((1995), 39 Alta. L.R. (3d) 66) de statuer, par une décision préliminaire, que les droits de redevance dérogatoire ne constituaient pas des intérêts fonciers. Le juge Rooke siégeant en chambre a fait droit à la demande en ces termes, au par. 3 :

> [TRADUCTION] ... en droit, le preneur à bail d'une concession pétrolière et gazière (qui est un profit à prendre), qui est en soi un intérêt foncier, obtenue d'un bailleur (location de la Couronne ou location à bail franche), ne peut, en common law, transmettre un intérêt foncier à un tiers.

Il a également conclu que, si un intérêt foncier pouvait dériver d'un profit à prendre — solution qu'il a écartée — , la question ne pourrait être tranchée sommairement, car une preuve serait nécessaire aux fins de l'examen des termes des instruments et de l'intention des parties.

6 Après avoir examiné les considérations de principe, la pratique du secteur d'activité en cause et la jurisprudence canadienne et américaine, la Cour d'appel de l'Alberta ((1999), 74 Alta. L.R. (3d) 219) a conclu que les droits de redevance dérogatoire pouvaient constituer des intérêts fonciers si telle était l'intention des parties. M'appuyant essentiellement sur les mêmes motifs que la Cour d'appel, je suis d'avis que les droits de redevance dérogatoire peuvent constituer des intérêts fonciers.

IV. La question en litige

7 Une redevance dérogatoire issue d'une participation directe (un héritage incorporel) peut-elle constituer un intérêt foncier?

V. Analyse

8 En common law, un intérêt foncier pouvait être issu d'un héritage corporel, mais non d'un héritage incorporel. Dans le *Dictionary of Canadian Law* (2e éd., 1995), la notion de « *corporeal hereditament* » (héritage corporel) est définie comme suit :

> [TRADUCTION]
>
> 1. Chose matérielle par contraste avec un droit. Peut s'entendre de fonds de terre, bâtiments, minéraux, arbres ou accessoires fixes. ...
>
> 2. Fonds de terre.

L'expression « *incorporeal hereditament* » (héritage incorporel) est définie comme suit :

[TRADUCTION]

1. « [Droit] ... sur un fonds de terre, qui [inclut] des choses telles que les rentes-charges, annuités, servitudes, profits à prendre, etc. » ...

2. Bien qui n'est pas matériel, mais peut être transmis par voie héréditaire.

9 Dans *Berkheiser c. Berkheiser*, [1957] R.C.S. 387, p. 392, le juge Rand a décidé qu'une concession pétrolière et gazière, l'intérêt dont est issue une redevance dérogatoire, peut être un profit à prendre, un intérêt foncier. Un profit à prendre est un héritage incorporel. L'appelante a prétendu que, en common law, un intérêt foncier ne pouvait être issu d'un héritage incorporel et que, par conséquent, les redevances dérogatoires ne pouvaient pas constituer des intérêts fonciers.

10 La jurisprudence canadienne semble indiquer le contraire. Dans *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703, la Cour suprême à la majorité s'est abstenue de décider si une redevance dérogatoire pouvait constituer un intérêt foncier. Toutefois, le juge Laskin, dissident, s'est intéressé précisément à cette question. Il n'a pas jugé la distinction entre les héritages corporels et incorporels utile dans ce contexte et il a traité de la difficulté de concilier les concepts modernes du commerce et les catégories anachroniques à la p. 722 :

> Les expressions « corporel » et « incorporel » ne font pas ressortir la distinction entre l'intérêt en droit et l'objet auquel il se rattache. D'après cette distinction tous les intérêts en droit sont « incorporels », et c'est l'autorité jamais attaquée d'une longue évolution historique qui nous oblige ici à étudier certaines institutions de la propriété dans les provinces régies par la *common law* au moyen d'un système de classification suranné et d'une terminologie surannée. Les rentes et les redevances ont été associées dans la jurisprudence (par exemple, dans les cause *Re Dawson and Bell* et *Berkheiser*, précitées; voir aussi *Attorney General of Ontario v. Mercer*, p. 777), mais jusqu'à maintenant, cette Cour n'a jamais eu à les analyser en regard de la classification des intérêts dans un bien-fonds en *common law*, ni à déterminer si cette classification est assez générale pour englober une redevance existant par elle-même.

11 Le juge Laskin s'est reporté à la décision *Berkheiser*, précitée, où le juge Rand a décidé qu'une redevance était assimilable à une rente. Bien que cette affaire ait porté sur une redevance de bailleur, le juge Laskin a estimé que, même si en théorie le titulaire d'une redevance de bailleur détient un intérêt de réversion, ce qui n'est pas le cas du titulaire d'une redevance dérogatoire, il n'y avait pas lieu de faire de distinction entre ces deux redevances dans l'effet qui leur est attribué à titre d'intérêts fonciers, puisque les deux intérêts sont essentiellement identiques. Les motifs du juge Laskin ont eu pour effet de rendre inapplicable, du moins quant aux redevances dérogatoires, la règle de common law interdisant la création d'intérêts fonciers à partir d'intérêts incorporels.

12 Le juge Laskin a conclu que la redevance dérogatoire était un intérêt foncier, analogue à une rente-charge. Il est significatif qu'il n'ait pas jugé que toutes les redevances dérogatoires étaient des intérêts fonciers. Il a estimé que les intentions des parties révélées par les termes du contrat de redevance permettraient de décider si les parties avaient l'intention de créer un intérêt foncier ou uniquement des droits contractuels.

13 Dans *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321 (B.R.), conf. (1994), 157 A.R. 65 (C.A.), et dans *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37 (B.R.), les juges Hunt et Matheson, respectivement, se sont fondés sur l'opinion dissidente exprimée dans *Keyes*, précité, pour conclure que les redevances de bailleur pouvaient être des intérêts fonciers selon les intentions des parties et les termes employés pour créer l'intérêt. La Cour d'appel dans *Scurry-Rainbow* n'a pas fondé sa décision sur cette question.

14 L'appelante a cité des décisions où il a été jugé que des droits de redevance n'étaient pas des intérêts fonciers. (Voir *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (C.S. Div. instr. Alb.); *Isaac c. Cook* (1982), 44 C.B.R. 39 (C.S.T.N-O.); *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (B.R.), conf. en partie [1989] 5 W.W.R. 340 (C.A. Alb.); *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (B.R.); *Nova Scotia Business Capital Corp. c.*

Coxheath Gold Holdings Ltd. (1993), 128 N.S.R. (2d) 118 (C.S.).) Bien que dans toutes ces décisions, il ait été statué que la redevance en cause n'était pas un intérêt foncier, elles ne permettent pas d'affirmer qu'une redevance ne peut jamais être un intérêt foncier. Dans chacune, la cour a conclu que les termes employés par les parties pour créer l'intérêt ne révélaient pas l'intention de créer un intérêt foncier.

15 La thèse selon laquelle les redevances peuvent constituer des intérêts fonciers est étayée par l'article de W.H. Ellis, « Property Status of Royalties in Canadian Oil and Gas Law » (1984), 22 *Alta. L. Rev.* 1, p. 10 :

> [TRADUCTION]
>
> Les redevances, telles qu'utilisées dans le secteur des hydrocarbures, n'ont de sens que si elles constituent des intérêts de propriété dans les minéraux non encore produits. Les titulaires des droits miniers doivent pouvoir créer de tels intérêts, s'ils précisent clairement que telle est leur intention.

16 Dans l'article intitulé « Can a Gross Overriding Royalty Be an Interest in Land? », publié dans *Oil & Gas Agreements Update* (1989), J. F. Newman conclut que, la plupart du temps, il est de l'intention des parties à un contrat de redevance dérogatoire que le droit de redevance constitue un intérêt foncier. En fait foi la pratique courante qui consiste à enregistrer des oppositions au bureau d'enregistrement des titres fonciers de l'Alberta afin de protéger ces intérêts.

17 Le secteur des hydrocarbures, qui s'est développé en grande partie dans la seconde moitié du XX^{e} siècle et continue d'évoluer, est régi par un ensemble de lois et de règles de common law. L'application des notions de common law à une industrie nouvelle ou en évolution est utile, car elle fournit aux intervenants de l'industrie et aux tribunaux un cadre juridique à l'intérieur duquel structurer les activités de ce secteur. Il n'est guère étonnant que certaines notions de common law élaborées dans des contextes sociaux, industriels et juridiques différents soient inapplicables dans le contexte particulier de ce secteur d'activité et de ses pratiques.

18 L'appelante n'a pu invoquer aucune raison de principe convaincante justifiant le maintien de la règle de common law qui interdit la création d'un intérêt foncier à partir d'un héritage incorporel, si ce n'est la fidélité aux principes de common law. Étant donné, d'une part, la coutume dans le secteur des hydrocarbures et, d'autre part, l'appui fourni par la jurisprudence, il est opportun et raisonnable que la loi reconnaisse qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

19 La Cour d'appel de l'Alberta nous offre des réflexions convaincantes sur l'évolution du droit, au par. 52 :

> [TRADUCTION]
>
> Il n'est pas nécessaire d'appliquer les principes qui se dégagent de l'argument précité pour empêcher qu'une redevance dérogatoire ne constitue un intérêt foncier, et ce pour plusieurs raisons. D'abord, il n'est pas nécessaire de classer les redevances et les redevances dérogatoires dans les catégories classiques du droit des biens en common law qui ne s'accordent pas avec les réalités du secteur pétrolier et gazier, ni de les assujettir aux définitions ésotériques des catégories classiques. Ensuite, certaines sources semblent indiquer qu'il est possible qu'un intérêt incorporel (une redevance dérogatoire) soit créé à partir d'un intérêt incorporel. Enfin, même si cela n'était pas possible, nous ne serions pas tenus de suivre la règle aveuglément, puisque, pour reprendre les propos du juge Holmes dans « The Path of the Law » (1897) 10 *Harv. L. Rev.* 457, p. 469, il est « choquant que la valeur d'une règle de droit ne tienne qu'à son ancienneté, dût-elle remonter à Henri IV », et « encore plus choquant que son fondement ait disparu depuis longtemps, mais qu'elle subsiste en raison d'un passéisme aveugle. »

20 Dans *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34, au par. 42, le juge Bastarache a mis en lumière les cas où une modification de la common law sera nécessaire :

> (1) pour permettre à la common law de suivre l'évolution de la société;

(2) pour préciser un principe de droit;

(3) pour éliminer une contradiction.

De plus, la modification doit être graduelle et ses conséquences doivent pouvoir être évaluées.

21 Dans le présent pourvoi, pour préciser le droit en matière de redevances dérogatoires, l'interdiction de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

22 Dans *Vandergrift*, précité, à la p. 26, le juge Virtue dit succinctement :

[TRADUCTION] ... il semble assez clair que, selon le droit canadien, un droit de redevance ou un droit de redevance dérogatoire peut être un intérêt foncier si les conditions suivantes sont réunies :

1) les termes employés pour décrire l'intérêt sont suffisamment précis pour démontrer l'intention des parties que la redevance constitue un intérêt foncier, plutôt qu'un droit contractuel sur une fraction des hydrocarbures extraits du sol;

2) l'intérêt dont est issue la redevance est lui-même un intérêt foncier.

IV. Conclusion

23 Le pourvoi est rejeté avec dépens en faveur des intimés.

Order accordingly.

Ordonnance en conséquence.

TAB 10

2013 QCCA 1323
Cour d'appel du Québec

Anglo Pacific Group PLC c. Ernst & Young Inc.

2013 CarswellQue 11251, 2013 CarswellQue 7724, 2013 QCCA 1323, [2013] R.J.Q. 1264, 237 A.C.W.S. (3d) 28, J.E. 2013-1467, EYB 2013-225348

Anglo Pacific Group PLC, Appelante-intimée, c. Ernst & Young inc., Intimée-séquestre requérant, et 9261-0690 Québec inc., Mise en cause-intervenante, et Northern Star Mining corp. et Jake Resources inc., Mises en cause-débitrices

Thibault J.C.A., Morin J.C.A., Bouchard J.C.A.

Heard: 28 mai 2013
Judgment: 6 août 2013
Docket: C.A. Qué. Québec 200-09-007899-120

Counsel: *Me Sébastien Guy*, pour l'appelante
Me Alain Gaul, Me Hugo Babos-Marchand, pour l'intimée
Me Christian Roy, Me Caroline Légaré, pour la mise en cause 9261-0690 Québec inc.

Subject: Insolvency; Corporate and Commercial; Natural Resources; Property

Thibault J.C.A., Morin J.C.A., Bouchard J.C.A.:

[UNOFFICIAL ENGLISH TRANSLATION]

1 The appellant is appealing from a judgment of the Superior Court, District of Abitibi, rendered on November 21, 2012 by the Honourable Ivan St-Julien J., who allowed the respondent's motion entitled *Motion Seeking the Authorization to Sell Property of the Debtors and the Issuance of a Vesting Order*. Accordingly, St-Julien J. authorized the respondent to sell the property of the debtors, Northern Star Mining Corp. and Jake Resources Inc., and issued a vesting order under which the property acquired by the impleaded party 9261-0690 Québec inc. was free of the charges listed in the conclusions of his judgment, more particularly those resulting from a debenture, a royalty agreement and two universal hypothecs entered into between the appellant and the debtors on August 28, 2009.

2 For the reasons of Thibault J.A., to which Morin and Bouchard JJ.A. subscribe, *THE COURT*:

3 *DISMISSES* the appeal and the motion for leave to appeal *de bene esse*, with costs.

3 (s)

Thibault J.C.A.:

4 The appellant is appealing from a judgment of the Superior Court, District of Abitibi, rendered on November 21, 2012 by the Honourable Ivan St-Julien J., [1] who allowed the respondent's motion entitled *Motion Seeking the Authorization to Sell Property of the Debtors and the Issuance of a Vesting Order*. Accordingly, St-Julien J. authorized the respondent to sell the property of the debtors, Northern Star Mining Corp. (NSM) and Jake Resources Inc. (JRI), and issued a vesting order under which the property acquired by the impleaded party 9261-0690 Québec inc. was free of the charges listed in the conclusions of his judgment, more particularly those resulting from a debenture, a royalty agreement and two universal hypothecs entered into between the appellant and the debtors on August 28, 2009.

5 The appeal addresses the issue of the nature of a debenture and a royalty agreement entered into in the context of Québec mining law, and their survival when the holder of a mining right declares bankruptcy. It is a matter of determining whether those acts constitute a real right, whether their registration in the public register of real and immovable mining rights (hereinafter referred to as the "mining register") means they are enforceable against third parties, and whether they survive a vesting order issued pursuant to the *Bankruptcy and Insolvency Act*[2] (hereinafter referred to as the "BIA"). Another aspect of the appeal concerns whether the two universal hypothecs granted the appellant survive the vesting order.

1- The facts

6 On August 28, 2009, the appellant, a royalty company, and the debtors,[3] companies operating in the gold exploration sector in Val-d'Or, signed a debenture (*Senior Secured Convertible Debenture*) by which the appellant granted the debtor NSM a loan of $8 000 000. Since the debtors' property was already charged by way of securities in favour of first ranking secure creditors, the appellant required, as a condition of the loan, that the debtors grant it a perpetual royalty, which is described in a royalty agreement attached to Appendix 1 of the debenture. Furthermore, the debenture was guaranteed by two universal second hypothecs, in favour of the appellant, on all the movable and immovable property of the debtors.

7 On August 31, 2009, the appellant published the second hypothecs in the land register, the mining register and the register of personal and movable real rights (hereinafter referred to as the "RDPRM"). On August 27 and September 14, 2010, it published the debenture, including the royalty agreement, in the mining register under registration numbers 53572 and 53585.

8 On August 18 and 19, 2010, the debtors filed a notice of intent to make a proposal to their creditors pursuant to the BIA. The deadline for filing a proposal was extended several times until January 24, 2011. On that date, the debtors did not file a proposal and they did not seek an additional period of time to do so, with the result that they were deemed to have assigned their property that day. Samson Bélair/Deloitte & Touche was appointed trustee for the debtors' assets.

9 On February 4, 2011, Computershare Trust Company of Canada, trustee of the first ranking secure creditors, filed a motion to appoint the respondent as receiver for the debtors' assets. The motion was allowed on February 21, 2011 in a judgment that was rectified on February 24, 2011.

10 On June 22, 2011, the respondent filed a motion for authorization to acquire the mining claims in the name of the debtor NSM. On June 27, 2011, the authorization was granted. The respondent acquired new claims through a loan of $635 951.25 from the first ranking secure creditors. On January 16, 2012, the ministère des Ressources naturelles et de la Faune confirmed the transfer of the new claims.

11 On February 2, 2012, the respondent filed a motion to authorize a procedure for the sale of the debtors' assets. The motion was allowed on February 13, 2012. The trial judge authorized the sale of the debtors' assets according to the *Procedure for the sale process*. That document provided for a detailed procedure. Announcements were published in five newspapers and offer letters were sent to more than 650 business corporations.

12 The February 13, 2012 judgment authorizing the sale procedure preserved the creditors' rights:

> CONSIDERING that this Order shall in no way prejudice or limit the right of any stakeholder to make representations as to the scope or the effect of a prospective vesting order to be sought by the Receiver; . . .

13 On February 22, 2012, the attorneys for the appellant wrote to the respondent. According to them, the royalty agreement constituted real rights that survived the sale of the debtors' assets. The documents related to the royalty agreement were in fact part of the information disclosed to the potential buyers for their due diligence.

14 On June 19, 2012, the respondent filed a motion entitled *Motion seeking the authorization to sell property of the debtors and the issuance of a Vesting Order*. It sought authorization to sell the assets of the debtors to the impleaded party according to the conditions provided for in a document entitled *Amended Offer*. It also sought the striking of the claims and charges affecting the debtors' assets (except those listed in the conclusions).

15 The sale procedure authorized by the trial judge in his judgment of February 13, 2012 allowed 55 business corporations to show their interest in acquiring the debtors' assets. Among them, five filed a purchase offer, four of which were deemed compliant. The offer of the impleaded party proved to be well above the others. The main conditions of the sale are described in the motion:

> 37. The material terms of the transaction, as set out in the Offer, as such Offer was later amended (the "Transaction") are as follows:
>
> (i) The Purchaser will assume and pay, perform and discharge, the Assumed liabilities (as such term is defined in the Offer). The Assumed Liabilities consist mainly of 1) the charge created in favour of the trustee to the notices of intention of the Debtors pursuant to a rectified judgment rendered on October 28, 2010 in the present matters, 2) the charges set out in sections 14.06(7), 81.4 (4) and 81.6 (2) *BIA*, 3) the "Receiver's Charge" created pursuant to a judgment rendered on February 21, 2011 in the present matters, 4) the Legal Hypothecs without any admission on each case of their validity and opposability and limited to the immoveable concerned, 5) the "Receiver's Borrowing Charge" created pursuant to a judgment rendered on February 21, 2011 as modified by a judgment rendered June 28, 2011 in the present matters, 6) the municipal and school taxes owed by either one of the Debtors (the "Property Taxes"), subject and limited to the Property Taxes that are secured by a charge with a prior ranking over the Secured Notes and 7) the unpaid source deductions on the salaries paid to the Debtors' employees (the "Unpaid Deductions"), subject and limited however to the Unpaid Deductions that are secured by a charge with a prior ranking over the Secured Notes and only to the extend that the proceeds of the Accounts Receivable (as such term is defined in the Offer) would not be sufficient to enable the Receiver to pay its fees and disbursements and the Unpaid Deductions;
>
> (ii) The Purchaser will pay to the Receiver by way of a Credit Bid (as such term is defined in the Sale Procedures) an amount of US$41,356,783.35 of the Secured Notes and an amount of CA$538,896.09 (with interest thereon, representing an aggregate amount of CA$643,216.65 in principal and interest accrued to May 8th, 2012) of the Receiver's Borrowing Charge, plus any applicable sale taxes;
>
> (iii) The Purchased Assets shall not include the goods subject to a third-party ownership and all accounts receivable, including cash, deposits and prepaid expenses;
>
> (iv) The Purchased Assets are being sold on an "as is, where is" basis.
>
> [*sic*]

16 The appellant did not contest the conclusions related to the sale of the debtors' assets or the striking of certain claims listed in the motion. It also consented to the sale having the same effects as a sale by judicial authority within the meaning of the *Civil Code of Québec*. It opposed, however, the conclusions related to the striking of its claims, as published in the land register, the mining register and the RDPRM.

17 On July 16, 2012, with the consent of the appellant and the respondent, the trial judge rendered judgment. In a first stage, he pronounced the uncontested conclusions of the respondent's motion. He authorized the sale of the debtors' property to the impleaded party according to the conditions of the *Amended Offer*. He declared that the sale had the effects of a sale by judicial authority within the meaning of the *Civil Code of Québec*. Lastly, he reserved the rights of the appellant:

[17] **DECLARES** that notwithstanding paragraphs 12 (d) and 16 herein, nothing in the present order shall affect:

a) The Anglo-NSR Obligations;

b) The net smelter return royalty granted in favour of Anglo by the Debtor Northern Star Mining Corp. and registered at the Public Register of Real and Immovable Mining Rights under 53572, as amended under number 53585 (the "**Anglo NST Royalty**"); and

c) The Encumbrances granted by the Debtors to secure the Anglo NSR Obligations, namely:

• The deed of hypothec registered by Anglo at the Land Registry for the Registration Division of Abitibi under numbers 16 505 699 and 16 505 700;

• The deed of hypothec registered by Anglo at the Public Register of Real and Immovable Mining Rights under numbers 53154 and 53155; and

• The deed of hypothec registered by Anglo at the Register of Personal and Movable Real Rights under numbers 09-0536464-0001 and 09-0536464-0004;

(hereinafter collectively defined as the "**Anglo Security**");

For greater clarity, save for the Anglo-NSR Obligations and the related Anglo Security, no other obligations between any of the Debtors and Anglo arising from any agreement will benefit from the exception provided in this paragraph;

18 On November 21, 2012, the trial judge dismissed the appellant's contestation. In that second stage, he issued a vesting order in favour of the impleaded party 9261-0690 Québec inc. as acquirer of the debtors' property, an order in which the appellants' rights were discharged. He also ordered the provisional execution of his judgment.

19 On November 27, 2012, the appellant filed a notice of appeal in accordance with subsections 193(*a*) and (*c*) of the BIA, and a motion to suspend the provisional execution ordered by the trial judge. On November 30, 2012, it filed a motion for leave to appeal *de bene esse* from the judgment in first instance in order to avoid contestation of the validity of its notice of appeal. On December 6, 2012, the motion for suspension of provisional execution was allowed and the motion for leave to appeal *de bene esse* was postponed *sine die*. [4]

2- Judgment in first instance

20 The judge analyzed the debenture and the royalty agreement in order to decide whether the debtors charged their property with a real right in favour of the appellant. First, he concluded that the contracts entered into did not give the appellant a direct right of enjoyment in the "Products" or "Properties" of the debtors. Second, he affirmed that the non-existence of such a right in the property prevented the creation of a real right, as the Court stated in *Épiciers Unis Métro-Richelieu Inc. v. The Standard Life Assurance Co.* [5] According to the judge, the debtors could also not charge the underground mineral substances with a conventional hypothec since they belonged to the domain of the State. [6]

21 The judge stated that, regardless of the nature of the rights granted the appellant in the debenture and the royalty agreement, their registration in the mining register did not make them enforceable against third parties. Rather, according to him, section 14 of the *Mining Act* [7] created a means whereby the registration was enforceable against the State only. For these rights to be enforceable against third parties, they would have to have been published in the land register and in the RDPRM.

22 Lastly, the judge studied the effects of the vesting order pronounced under section 243 of the BIA. He indicated that the order had the same effect as a sale by judicial authority, i.e. it discharged the real rights to the extent provided for in the *Code of Civil Procedure*. According to article 696 of the *Code of Civil Procedure*, the sheriff's sale discharged the real rights not included in the sale conditions, with the exception of those listed in that provision. Since the debenture and the royalty agreement evidenced the existence of a personal obligation between the appellant and the debtors, not the granting of a real right, they were not contemplated by the exceptions provided for in article 696 of the *Code of Civil Procedure* and, therefore, did not survive the vesting order.

3- Questions in dispute

23 Three questions emerge from the examination of the arguments submitted by the parties:

1. Do the debenture and the royalty agreement entered into between the debtors and the appellant on August 28, 2009 constitute an innominate real right in favour of the appellant?

2. Does the registration of the debenture and the royalty agreement in the mining register make those acts enforceable against third parties?

3. Do the rights resulting from the debenture and the royalty agreement survive the vesting order?

4- Analysis

24 Before studying the questions in dispute, I would like to point out that, according to clause 9.12 of the debenture, [8] the parties explicitly agreed that the debenture must be interpreted according to, and governed by, the laws of Québec.

4.1 Existence of an innominate real right

25 The appellant argued that the trial judge erred in refusing to acknowledge that it held an innominate real right on the "Products" and "Properties" defined in the debenture. [9] Its argument was based on five elements, which I summarize as follows.

26 *First*, it contended that the constitution of an innominate real right depends on the parties' intention. It referred to the Court's ruling in that regard in *Club Appalaches inc. v. Québec (Attorney General)* [10] in order to affirm that the determination depends on the analysis of the parties' intention, their conduct, the circumstances in which the act was concluded and custom. To determine whether the parties intended to create an innominate real right, it must be determined whether the parties sought to: (1) create a permanent right, (2) bind their heirs, assigns and successors (right of pursuit) and (3) attribute a value to the right involved.

27 According to the appellant, clauses 4.3, 9.15, 9.16 and 9.18 of the debenture and clause 2.1 of the royalty agreement allows one to determine that the three conditions were met. [11] It pointed out that the constitution of the perpetual royalty and its nature as a real right were the essential conditions for the financing granted the debtors. It also insisted on the fact that custom in the mining industry created, for the parties involved, a legitimate expectation that such agreements would be respected despite a change of owner. In support of its contentions, the appellant cited the following excerpt from the work entitled *Canadian Law of Mining*:

> Oil and gas cases will be considered by the courts in any analysis of hardrock mineral royalties, nothwithstanding the differences between the industries. . . .
>
> Indeed, it makes a certain amount of sense to ask that a royalty, in order to qualify as an interest in land, be adequately associated with the land from which it is carved just as a rentcharge is connected with the land by virtue of the remedy of distress. A royalty should be tied directly to the minerals that exist in and are produced from a

> specific parcel of land. The tie or connection should be made with mineral operations on the land no matter who carries them out. It should not depend upon the identity or character of the person conducting the operations. Thus, a net smelter royalty may be much more of an interest in land than a net profits interest, for the latter depends very much on the profit-making and cost-containment abilities of the operator.
>
> It would be no bad thing if the development of judicial policy on royalties should give conscious attention to the needs of business efficacy and fairness as well as those of stability in property law. The circumstances in which people accept royalties would be relevant. They often accept them as partial consideration in a property transaction and know that it may be some time and several operators before a property comes into production. Industry expectations also would be relevant; although they are not the source of legal obligation, they can hardly be disregarded in deciding which is the better direction to develop legal principles. In many circumstances, there may be a clear expectation that a person who acquires a mineral property knowing it is subject to a royalty should pay the royalty; and that royalty-holders should be entitled to a payment if and when the property comes into production, no matter who owns it. Over time, a perception may grow that justice is not well served by rules that excuse the owner from paying the royalty. [12]
>
> [*sic*]

28 *Second*, the appellant proposed that the fact that the royalty is calculated in cash is not an obstacle to the creation of an innominate real right. In its opinion, the trial judge confused the nature of the royalty and the manner in which it is calculated. That misconception was said to be based on an erroneous interpretation of clause 9.15 of the debenture and of the definition of the term "Properties" in clause 1.1.53 of that act:

> 1.1.53 **Properties**" means the rights, present and future, to conduct Exploration, Development and Mining within the geographic locations identified in Schedule 3, including for greater certainty as of the date hereof the Existing Claims, and any rights substituted for such rights or issued as a consequence of such rights, whether extending over a greater or lesser area and including all related rights with respect thereto;
>
> . . .
>
> 9.15 Nature of Interest. All covenants, conditions, and terms of this Debenture (including the Net Smelter Return Royalty) shall: (a) be of benefit to and run as a covenant with the Properties; (b) create a direct real property interest in the Products and the Properties in favour of the Holder, sufficient to secure the payments herein provided for, and shall attach to (i) any amendments, relocations, adjustments, resurvey, additional locations or conversions of any mining claims comprising the Properties; and (ii) to any renewal, amendment or other modification or extensions of any leases of any real property interests comprising the Properties, and shall inure to the benefit of and be binding upon the parties hereto, and their respective successors and assigns, including, without limitation, partners, joint venture partners, lessees and mortgagees. Nothing herein shall be construed to create, expressly or by implication, a joint venture, mining partnership, commercial partnership, or other partnership relationship between the Corporation or the Pledgor on one hand and the Holder on the other hand.

29 Also in regard to the second argument, the appellant pleaded that a mining claim is an immovable real right and, as such, constitutes separate property. The claim gives its holder the right to obtain a mining lease if certain conditions are met, and the obtaining of a mining lease gives its holder the rights of an owner.

30 The calculation formula provided for in the royalty agreement does not change the direct relationship between the appellant and the "Properties". Rather, it imposes on the holder of the mining claim the obligation to perform [TRANSLATION] "a service" for the benefit of the creditor.

31 *Third*, the appellant affirmed that the parties can grant an innominate real right over incorporeal property. Here, it is the "Properties", i.e. the existing claims (more than 290), as well as the mining rights substituted for them, resulting from them or otherwise related to them, for the four different projects: Midway, Callahan, McKenzie Break and Fournière. The appellant pointed out that the notion of property refers to both corporeal and incorporeal property (art. 899 C.C.Q.). For example, it refers to a movable hypothec on claims (arts. 2710-2713 C.C.Q.) and a movable hypothec on securities (arts. 2714.1-2714.7 C.C.Q.).

32 *Fourth*, the appellant firmly opposed the idea that the absence of a right of enjoyment in a thing prevents the creation of an innominate real right. That theory, developed by Professor Madeleine Cantin Cumyn, [13] is based on article 405 of the *Civil Code of Lower Canada*:

> **Art. 405.** A person may have on property either right of ownership, or a simple right of enjoyment, or a servitude to exercise. [Emphasis added.]

33 But article 911 of the *Civil Code of Québec* does not make that distinction, with the result that it is no longer necessary to grant a right of enjoyment in property in order to create a real innominate right:

> **911.** A person, alone or with others, may hold a right of ownership or other real right in a property, or have possession of the property.
>
> A person also may hold or administer the property of others or be trustee of property appropriated to a particular purpose.

34 *Fifth*, the royalty agreement grants the appellant a real right in the "Products", i.e. in the substances extracted, which must be considered movables by anticipation. A mining claim grants its holder the right to obtain a mining lease, which gives the holder the rights of an owner.

35 To answer the question posed in this section, I propose to (1) define the characteristics proper to a real right constituted by innominate dismemberment, (2) ascertain the capacity of the debtors to constitute a real right in favour of the appellant, and (3) study the debenture, the royalty agreement and the circumstances surrounding their drafting in order to define the nature of the rights granted the appellant and decide whether the debtors granted it an innominate real right.

4.1.1 Characteristics proper to a real right

36 Civil law is a complete system, and care must be taken not to adopt principles from foreign legal systems without questioning their compatibility with our law. [14] That word of caution is required because the appellant seeks to indirectly import certain common law notions applicable to mining royalties. [15]

37 The appellant argued that it holds an innominate real right both in the mining rights (mining lease claim), which are incorporeal property, and in the substances to be extracted, which are corporeal property, and that such a right does not require it to hold a [TRANSLATION] "right of enjoyment" on the property. According to the appellant, that requirement, which stems from article 405 of the *Civil Code of Lower Canada*, was not included in the *Civil Code of Québec*. An innominate real right is constituted, it wrote, when the parties to the act intend to (1) create a permanent right, (2) bind their heirs, assigns and successors (right of pursuit) and (3) attribute a value to the right involved.

38 In my opinion, the appellant committed an error of principle at the stage of identifying the conditions required to constitute an innominate real right, and that distorts its argument. Let me explain.

39 The main distinctions between a personal right and a real right can be summarized as follows. A personal right (an *in personam* right) is the right of a person to require a prestation by another person. [16] Although that right may

involve property, it is exercised against a person: it is not a right on a thing, but a right to a thing, [17] in contrast to a real right, which is enforceable against third parties, subject to the rules of publication. [18] A personal right is called [TRANSLATION] "relative" because it binds only the creditor and the debtor. [19] The creditor of a personal right holds no right of pursuit or right of preference in the thing. [20]

40 Conversely, a real right gives its holder a power that can be exercised directly on property. [21] There is no intermediary between the holder of the right and the property. A real right gives its holder a right to pursue the property (right of pursuit) and to enforce the right against any person in whose hands the property may be found. [22] It also gives its holder the capacity to abandon the right and, in the case of accessory real rights, a right of preference. [23]

41 The right of ownership is the most complete real right. [24] Article 947 of the *Civil Code of Québec* defines ownership in the following manner:

> **947.** Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law.
>
> Ownership may be in various modes and dismemberments.

42 The right of accession (*accessio*) is added to those prerogatives:

> **948.** Ownership of property gives a right to what it produces and to what is united to it, naturally or artificially, from the time of union. This right is called a right of accession.

43 According to authors Lafond, Lamontagne and Normand, *usus* is the right to use property and the right to enjoy it; *fructus* is the right to benefit from property, to receive its fruits (that which is produced by growing) and products (for example, trees and ore); *abusus* is the right to dispose freely and completely of the property, both physically and legally; *accessio* is the ability to make one's own that which the property generates and that which is attached to it (for example, deposits and islands).

44 Article 911 of the *Civil Code of Québec* states that a person can hold a right of ownership in a property. As article 947 of the *Civil Code of Québec* indicates, the right of ownership concerns property (not only a thing, as provided for in article 406 of the *Civil Code of Lower Canada*). [25] Property can be corporeal or incorporeal, and is divided into movables and immovables (art. 899 C.C.Q.). [26]

45 For some authors, the classic and materialistic conception of ownership is outdated. [27]

46 The question as to whether ownership can refer to incorporeal property under the *Civil Code of Québec* has been the subject of numerous commentaries in legal theory. [28] The Québec legislator is said to have opened the door to a shift in paradigm by substituting the word "property" for the word "thing" in the definition of ownership (art. 947 C.C.Q.), by stating what the specific dismemberments of ownership are (art. 1119 C.C.Q.) and, more generally, by more broadly recognizing that real rights can concern rights (a movable hypothec on debts is one example).

47 Some authors believe that the word "property" in article 899 of the *Civil Code of Québec* refers only to corporeal or tangible things. [29] Others believe that the use of the word "property" in article 947 of the *Civil Code of Québec* could be more the result of a terminological choice than of a determination to accept that the object of ownership can be made intangible. [30] Authors Normand, Lamontagne and Emerich come down in favour of recognition of the ownership of incorporeal property, [31] while author Brierley does not appear to have closed the door on that possibility. [32]

48 Regarding Québec mining rights, sections 8 and 9 of the *Mining Act* provide for the following:

8. The mining rights conferred by the following titles are immovable real rights:

- claims;
- mining exploration licences;
- mining leases;
- mining concessions;
- seabed exploration licences;
- seabed mining leases;
- exploration licences for surface mineral substances;
- leases to mine surface mineral substances;
- licences to explore for petroleum, natural gas and underground reservoirs;
- leases to produce petroleum and natural gas;
- authorizations to produce brine;
- leases to operate an underground reservoir.

9. Every real and immovable mining right constitutes a separate property.

49 The rights listed in section 8 of the *Mining Act* are evidently incorporeal rights. Section 9 sets out, however that all mining rights, real and immoveable constitute "separate property". The English version of this article states as follows: "Every real and immovable mining right constitutes a separate property".

50 The English version of the French expression "propriété distincte" is "separate property", envisions a distinct property and not strictly a separate right of ownership. Bear in mind here that, in article 899 of the *Civil Code of Québec*, the English version of the French word "bien" is "property". However, in article 947 of the *Civil Code of Québec*, the English version of the French word "propriété" is "ownership".

51 According to authors Lamontagne and Brisset des Nos, who are no doubt aware of that distinction, "separate property" must be understood in the following manner:

> [TRANSLATION]
>
> . . . according to section 9, mining rights constitute "separate property" in that they affect the subsurface independently of the surface, as the disposition of surface rights does not include mining rights — except, by accessory means, those related to the lower mineral substances — and vice versa. [33]

52 The Québec legislator thus provided for a specific mining rights regime by giving those rights the quality of "separate property" within the above meaning.

53 In my opinion, given the provisions of the *Civil Code of Québec* and the *Mining Act*, ownership refers both to corporeal and incorporeal property inasmuch as the holder has all the attributes of ownership (*usus*, *abusus* and *fructus*):

> [TRANSLATION]

> The right of ownership necessarily concerns property that may be corporeal or incorporeal (intellectual rights, negotiable instruments and debts) (art. 899 C.C.Q.). Hence, the object does not include only tangible property, but property made intangible as well. That observation stems from substitution of the word "property" for the word "thing" — a notion traditionally reserved for what has a tangible existence only — in the definition of ownership as it appeared previously in the *Civil Code of Lower Canada*.
>
> The conclusion must not be drawn from that change that any property — and, above all, any right — has the required qualities to become the object of a right of ownership. The object must be sufficiently individualized to have its own identity. Furthermore, its holder must have — or at least be able to claim to have — all the attributes of ownership (*usus, fructus, abusus* and *accessio*) on the property. [34]

54 Ownership can be dismembered. Dismemberment occurs when two or more people each have one or more attributes of the right of ownership — the right of use (*usus*), of enjoyment (*fructus*) and of free disposition (*abusus*) — of the same property, but do not possess all of them. [35] According to Professor Sylvio Normand, dismemberment of ownership [TRANSLATION] "causes a division of the body of ownership attributes, with the result that one or more of the attributes inherent in the right of ownership shifts to the hands of another person, the holder of the dismemberment". [36]

55 Article 1119 of the *Civil Code of Québec* explicitly provides that usufruct, use, servitude and emphyteusis are dismemberments of the right of ownership and are real rights. In each of these cases, the holder of the dismemberment of the right of ownership enjoys certain attributes of ownership. The usufrutuary has "the right of use and enjoyment, for a certain time, of property owned by another . . ." (art. 1120 C.C.Q.). The user has "the right to enjoy the property of another for a time and to take the fruits . . . thereof" (art. 1172 C.C.Q.). Emphyteusis is "the right which, for a certain time, grants a person the full benefit and enjoyment of an immovable owned by another . . ." (art. 1195 C.C.Q.). A servitude is a charge imposed on an immovable — the servient land — that requires the owner of the land to tolerate "certain acts of use by the owner of the dominant land or himself abstain from exercising certain rights inherent in ownership" (art. 1177 C.C.Q.). In each of these situations, the owner of the property and the holder of the dismemberment share the attributes of ownership as long as the dismemberment lasts:

> [TRANSLATION]
>
> *Usufruct* is the right to temporarily use and enjoy property belonging to another. It transmits to its holder the *usus* and the *fructus*, while the owner retains the *abusus* and the *accessio* (art. 1120 C.C.Q.). *Use*, which is reduced usufruct, allows its holder to use the property of another, for a certain time. It limits the right to the fruits and revenues to the extent of the needs of the user and the persons living with the user or the user's dependants. The user has only limited *usus* and *fructus* (art. 1172 C.C.Q.). A *servitude* is a charge imposed on an immovable in favour of another immovable; it grants limited *usus* (art. 1177 C.C.Q.). Lastly, emphyteusis allows the holder to fully use an immovable belonging to another and to derive all its benefits provided the holder makes improvements to it. That dismemberment shifts virtually all the attributes of ownership to the holder of the emphyteusis, and the owner retains only a facet of *accessio* (art. 1195 C.C.Q.). [37]

56 The courts and doctrine also recognize that ownership can be the object of conventional innominate dismemberments. [38] For example, the right to fish, the right to hunt and the right to log have been qualified as such because their holders have an unnamed [TRANSLATION] "right of enjoyment" on property:

> [TRANSLATION]
>
> The right to innominate enjoyment on property allows a person — not an immovable — to derive the benefit from property belonging to another person. Its holder derives a direct benefit from the recognized right. That right can

> take various forms. The examples provided by the jurisprudence and doctrine are frequently akin to nominate dismemberments. However, for various reasons, that qualification has proven impossible.
>
> Thus, the right to fish and the right to hunt cannot be considered a usufruct, since wild animals are not fruits of the forest or the sea. The usufruct qualification is hardly more suitable for the right to log or the right to extract certain substances from the ground, since wood and minerals are products, not fruits. Furthermore, although this is rare, a right of way can be granted in favour of a person, not in favour of an immovable, thereby making the qualification as a servitude impossible. The qualification as an innominate dismemberment could be suitable for a contract of emphyteusis, but a crucial element for its constitution would be missing.
>
> Innominate dismemberment that grants a right of enjoyment was wrongly presented as a change in servitude [TRANSLATION] "midway between a real servitude and a personal obligation". Doctrine authors are in fact used to qualifying innominate dismemberments as personal servitudes and dealing with the subject in a chapter they devote to servitudes. However, personal servitudes are associated with real rights, not personal rights. Moreover, that category is in opposition to the category of [TRANSLATION] "real" servitudes. To eliminate any confusion, it would be preferable to avoid using the expression [TRANSLATION] "personal servitudes" — although it is wholly justifiable — and substitute for it one of the following expressions: innominate dismemberments of ownership, innominate rights of enjoyment or innominate real rights. [39]

57 The appellant argued that the interpretation of author Cantin Cumyn that the holder of an innominate real right must justify a [TRANSLATION] "right of enjoyment" on the thing was not retained in Québec jurisprudence. [40] According to the appellant, for a real right to be created, it is sufficient to grant a permanent right on an immovable, to bind a person's heirs and to attribute a value to the right involved. As I wrote earlier, when the author wrote her paper, article 405 of the *Civil Code of Lower Canada* prescribed the following:

> **Art. 405.** A person may have on property either a right of ownership, or a simple right of enjoyment, or a servitude to exercise. [Emphasis added.]

58 The appellant is wrong. Article 911 of the *Civil Code of Québec*, despite formulating the above article differently, did not change the state of the law regarding the attributes of ownership and its dismemberments. That is what the comments of the Minister show:

> [TRANSLATION]
>
> That article retains the substance of article 405 of the *Civil Code of Lower Canada*, from the standpoint of the relations that may exist between a person and property. It provides that a person can be the holder of a real right other than that of ownership, such as a right of usufruct or a real security, and can be the holder of the rights listed, alone or with others, to cover the cases of co-ownership. [41]

59 And that is also shown by the text of article 947 of the *Civil Code of Québec*, cited earlier.

60 A real right requires the existence of a direct right on property. The expression [TRANSLATION] "simple right of enjoyment" in article 405 of the *Civil Code of Lower Canada* referred to one or more of the three attributes related to ownership — the right to use, enjoy and freely dispose of — transferred by the owner to a third party that then becomes the holder of a real right, i.e. a dismemberment, in the thing of another person. Those attributes subsist under the *Civil Code of Québec* and, for dismemberment of a real right to occur, one or more of them must be assigned by the owner.

61 To underpin the idea that a real right requires a legal relationship between a person and property, I refer to *Sacchetti v. Lockheimer*, in which the Supreme Court wrote the following:

> A real right is a legal relationship between a person and a thing: it gives its holder a direct and immediate legal power over the thing, a power which he exercises without intermediary. If principal (the right of ownership and its components), it relates to the physical aspect of the thing; if accessory (such as a hypothec, pledge or privilege), it concerns the monetary value of the thing as a guarantee of the performance of a principal obligation. The attributes of the real right are the right of pursuit and the right of preference, as well as possession and the right of abandonment. [42]

62 In *Haddad v. Groupe Jean Coutu (PJC) inc.*, Kasirer J.A. wrote the following:

> [TRANSLATION]
>
> [76] The charge also cannot be considered a personal servitude in the circumstances since it gives no right of enjoyment to PJC or its franchisees on the Haddad immovable. As Rochette J.A. explained in *Épiciers Unis*, such a charge is not exercised directly on a thing and therefore cannot constitute a real right, even as a personal servitude. Despite the terms used in the act, the clause imposes only a personal obligation on Mr. Haddad to comply with the non-competition commitments contracted to the benefit of his PJC. [43]

63 I conclude that the holder of a real right constituted by the dismemberment of an innominate ownership right, such as a mining claim or lease, must necessarily and obligatorily justify a direct right in the property (both corporeal and incorporeal) — the right to use, enjoy or dispose of the property — in addition to the right of pursuit and the capacity to abandon the property.

64 At this stage in the analysis, the rights of the debtors should be examined and their capacity to constitute an innominate real right in favour of the appellant should be ascertained.

4.1.2 Capacity of the debtors to constitute an innominate real right

65 The *Mining Act* provides the legal framework in which the Québec mining industry operates. The object of that legislation is to promote Québec mineral prospecting, exploration and mining. [44] Section 3 provides, subject to sections 4 and 5, that the rights to mineral substances and underground reservoirs form part of the domain of the State. [45]

66 The regime provides that, to mine the mineral substances (with the exception of some of them), the operator must obtain a mining lease from the State. [46] A claim is generally obtained beforehand. [47] A claim is a title, limited in time (two years, unless renewed) that gives its holder an exclusive right to engage in the limited exploration for certain mineral substances, a limited right to extract the mineral substances and a right to a mining title, i.e. a mining lease. [48] A mining lease gives the operator the rights and obligations of an owner, particularly the right to mine and extract mineral substances, [49] under certain restrictions. A mining lease is granted to the claim holder if the holder establishes the existence of indicators of the presence of a workable deposit, and if the holder meets the requirements and pays the annual rental prescribed by regulation. [50] The term of a mining lease is 20 years. It can be renewed for ten years, under certain terms and conditions, three times, under the conditions determined by the Minister. [51] Without a mining lease, a claim holder may not mine the mineral substances.

67 Section 8 of the *Mining Act* provides that a mining claim and lease are immovable real rights. A mining lease creates a dismemberment of the right of ownership of the subsoil that is part of the domain of the State. The dismemberment necessarily ends upon expiry of the lease or its revocation. [52] That *sui generis* immovable real right is akin to emphyteusis, according to authors Lamontagne and Brisset des Nos, [53] since, for the duration of the lease, the leasee has the rights and obligations of an owner, subject to the restrictions of Division V of the *Mining Act*. [54] Except as regards the minerals extracted and the mining tailings, the lessee does not in fact acquire a right of ownership to the soil or subsoil. [55]

68 The appellant contended that the real rights granted it by the debtors are the result of the claims that the debtors held. More specifically, it argued that the debtors instituted, in its favour, a conventional innominate dismemberment of their claims and the rights resulting from them, particularly mining leases. As I explained earlier, the *Civil Code of Québec* and the *Mining Act* authorize the dismemberment of property, which can be corporeal or incorporeal. The claim and the immovable lease, which are separate incorporeal property, can therefore be dismembered. That means that the holder of the claim or the mining lease can grant to a third party one or more of the attributes of ownership associated with the right held.

69 The dismemberment of the right of ownership stems from the exercise of *abusus*, which is linked, as explained earlier, to the right to dispose of one's property. [56] Hence, one must, in principle, hold part of the *abusus* in order to grant a third party a real right on property. For example, emphyteusis has the power to create a servitude on the property that is its object. [57] The holder of a mining lease, who has the rights and obligations of an owner, can dismember the right in favour of a third party for the duration of the lease (since more rights than one has acquired cannot be assigned) and grant the third party a real right in the mineral substances that its lease allows it to mine.

70 What about a claim? In the context of the *Mining Act*, the State is the owner of the right to the mineral substances. It is the State that dismembers its ownership right in favour of a person by attributing a claim to that person. Can the holder of the claim, which is a separate immovable real right, in turn dismember its ownership? The holder of a mining claim can, of course, exercise its right jointly with another person if they can organize the exercise of their right by means of an agreement that can be published. [58] A mining claim grants its holder the right to use the property and to explore for deposits. Those rights can be dismembered. However, the holder of a mining claim does not, at that stage, have a right on the mineral substances as the holder of a mining lease does. In that context, did the debtors have the capacity to grant the appellant a real right on the mineral substances likely to be extracted, should a deposit be discovered and a mining lease granted?

71 Yes, in my opinion. Although the law says nothing on that specific subject, I believe that the principles applicable to a hypothec granted by a non-owner must be adapted to the situation of a claim holder who grants a real right on extracted mineral substances of which it will become the owner after the granting of a mining lease. Bear in mind that, under the *Civil Code of Lower Canada*, the law declared null a hypothec on the property of another, subject to improvement of an insufficient title (art. 2043 C.C.L.C.). The *Civil Code of Québec* allows a hypothec on the property of another or on future property, but it specifies that the hypothec begins to affect the property only when the grantor acquires title to the hypothecated property (art. 2670 C.C.Q.).

72 Here is author Payette's explanation of the rules surrounding a hypothec granted by a non-owner:

> [TRANSLATION]
>
> *(a) Hypothec granted by a non-owner*
>
> **467.** As long as the grantor does not become the holder of the right on which the grantor created a hypothec, the hypothec does not affect the right (art. 2670 C.C.Q.). A hypothec created on the property of another does not affect it from the time of its creation, but is likely to affect it one day. It is incorrect to say that it is null; if it were, it would be difficult to explain how it began to affect the property from the day that the grantor acquired it or how it acquires rank on the movable property affected, upon its registration, although it was registered prior to the acquisition (art. 2954 C.C.Q.).
>
> Furthermore, the grantor must have the capacity to alienate the property hypothecated (art. 2681 C.C.Q.). However, even though a person does not yet have ownership of property, the person has the capacity to alienate it if the future property is likely to be the object of an obligation (art. 1374 C.C.Q.); in that case, there is a sale of property that is still non-existent or a sale of the thing of another; although the sale of the thing of another can be declared null, it

becomes unassailable if the seller subsequently acquires ownership of the property (art. 1713 C.C.Q.). It is therefore more precise to say, paraphrasing the terms used by the legislator for the sale, that a hypothec on the property of another becomes unassailable on the day when the grantor becomes its owner.

Under the *Civil Code of Lower Canada*, doctrine and jurisprudence attributed to the subsequent acquisition of an immovable the effect of improving the hypothec previously granted by the new owner; Québec law is said to be distinguished, on this point, from French law, certain texts of which differ from those found in the Code and led to the conclusion that a hypothec granted by a non-owner is absolutely null.

Mention must also be made of certain circumstances in which the law allows the holder of a hypothec acquired in good faith on the property of another to enforce it against the true owner. [59]

[References omitted.]

73 I note from the principles that prevailed under the *Civil Code of Lower Canada* and those applicable under the *Civil Code of Québec* that the validity of a real right granted by a non-owner is not challenged when the grantor becomes the owner of the hypothecated property.

74 At a time when mining law promises to be a driving force of the Québec economy, civil law must adapt to the economic and legislative reality associated with mining law, without undermining the foundations of property law and without overshadowing the conditions for constituting a real right. Civil law is sufficiently flexible to allow the holder of a mining claim — a potential owner of extracted mineral substances — to grant a real right, not only on the claim, but also on the extracted mineral substances over which the holder will obtain an ownership right after a mining lease has been granted.

75 Like the situation that prevails when a non-owner grants a hypothec on property before becoming its owner — a hypothec that will affect the property when the non-owner's ownership is confirmed — a claim holder can grant an immovable real right on extracted mineral substances of which the claim holder will become the owner after the granting of a mining lease. The immovable real right will then take effect when the right of ownership of the extracted mineral substances is confirmed. The subsequent coming into effect of the real right constituted by the claim holder carries with it the obligation for the parties to provide for a right of pursuit in the act instituting it and to publish the act.

76 Now let us see whether the terms of the debenture and the royalty agreement make it possible to conclude that the debtors instituted on the "Properties" and the "Products" a real right in favour of the appellant.

4.1.3 Do the debenture and the royalty agreement constitute a real right?

77 The creation of an innominate real right is not solely the result of the use of these terms in a contract. In addition, the contract must contain the essential characteristics of a real right. The characteristics are, as I wrote earlier, the attribution to the innominate real right beneficiary of one or more of the attributes of ownership — the right to use, enjoy and freely dispose of the property — as well as a right of pursuit on the property and the capacity to abandon it.

78 The only mention in clauses 9.15 and 9.17 of the debenture are alone insufficient to qualify the right to royalties as a real right, since the appellant was not granted a direct right in the property ("Properties" and "Products"), whether it be the right to use, enjoy or dispose of the property:

> 9.15 Nature of Interest. All covenants, conditions, and terms of this Debenture (including the Net Smelter Return Royalty) shall: (a) be of benefit to and run as a covenant with the Properties; (b) create a direct real property interest in the Products and the Properties in favour the Holder, sufficient to secure the payments herein provided for, and shall attach to (i) any amendments, relocations, adjustments, resurvey, additional locations or conversions of any mining claims comprising the Properties; and (ii) to any renewal, amendment or other modification or extensions of any leases of any real property interests comprising the Properties, and

> shall inure to the benefit of and be binding upon the parties hereto, and their respective successors and assigns, including, without limitation, partners, joint venture partners, lessees and mortgagees. Nothing herein shall be construed to create, expressly or by implication, a joint venture, mining partnership, commercial partnership, or other partnership relationship between the Corporation or the Pledgor on one hand and the Holder on the other hand.
>
> . . .
>
> 9.17 Mining Methods - No Implied Covenants. Each of the Pledgor and the Corporation and its Affiliates shall act reasonably in accordance with sound mining and engineering practices. Each of the Pledgor and or the Corporation shall do all things and make all payments necessary or appropriate to maintain the right, title and interest of the Pledgor and/or the Corporation in the Properties and the NSM Plant and to maintain the Properties and the NSM Plant in good standing, provided that each of the Pledgor and the Corporation shall have the sole and exclusive right to determine the timing and the manner of any production from the Properties and all related exploration, development, operational and mining activities, provided such determination is made in accordance with sound mining and engineering practices. Nothing in this Debenture shall require the Pledgor and or the Corporation to explore, develop or mine or continue operations on the Properties or to process ores from the Properties.

[Emphasis added.]

79 According to the terms of the royalty agreement, the royalty payable was dependent on the sale of the mineral substances extracted or processed by the debtors (clauses 1.8 and 1.10 of the royalty agreement). [60]

80 The analysis of all the clauses of the acts in question, namely, the debenture and the royalty agreement, does not make it possible to conclude that real rights were created in favour of the appellant. The right resulting from the royalty agreement was a personal right to receive the payment of a royalty calculated according to the terms and conditions provided for in clauses 2.1 *et seq.*, [61] when the mineral substance was sold. Of course, the appellant had the right to inspect the premises (clause 5.3) concerned by the royalty agreement, [62] and to be informed of the work (clause 7.1.2) involved in the debenture, [63] but it had no attribute of ownership (*usus, fructus* or *abusus*) in the mining claim or lease or in the mineral substances extracted or to be extracted. For example, in the event of the debtor's failure to extract the ore or sell it, the acts in question gave the appellant no right to extract the ore itself or have it extracted by another commercial corporation, or, if it was extracted, to sell the ore itself. In the same way, the acts in question did not grant the appellant the right to be paid, as it chose, in cash or in kind, in order to link the royalty to the mineral substances, not to the profits derived from their sale. The debtors' right was not dismembered. In accordance with clause 9.17 of the debenture, the debtors retained the full and exclusive right to conduct all their business: "each of the Pledgor and the Corporation shall have the sole and exclusive right to determine the timing and the manner of any production from the Properties and all related exploration, development, operational and mining activities, provided such determination is made in accordance with sound mining and engineering practices. Nothing in this Debenture shall require the Pledgor and or the Corporation to explore, develop or mine or continue operations on the Properties or to process ores from the Properties".

81 As I explained earlier, the appellant's theory is based on the erroneous idea that a real right is constituted when the parties' intention is to: (1) create a permanent right; (2) bind their heirs, assigns and successors (right of pursuit); and (3) attribute a value to the right involved. The constitution of a dismemberment of the property requires a division of the attributes of ownership, i.e. *usus, fructus* or *abusus*, a division absent from the debenture and the royalty agreement.

82 I would like to point out in passing that the Supreme Court discussed the consequences of a royalty agreement in a common law context in *Bank of Montreal v. Dynex Petroleum Ltd.* [64] The right to royalties can constitute a personal right or, according to the parties' intention, an "interest in land". The concept of an interest in land gives the holder of

the right an interest in land against the subsurface or the ore, [65] which enables it to enforce its right to the royalty against the new owner. [66] The Supreme Court confirmed that an interest in land can be created from a direct participation or a *profit à prendre*, if that reflects the parties' intention:

> 21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties. [67]

83 The elements that make it possible to determine the existence of an intention to create an interest in land were described in *St-Andrew Goldfield Ltd. v. Newmont Canada Limited*. I want to stress that, even in a common law context, it is not certain that the debenture or the royalty agreement entered into between the debtors and the appellant would have created an interest in land:

> [98] Royalty interests can be interests in land if the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the substances recovered from the land, and the interest, out of which the royalty is carved, is itself an interest in land. The intentions of the parties, judged by the language creating the royalty, determine whether the parties intended to create an interest in land or to create contractual rights only. (*Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 (CanLII), [2002] 1 S.C.R. 146, at paras. 12, 14 and 22.)
>
> [99] Turning then to the language of the Barrick royalty agreement, Newmont "***covenants and agrees . . . to pay***. . . a net smelter return royalty . . . with respect to all valuable minerals ***produced*** from mining rights and surface leases known as the Holt-McDermott mining claims and leases".
>
> [100] While I agree with Newmont that there is no magical "incantation" that must be used to create an interest in land, it is trite to say that language used in an agreement is intended to have and does have a certain meaning. As all the witnesses at this hearing acknowledged, each royalty agreement is different. It is therefore necessary to examine the specific wording used by the parties to determine the meaning that they ascribed to the royalty in this case and the rights that they intended to create.
>
> [101] The use of the words "covenants and agrees to pay" and "produced" in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.
>
> [102] The case law that the parties have submitted makes a valid distinction between the "granting" of royalties attached to or "in" the land or the minerals themselves, thus creating an interest in the land, and the payment of royalties attached to the minerals or revenues "produced" or "removed" from the land, resulting in the creation of contractual rights to the payment of a share of the revenue from the minerals after they have been extracted: see, for example, *Bensette and Campbell v. Reece* [1973] 2 W.W.R. 497 (Sask.C.A.), at p. 500; *Vandergrift v. Coseka Resources Limited* 1989 CanLII 3163 (AB QB), (1989), 67 Alta. L.R. (2d) 17 (Alta.Q.B.), at pp. 26 to 28; *Guar. Trust Co. v. Hetherington* 1987 CanLII 3332 (AB QB), (1987), 50 Alta. L.R. (2d) 193 (Alta.Q.B.), at pp. 216 to 222 and 224; *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd. (No. 2)* (1963), 45 W.W.R. 26 (S.C.C.), at pp. 31 to 33; and *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, [2008] N.B.J. No. 360 (N.B.Q.B.), at paras. 34 and 40.
>
> [103] Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Limited*, *supra*, at pp. 28 to 29; and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd.* (No. 2), *supra*, at pp. 32 to 33.

> [104] Under the Barrick royalty agreement, the royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out and, as an express condition or limitation of the royalty, the royalty holder has no right to claim a reversionary interest in any of the property should the owner seek to relinquish all or any portion of the property. The royalty holder's rights to re-enter upon the property are only for accounting and auditing purposes with respect to the protection of the royalty holder's contractual rights to payment of the royalty.
>
> [105] In light of the other noted terms of the Barrick royalty agreement, the provision in section 14 for registration of a notice of the agreement is not sufficient by itself to demonstrate that the parties intended to create an interest in land. As noted in the cases submitted by the parties, a contractual provision for registration of a royalty is not determinative of the issue. The notice of the agreement was not registered on the title to the transferred property at the time of the closing of the purchase by St. Andrew.
>
> [106] From my reading of the provisions of the Barrick royalty agreement, I cannot see that the parties intended by the royalty to create an interest in land. The provisions are consistent with the creation only of a contractual right to payment of the royalty. It would have been a very simple thing for the parties to have used specific language to create an interest in land. The effect of the Barrick royalty agreement is to create only a contractual right to the payment of the royalty. [68]

[Emphasis added.]

84 To grant a person an innominate real right, a right of enjoyment (*usus*, *fructus* or *abusus*) in the property must be assigned to the person. The debtors had the capacity to grant such a right in their claims, the mining leases and the substances to be extracted. Reading the debenture and the royalty agreement confirmed that the debtors did not grant the appellant any of the attributes of ownership whatsoever in regard to their claims or the mineral substances to be extracted in the event that a mining lease was granted. The debtors retained all the attributes related to ownership and, although they expressed the wish to grant a real and perpetual right in the "Properties" and "Products", they instead granted the appellant the right to receive a percentage of the profits derived from the sale of the mineral substances extracted.

4.2 Enforceability of the debenture and the royalty agreement against third parties

85 As I mentioned earlier, the debenture and the royalty agreement were not published in the land register, but they were published in the mining register. The respondent and the impleaded party contended that the failure to publish those acts in the land register means that they are not enforceable against them. The appellant argued that the *Mining* Act establishes a publication mechanism that differs from the general regime, exempting it from publication in the land register and making the acts enforceable against third parties upon publication in the mining register.

86 The *Mining Act* provides for the following:

> **10. The following are exempt from registration at the registry office:**
>
> • claims;
>
> • mining exploration licences;
>
> • seabed exploration licences;
>
> • exploration licences for surface mineral substances;
>
> • non-exclusive leases to mine surface mineral substances;
>
> • licences to explore for petroleum, natural gas and underground reservoirs;

• authorizations to produce brine.

11. A public register of real and immovable mining rights granted under this Act shall be kept at the Ministère des Ressources naturelles et de la Faune.

13. The registrar appointed by the Minister of Natural Resources and Wildlife shall

(1) keep the public register of real and immovable mining rights;

(2) make in the register a summary entry of such rights and their renewal, transfer, surrender, abandonment, revocation or expiry, and keep in the register the titles evidencing those rights;

(3) register therein any other instrument relating to those rights.

14. Every transfer of a real and immovable mining right, and every other act to which paragraph 3 of section 13 applies, shall be registered in the public register of real and immovable mining rights on presentation of a copy of the instrument evidencing the transfer or act and on payment of the fees fixed by regulation.

No such transfer or act, whether or not it is exempt from registration at the registry office of the registration division, may have effect against the State unless it has been registered in the public register of real and immovable mining rights. [69]

[Emphasis added.]

87 Two observations arise from these provisions. The first concerns the creation of an exemption from publishing certain mining rights in the land register (s. 10 of the *Mining Act*). Author Daniel Morin pointed out that the objective of the exemption is to [TRANSLATION] "make the land register more flexible and avoid the State's having to register certain real rights that are considered 'temporary' because of their relatively short existence". [70] The second concerns the registrar's obligation to keep the mining register and enter in it the mining title, along with its renewal, transfer, surrender, abandonment, revocation or expiry, as well as any act related to those rights (s. 13 of the *Mining Act*).

88 Section 14 of the *Mining Act* provides explicitly that, to be enforceable against the State, the transfer of a mining right or the instrument to which paragraph 3 of section 13 applies, whether it is exempt or not from registration at the registry office, must be published in the mining register.

89 The *Mining Act* has nothing to say about the enforceability against third parties of the transfer of a mining right, its renewal, etc. or an instrument to which paragraph 3 of section 13 of the Act applies. Hence, the rules of the general regime in the *Civil Code of Québec* for the publication of rights apply. Here are the relevant articles:

2938. The acquisition, creation, recognition, modification, transmission or extinction of an immovable real right requires publication.

Renunciation of a succession, legacy, community of property, partition of the value of acquests or of the family patrimony, and the judgment annulling renunciation, also require publication.

Other personal rights and movable real rights require publication to the extent prescribed or expressly authorized by law. Modification or extinction of a published right shall also be published.

2941. Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.

Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

2972. The land register contains one land book for each registration division in Québec.

Each land book contains an index of immovables, a register of real rights of State resource development, a register of public service networks and immovables situated in territory without a cadastral survey and an index of names. The index of names comprises all the entries that cannot be made in the index of immovables or the other registers kept by the Land Registrar.

. . .

2972.2. The register of real rights of State resource development contains one land file, identified by a serial number, for each such real right in the registration division the *situs* of which is not immatriculated.

3040. The *situs* of a real right of State resource development which is not immatriculated is described by the mention of the nature of the right and a description of the place where it is exercised, unless a land file has been opened for the *situs* of the right in question.

The number of the land files of the immovables on which the right is exercised shall be included in the application for the opening of the land file of that right, so that the relevant correspondences may be entered in the land register, either in the index of immovables or in the register of public service networks and immovables situated in territory without a cadastral survey; the right is enforceable against third persons only from the time the relevant correspondences are entered in the register.

[Emphasis added.]

90 Articles 2938, 2941 and 3040 of the *Civil Code of Québec* provide that immovable real rights are subject to publication and that publication makes those rights enforceable against third parties. [71] In principle, to the extent that they grant a real right, the debenture and the royalty agreement must be published in the land register in order to be enforceable against third parties. In that regard, I cite the comments of author Morin:

[TRANSLATION]

According to the legislator, the register of real and immovable mining rights is an administrative register that allows the State to control mining rights and be informed of any transfer or assignment, or other rights that may affect them. To that end, any right or transfer that is not published in the register is not enforceable against the State, regardless of whether it is exempt or not from registration at the registry office. However, the rights not published in the register are effective between the parties pursuant to the relative effect of the contracts. Besides that stipulation, the *Mining Act* has nothing to say about the enforceability granted by the register of real and immovable mining rights.

Lastly, and in accordance with article 2938 of the *Civil Code of Québec*, real rights of State resource development, with the exception of those with the exemption under section 10 of the *Mining Act*, must absolutely be published in the register of real rights of State resource development (hereinafter referred to as the "**R.R.R.S.R.D.**"), which is an integral part of the land register.

But, as I mentioned previously, the objective of the publication of rights is to make them enforceable against third parties. To achieve that objective, they must have been published in the appropriate register. [72]

[References omitted.]

91 And here are the comments of authors Denys-Claude Lamontagne and Jean Brisset des Nos:

[TRANSLATION]

109. The real immovable mining rights that must be registered at the registry office are the following:

- mining leases;
- mining concessions;
- seabed mining leases;
- exclusive leases for the mining of surface mineral substances;
- leases to produce petroleum and natural gas;
- leases to produce brine;
- leases to operate an underground reservoir.

110. First, for purely administrative purposes, the real and immovable mining rights that must be published are entered in the register of real rights of State resource development, centralized at the ministère des Ressources naturelles, de la Faune et des Parcs.

111. Next, these mining rights and the associated acts (sale, transfer, etc.) are entered in the public register of real and immovable mining rights, kept at the same department. We explained earlier the rules of publication in this area: an unpublished right is not enforceable against the State.

112. Last, these mining rights and the related acts are published at the registry office according to the *Civil Code of Québec*, which provides for special rules of publication.

. . .

• The legislator maintained the mining register and the personal file of holders of mining rights, described in articles 2129 (*d*) *et seq.* of the *Civil Code of Lower Canada* (*supra*, Nos. 115 and 116), and continued, since January 1, 1994, under the names register of real rights of State resource development and directory of holders of real rights. Let us explore this further.

The register of real rights of State resource development is the centrepiece of the publication of real and immovable mining rights, and possibly other rights that will be determined by future laws and regulations. Just as the registration of a right in the index of immovables makes it enforceable against third parties, a real right of State resource development is validly published as of its registration in the corresponding register. Article 3040 of the *Civil Code of Québec* clearly establishes that the registration of a right in the register means that "the right is enforceable against third persons" only from the time the relevant correspondence (a two-way process) is established with the land register. Thus, with that sole reservation, a real right of State resource development is enforceable against third parties once it is entered in the register of State rights of resource development, not the supplementary directory of holders of real rights. That register is part of the real publication, even in the absence of registration of the basis for the right concerned, since, although the registrations are not grouped by corporeal immovable (as registered immovables are), they are at least grouped by incorporeal immovable (as mining leases are), i.e. by the real rights of State resource development to which the records in numerical order correspond. That is why the registrar cannot accept an application in respect of a right when it contains no designation of the record in question or is not accompanied by a notice referring to the record, unless it includes or is accompanied by an application to establish a record. Exceptionally however, before a record is opened, an application that does not evidence a real right established by an agreement or an agreement related to a real right gives rise to registration in the index of names. [73]

[Emphasis added.]

92 The appellant contended that the publication of the debenture and the royalty agreement in the land register was not necessary, since the *Mining Act* explicitly provides for another mode of publication, which exempts it from the obligation to publish in the land register, as article 2934 of the *Civil Code of Québec* stipulates:

> **2934.** The publication of rights is effected by their registration in the register of personal and movable real rights or in the land register, unless some other mode is expressly permitted by law.
>
> Registration benefits the persons whose rights are thereby published.
>
> [Emphasis added.]

93 The appellant is wrong. Here are the comments of the Minister of Justice concerning the adoption of that article:

> [TRANSLATION]
>
> That article is new law. It indicates, at the beginning of Book Nine, the manner in which a right is to be published; it identifies, also at the beginning, the registers in which the rights are entered.
>
> The first paragraph of article 2934 refers indirectly to a hypothec with delivery, which does not give rise to an entry in a register, since holding the property or title is a method of publication that is still valid and useful (art. 2703).
>
> The second paragraph indicates the people who benefit from the registration.[74]
>
> [Emphasis added.]

94 In this case, the words "unless some other mode is expressly permitted by law" must be understood to mean a mode that enables third parties to be informed of the existence of a real right. The mining register is not such a mode. The entries therein serve to make the rights enforceable against the Minister, not third parties, which must be [TRANSLATION] "informed" through the land register, as article 3040 of the *Civil Code of Québec* requires.

4.3 Effect of the vesting order

95 The appellant argued that the trial judge had a misconception of the nature of the sale ordered under the authority of section 243 of the BIA. According to it, such a sale must comply with the principles of the *Civil Code of Québec*. More specifically, it contended that the sale of the debtors' property constitutes, in reality, a taking in payment (not a sale by judicial authority). Therefore, the judge should not have discharged the real rights held by the appellant (the debenture, the royalty agreement and the universal hypothecs).

96 Subsidiarily, the appellant contended that the judge erred by refusing to consider its contestation as an opposition to secure charges.[75] It referred the Court to *Frères Maristes (Iberville) v. Gestion N. Cammisano inc.*,[76] in which the Superior Court recognized that a real right survives the adjudication of ownership in the context of a sale by judicial authority for taxes and it is not discharged by the sheriff's sale.

97 In accordance with subsection 243 (1) of the BIA, a court may, on application by a secured creditor, appoint a receiver and grant the receiver the following powers:

> **243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

[Emphasis added.]

98 It is pursuant to paragraph 243(1)(*c*) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge. [77]

99 The appellant contended that the sale authorized by the trial judge in fact constituted a disguised taking in payment, not allowed under the *Civil Code of Québec*. I fail to see on what factual or legal foundation the appellant bases its contention. Concretely, the sale authorized by the trial judge did not constitute a disguised taking in payment. First, let me point out that it was preceded by a transparent and public procedure aimed at obtaining purchase offers. Second, let me say that the sale was granted to the impleaded party because it submitted the best offer. Accordingly, although the impleaded party was the mandatary of the first ranking secure creditors and acquired the debtors' assets by means of a credit bid, the judicial operation carried out constituted a sale, not a taking in payment. The impleaded party did not pay itself out of the debtors' assets, as is the case in taking in payment; rather, it made the acquisition by means of a sale.

100 The effects of the vesting order are those of a sale by judicial authority. [78] They discharged all the real rights not included in the terms of sale, as in the exceptions under article 696 of the *Code of Civil Procedure*:

696. A sheriff's sale discharges the immovable from all real rights not mentioned in the conditions of sale except:

(1) servitudes;

(2) *(paragraph repealed)*;

(3) rights of emphyteusis, the rights necessary for the exercise of superficies and rights of substitution not yet open, except when it appears in the record of the case that there exists a prior or preferable claim;

(4) *(paragraph replaced)*;

(5) the administrative encumbrance affecting a low-rental housing immovable.

A sheriff's sale does not affect the legal hypothec securing the rights of municipalities, school boards or the Comité de gestion de la taxe scolaire de l'île de Montréal in respect of instalments not yet due of special taxes, the payment of which is spread over a certain number of years; such instalments do not become due by reason of the sale of the immovable and are not collocated, but remain payable according to the terms of their imposition.

101 In actuality, the appellant's rights (even if they had been real rights) were not mentioned in the rights that survived the sale. Rather, they were included in the rights to be discharged. Furthermore, those rights are not listed in the exceptions in article 696 of the *Code of Civil Procedure*.

102 I want to point out that the appellant did not contest Conclusion 11 of the respondent's motion, which asked precisely that the sale have the same effects as a sale by judicial authority according to the *Civil Code of Québec* (art. 2794 C.C.Q. and art. 696 C.C.P.). Furthermore, it acknowledged before the Court that the acquisition procedure by means of a credit bid was legal.

103 *Frères Maristes (Iberville) v. Gestion N. Cammisano Inc.*, [79] cited by the appellant, does not support its position. That judgment deals with the effect of a sale for taxes, governed by sections 528 and 529 of the *Cities and Towns Act*. [80] Those sections specify that the sale discharges the immovable "of any privilege or hypothec with which it may be charged." In that specific legislative context, it goes without saying that real rights other than hypothecs and privileges are not struck.

104 In conclusion, the operation authorized by the trial judge constitutes a sale and it has the same effects as a sale by judicial authority, i.e. it discharges the real rights to the extent provided for in the *Code of Civil Procedure* (art. 2794 C.C.Q. and art. 696 C.C.P.). The trial judge was correct to strike the debenture, the royalty agreement and the universal second hypothecs entered into between the debtors and the appellant on August 28, 2009.

105 Before I conclude, a procedural issue related to the institution of the appeal should be decided. As I pointed out earlier, the appellant submitted a notice of appeal on the basis of subsections 193 (*a*) and (*c*) of the BIA. Furthermore, it filed a motion for leave to appeal *de bene esse*, should its notice of appeal be contested.

106 There was in fact no such contestation at the hearing. Indeed, the appeal is within the framework of subsections 193 (*a*) and (*c*) of the BIA. First, it concerns the appellant's right to eventually receive royalties. Second, the royalties are the result of the granting of a loan of $8 000 000 and would no doubt exceed $10 000 if the conditions required for their payment were met.

107 In the circumstances, I am of the opinion that the motion for leave to appeal *de bene esse* should be dismissed.

108 Therefore, I propose to dismiss the appeal and the motion for leave to appeal *de bene esse*, with costs.

108 (s)

Footnotes

1 *Ernst & Young inc. v. Anglo Pacific Group PLC*, S.C. Abitibi, Nos. 615-11-001228-107 and 615-11-001229-105, November 21, 2012, St-Julien J. (hereinafter referred to as the "judgment appealed from").

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

3 JRI is a subsidiary of NSM. It was constituted to operate an ore processing plant. The property of the debtors consisted essentially in mining claims or interests in the mining claims, an ore processing plant and specialized equipment for the mining sector.

4 *Anglo Pacific Group PLC v. Ernst & Young inc.*, 2012 QCCA 2149.

5 [2001] R.J.Q. 587 (C.A.).

6 *A. Brousseau & Fils ltée. v. Turcotte*, J.E. 2003-535 (C.A.).

7 *Mining Act*, R.S.Q., c. M-13.1.

8 See appendix.

9 See paragraph 28 *infra*, as well as the appendix.

10 [1999] R.J.Q. 2260 (C.A.). See also *Fortier v. Grenier*, 2006 QCCS 1929; *Duchesne v. Duchesne*, B.E. 2001BE-12 (S.C.); *Les Frères Maristes (Iberville) v. Gestion N. Cammisano inc.*, [1993] R.D.I. 187 (S.C.), discontinuance of appeal (C.A., 1993-05-21), 500-09-002077-923.

11 See paras. 28 and 78 *infra*, as well as the appendix.

12 Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at 465 and 470-471. See also *Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146, 2002 SCC 7.

13 Madeleine Cantin Cumyn, "De l'existence et du régime juridique des droits réels de jouissance innommés : essai sur l'énumération limitative des droits réels", (1986) 46 *R. du B.* 3, 25, 36 and 39-40.

14 *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 31.

15 *Bank of Montreal v. Dynex Petroleum Ltd.*, *supra* note 12.

16 Arts. 1371 and 1373 C.C.Q.; Sylvio Normand, *Introduction aux droits des biens*, 1st ed. (Montréal: Wilson & Lafleur, 2000) at 39 [Normand 1]; Pierre-Claude Lafond, *Précis de droit des biens*, 2nd ed. (Montréal: Thémis, 2007) No. 412 at 162-163; Denys-Claude Lamontagne, *Biens et propriété*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2009) No. 96 at 59; Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les obligations*, 7th ed., by Pierre-Gabriel Jobin and Nathalie Vézina (Cowansville, Qc.: Yvon Blais, 2013) No. 6 at 6.

17 Normand 1, *ibid.* at 39; Jean-Louis Baudouin and Pierre-Gabriel Jobin, *ibid.*, No. 6 at 6.

18 Normand 1, *ibid.* at 36; D.-C. Lamontagne, *supra* note 16, No. 103 at 61; P.-C. Lafond, *supra* note 16, Nos. 444-445 at 173.

19 J.-L. Baudouin and P.-G. Jobin, note 16 at 6-7; Pierre-Claude Lafond, *ibid.*, No. 414 at 163; Normand 1, *ibid.* at 41; Denys-Claude Lamontagne, *ibid.*, No. 99 at 60.

20 Pierre-Claude Lafond, *ibid.*, No. 416 at 164; Normand 1, *ibid.* at 41; Jean-Louis Baudouin and Pierre-Gabriel Jobin, *ibid.*, No. 6 at 7.

21 Normand 1, *ibid.* at 29-30; D.-C. Lamontagne, *supra* note 16, Nos. 102-104 at 60-61; Pierre Basile Mignault, *Le droit civil canadien*, Vol. 2 (Montréal: Théoret, 1896) at 390; Pierre-Claude Lafond, *ibid.*, No. 422 at 166. See also para. 425 of Pierre-Claude Lafond, where it is mentioned that the idea of a direct right on property may appear contestable.

22 Pierre-Claude Lafond, *ibid.*, No. 443 at 173; Normand 1, *ibid.* at 36; Denys-Claude Lamontagne, *ibid.* No. 117 at 69.

23 Pierre-Claude Lafond, *ibid.*, Nos. 449-453 at 174-175; Normand 1, *ibid.* at 36-39; Denys-Claude Lamontagne, *ibid.*, Nos. 116-118 at 69.

24 Pierre-Claude Lafond, *ibid.*, Nos. 657-684 at 259-270; Normand 1, *ibid.* at 91-94; Denys-Claude Lamontagne, *ibid.*, No. 207 at 158-159.

25 However, bear in mind that, as we have seen, article 405 C.C.L.C. already dealt with property ownership.

26 Article 899 C.C.Q. reproduces article 374 C.C.L.C. almost textually.

27 Normand 1, *supra* note 16 at 96; Sylvio Normand, "Les nouveaux biens", (2004) 106 *R. du N.* 177, 183-185 [Normand 2]; Denys-Claude Lamontagne, *ibid.*, No. 205 at 157; Yaëll Emerich, *La propriété des créances : approche comparative* (Cowansville, Qc.: Yvon Blais, 2006) at 18-67 [Emerich 1]; Yaëll Emerich, "Faut-il condamner la propriété des biens incorporels ? Réflexions autour de la propriété des créances" (2005) 46 *C. de D.* 905 at 909-912 and 916-920 [Emerich 2]; Yaëll Emerich, "Regard civiliste sur le droit des biens de la common law pour une conception transsystémique de la propriété" (2008) 38 *R.G.D.* 339 at 370-376 [Emerich 3].

28 See Denys-Claude Lamontagne, *ibid.*, No. 205 at 157; Normand 1, *ibid.* at 96; Normand 2, *ibid.* at 183-185; Emerich 1, *ibid.* at 18-67; Emerich 2, *ibid.* at 909-912 and 916-920; Emerich 3, *ibid.* at 370-376; P.-C. Lafond, *supra* note 16, No. 419 at 165; John E.C. Brierley, "Regards sur le droit des biens dans le nouveau Code civil du Québec" (1995) 47 *R.I.D.C.* 33 at 36-49; Roderick A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 *McGill Law*

Journal 761 at 785-812; Madeleine Cantin Cumyn and Michelle Cumyn, "La notion de biens" in *Mélanges offerts au professeur François Frenette - Études portant sur le droit patrimonial* (Québec: Les Presses de l'Université Laval, 2006) at 140-150.

29 M. Cantin Cumyn and M. Cumyn, *ibid.* at 140-150.

30 R. A. Macdonald, *supra* note 28 at 798 and 804; John E.C. Brierley, "Regards sur le droit des biens dans le nouveau Code civil du Québec" (1995) 47 *R.I.D.C.* 33 at 35-36.

31 Normand 1, *supra* note 16 at 96; Normand 2, *supra* note 27 at 184-185; Denys-Claude Lamontagne, *supra* note 16, No. 205 at 157; Emerich 2, *supra* note 27 at 909-912 and 916-920; Emerich 1, supra note 27 at 52-56.

32 J.E.C. Brierley, *supra* note 30 at 36 and 48-49.

33 Denys-Claude Lamontagne and Jean Brisset des Nos, *Le droit minier*, 2nd ed. (Montréal: Thémis, 2005) No. 73 at 47.

34 Normand 1, *supra* note 16 at 96.

35 Ministère de la Justice, *Commentaires du ministre de la Justice : le Code civil du Québec*, Vol. 1, (Québec: Les Publications du Québec) at 556.

36 Normand 1, *supra* note 16 at 31.

37 *Ibid.* at 31-32.

38 *Ibid.* at 32 and 267-269; M. Cantin Cumyn, *supra* note 13; P.-C. Lafond, *supra* note 16, Nos. 679-680 at 758-759; *Club Appalaches inc. v. Québec (Procureur général)*, *supra* note 10. Author Denys-Claude Lamontagne is of the opinion that that is not possible. See D.-C. Lamontagne, *supra* note 16, No. 114 at 67-68.

39 Normand 1, *ibid.* at 269-270.

40 M. Cantin Cumyn, *supra* note 13.

41 Ministère de la Justice, *supra* note 35 at 535.

42 *Sacchetti v. Lockheimer*, [1988] 1 S.C.R. 1049 at 1056. (The Court used the word "thing", given that, according to article 406 C.C.L.C., ownership concerned a thing.)

43 *Haddad v. Groupe Jean Coutu (PJC) inc.*, 2010 QCCA 2215at para. 76.

44 *Mining Act*, *supra* note 7, s. 17.

45 *Ibid.*, s. 3; D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33 at 14.

46 *Mining Act*, *ibid.*, at s. 100.

47 *Ibid.* at s. 101.

48 *Ibid.*, ss. 61, 64, 65, 69 and 101; D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33, Nos. 78-79 at 50-54; Jean-Paul Lacasse, *Le claim en droit québécois* (Ottawa: Les Éditions de l'Université d'Ottawa, 1976) at 105-117.

49 *Mining Act*, *ibid.*, ss. 100 and 105; Denys-Claude Lamontagne and Jean Brisset des Nos, *ibid.*, Nos. 89-92 at 59-60.

50 *Mining Act*, *ibid.*, s. 101; J.-P. Lacasse, *supra* note 48, 1976, at 115-117.

51 *Mining Act*, *ibid.*, s. 104.

52 D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33 at 67.

53 *Ibid.* at 68-69.

54 *Mining Act*, *supra* note 7, at s. 105.

55 D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33, No. 102 at 68.

56 P.-C. Lafond, *supra* note 16, No. 665 at 263.

57 D.-C. Lamontagne, *supra* note 16, No. 467 at 321-322.

58 Art. 1014 C.C.Q. See Henri Lanctôt, "La convention de coparticipation" (Insight Information Co., Deuxième forum minier, Québec) September 30, 2004 at 23.

59 Louis Payette, *Les sûretés réelles dans le Code civil du Québec*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2010) No. 467 at 213.

60 See the appendix.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Supra* note 12.

65 Valérie Mac-Seing, "Prête-nom dans le cadre de transactions immobilières au Québec : défis et enjeux", in Service de la formation continue, Barreau du Québec, *Développements récents en droit immobilier et commercial* (Cowansville, Qc.: Yvon Blais, 2006) at 88-89; Barbara Pierre, "Classification of Property and Conceptions of Ownership in Civil and Common Law", (1997) 28 *R.G.D.* 235 at 251-252.

66 B.J. Barton, *supra* note 12 at 463-464.

67 *Banque de Montréal v. Dynex Petroleum Ltd.*, *supra* note 12 at para. 21.

68 *St. Andrew Goldfields Ltd. v. Newmont Canada Limited*, 2009 CanLII 40549at paras. 98-103 (Ont. Sup. Ct. J.), upheld by 2011 ONCA 377.

69 *Mining Act*, *supra* note 7, ss. 10-14.

70 Daniel Morin, "Chronique - De la publicité de certains droits miniers réels immobiliers", in *Repères*, February 2013, *Droit civil en ligne*, EYB2013REP1311 at 4.

71 On this subject, see D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33, Nos. 103-124 at 69-85; Denys-Claude Lamontagne and Pierre Duchaine, *La publicité des droits*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2012) Nos. 69-70 at 63-64.

72 D. Morin, *supra* note 70 at 7.

73 D.-C. Lamontagne and J. Brisset des Nos, *supra* note 33 at 71-72 and 82-83.

74 Ministère de la Justice, *Commentaires du ministre de la Justice : le Code civil du Québec*, Vol. 2, (Québec: Les Publications du Québec) at 1843.

75 Art. 676 C.C.P.

76 *Supra* note 10.

77 Jacques Deslauriers, *La faillite et l'insolvabilité au Québec*, 2nd ed. (Montréal: Wilson & Lafleur, 2011) at 257; Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2nd ed. (Markham: LexisNexis Canada Inc., 2012) at 217.

78 *Supra* note 2, s. 72. See also Alain Heyne and Éric Lavallée, "Séquestre intérimaire et séquestre de la partie XI de la *Loi sur la faillite et l'insolvabilité*", in JurisClasseur Québec, coll. "Droit des affaires", *Faillite, insolvabilité et restructuration*, Vol. 9 (Montréal: LexisNexis Canada, 2013), loose-leaf, at 9/94.

79 *Supra* note 10.

80 R.S.Q., c. C-19.

TAB 11

1989 CarswellAlta 76
Alberta Court of Queen's Bench,

Vandergrift v. Coseka Resources Ltd.

1989 CarswellAlta 76, [1989] A.W.L.D. 528, 15 A.C.W.S. (3d) 36, 67 Alta. L.R. (2d) 17, 95 A.R. 372

VANDERGRIFT et al v. COSEKA RESOURCES LIMITED et al.

Virtue J.

Judgment: March 30, 1989
Docket: Calgary No. 8201 33548

Counsel: *W.H. Kennedy*, for plaintiffs.
E.L. Bunnell, Q.C., for defendants except Telstar Resources Ltd.
B.K. O'Ferrall, for third party Dome Petroleum Ltd.
T.M. Hughes, for fourth party Wudel.
L.C. Fontaine, for fourth party Chevron Standard Ltd.

Subject: Natural Resources; Civil Practice and Procedure

Action for declaration that gross overriding royalty be calculated and paid as a percentage of the pooled production of all wells in a gas block.

***Virtue J.*:**

Introduction, issues, and relief sought

1 The plaintiffs are entitled to an overriding royalty in the gas and oil substances recovered from seven sections of leasehold land in the Coleman field (the "Suffolk lands") on which there is one producing gas well. The lease on the Suffolk lands is held by the defendants (the working interest owners) who also hold the lease on the adjacent eight sections of land (the "TransAlta lands") on which there are five producing gas wells. Coseka Resources Ltd. operates the wells on all the lands in the gas block for the leaseholders. The Energy Resources Conservation Board of Alberta issued an order establishing the Suffolk lands and the TransAlta lands as a gas block. The gas block order was in effect from 29th June 1978 until November 1987, when it was rescinded.

2 There are two main issues to be dealt with:

3 1. Have the defendants wrongfully taken gas, underlying the Suffolk lands, without payment to the plaintiffs for their royalty?

4 2. Did the issuance of the gas block order entitle the plaintiffs to be paid their royalty based upon the pooled production from all the wells in the gas block, rather than on the one well on the Suffolk lands?

5 The plaintiffs seek a declaration that their royalty should be calculated on the basis of the total production from the gas block during the time the gas block order was in effect, and, in addition, specific performance of the royalty agreement on the basis of such a declaration; and an accounting for all royalties said to be due to the plaintiffs, with interest.

6 The trial, by agreement of the parties, was split into two parts: the first, to determine the issues arising between the plaintiffs and the defendants, and the second, if required, to deal with the issues arising between the defendants and the third and fourth parties.

The facts

7 Imperial Oil Enterprises and others ("Imperial") held the petroleum and natural gas lease from the Crown on the Suffolk lands. On 1st April 1971 Imperial entered into a farmout agreement with Suffolk Oil and Gas Ltd. ("Suffolk") under which Suffolk was to acquire a 60 per cent working interest in 94.4 per cent of the lease held by Imperial in exchange for drilling a gas well on the lands.

8 On 2nd April 1971 Suffolk as grantor, and Suffolk, Kenneth Kary, and Vandergrift Oil and Gas Limited as grantees, agreed in writing that the obligations, benefits and liabilities under the farmout agreement were held by grantees in equal shares.

9 On 12th May 1971 Suffolk obtained Crown Reserve and Natural Gas Licence No. 236 for the Suffolk lands.

10 Suffolk intended to sell off portions of the leasehold interests it would earn under the farmout agreement to working interest owners in order to finance the costs of drilling the well provided for in the farmout agreement. Before doing so, Suffolk, on 13th May 1971 (the day after it acquired Natural Gas Licence No. 236) entered into a royalty agreement under which it assigned to itself, Suffolk Oil & Gas Ltd., and to Kenneth Kary and Vandergrift Gas and Oil Enterprises Ltd., a three (3%) per cent gross overriding royalty on all petroleum substances recovered from the lands.

11 By a series of assignments, the 3 per cent overriding royalty came to be held by the plaintiffs, Millard R. Vandergrift (1/3), Howard J. Fogarty (1/9), Oilmen's Wellsite Services Limited (1/9), The Carbon Brick and Coal Company Limited (1/9) and 240689 Alberta Limited (1/3). (The plaintiff 240689 has subsequently discontinued its action so that the remaining plaintiffs represent two thirds of the royalty holders.)

12 On 13th August 1973, after Suffolk completed the well it was to drill under the farmout agreement (the 4-23 well), the Alberta Department of Mines & Minerals granted to Suffolk a natural gas lease covering the 60 per cent interest in the Suffolk lands which it had earned under the farmout agreement.

13 Suffolk had planned to retain a portion of the lease on the Suffolk lands itself, but because drilling costs on the farmout well exceeded estimates Suffolk ended up selling its entire interest in the lease to finance the well, and on 5th July 1974 Suffolk transferred the lease to nine working interest owners who are now represented by the defendants. The only interest retained by the original developers was the 3 per cent overriding royalty, which is now held by the plaintiffs.

14 The defendants, as the leaseholders, had the sole responsibility for the operation of the field. They retained Coseka Resources Ltd. as the field operator for both the Suffolk and the TransAlta lands.

15 The gas well drilled by Suffolk under the farmout agreement on the Suffolk lands is known as the 4-23 well. After the 4-23 well was drilled, the defendants drilled five wells on the TransAlta lands. All the wells were successful natural gas producers.

16 In September 1973 the defendants entered into an agreement under which they pooled their respective interests, and agreed to allocate the pooled costs and revenues of the Suffolk and TransAlta lands (including well 4-23) to each working interest owner in accordance with a schedule of percentages of production. The plaintiffs, not being working owners, were not party to this agreement, nor were they, as holders of a non-operating royalty interest, responsible for the payment of any of the expenses of operating the field. The agreement, however, identified the interests of the various royalty holders, and provided a method for payment to the plaintiffs of their 3 per cent royalty "applicable to production from the (Suffolk) lease".

17 On 6th April 1978 the field operator, Coseka, applied to the Oil & Gas Conservation Board for a gas block order. The board registered the application, advertised the suspension of Pt. 4 of the Oil & Gas Conservation Regulations, and, when no objections were received, conducted a hearing, following which it issued Gas Block Order 7806 on 29th June 1978. This order established a rectangular block of fifteen sections of land, made up of the seven sections comprising the

Suffolk lands and the eight sections comprising the TransAlta lands, as the North Coleman Gas Block No. 1. Several years later, on 1st October 1987, a decision of the Court of Appeal of Alberta directed the board to reconsider its gas block order. The board did so, and on 18th November 1987 the board rescinded the order. The order was in effect from 29th June 1978 to 1st October 1987.

18 It is the position of the plaintiffs that the gas block order (while it was in force) constituted a form of "statutory or *defacto* unitization" of the North Coleman gas field. The result of this, the plaintiffs say, is that rather than being entitled to a 3 per cent overriding royalty on the gas produced from the 4-23 well, they should be entitled to their royalty based upon a proportionate share of the pooled production from all the wells in the North Coleman Gas Block No. 1. The plaintiffs say further that, as the Suffolk lands comprise seven of the fifteen sections included in the gas block order, their 3 per cent royalty should be based on 94.4 of 7/15ths of the total production from all the wells in the block.

19 The defendants maintain that the plaintiffs' royalty has been properly calculated and paid to them based upon the actual production from the Suffolk lands, and that the gas block order did not change the basis for the payment of royalties to the plaintiffs as set out in the royalty agreement.

20 The way in which the royalty is calculated is of considerable significance. The well on the Suffolk lands (well 4-23), came into production in November 1975. It was successful in producing gas from both the Devonian level and the Mississippian level which lies above the Devonian. Originally, the well was produced from the Devonian level which was quite productive and easier to get at and handle than the Mississippian zone. In May 1978, as a result of a drilling accident, a tool (known as a mandril) lodged in the hole. It could not be retrieved, and as a result it blocked off the production of gas from the Devonian level. Since that time 4-23 has produced only from the Mississippian level. No claim is advanced based on this drilling accident, but the 4-23 well does not have the same production capacity as it did before the accident, and, as the plaintiffs' royalty under the royalty agreement is based on actual production, their potential royalty income is affected.

1. Have the defendants acted unfairly in producing the gas from the Coleman field?

21 The plaintiffs allege that the defendants' operator, Coseka, has acted unfairly with respect to producing gas from the 4-23 well in comparison to the wells on the TransAlta lands, and further that it is operating the field so as to drain off natural gas from the pool beneath the 4-23 well to a well on the TransAlta lands. The plaintiffs seek an accounting for additional royalty which they allege is due because of these production practices.

22 There are six producing gas wells in the Coleman Gas Block; one on the Suffolk lands, and five wells on the TransAlta lands. All produce only from the Mississippian zone, except well 6-14 on the TransAlta lands which produces from both the Devonian and Mississippian levels, but primarily from the Devonian. All the gas wells are operated by the defendant Coseka on behalf of the defendant leaseholders. The wells in the gas block are shut in from time to time for technical reasons and also when the demand for natural gas is reduced. The operator, Coseka, makes the decision as to which well or wells will be shut in.

23 The evidence does not substantiate the plaintiffs' allegation that Coseka, in assigning production to individual wells, has discriminated against the 4-23 well to the detriment of the plaintiffs. In fact, Coseka prefers to produce the 4-23 well because the royalty factor is 3 per cent while it is 5 per cent on the wells on the TransAlta lands. In its application for the block order Coseka stated with respect to the 4-23 well: "the full productive capabilities of the well are required to meet and maintain the total gas contract commitments for the North Coleman field". The evidence of Mr. Jones as to production practices was credible, and I accept it. I conclude from all the evidence that in operating the field Coseka has acted fairly when it has been necessary to shut in a well, or wells, for market-based or other reasons.

24 Nor does the evidence satisfy me that the Devonian gas reservoir under 4-23 is being drained by the production at that level from the 6-14 well. Again, I accept the evidence of Mr. Jones which was to the effect that drainage is limited to one-half mile of the well site, and, with respect to the 6-14 well, would not occur beyond the boundaries of section 14.

25 I also conclude on the evidence that there has been no discrimination against drilling new wells on the Suffolk lands (on which the plaintiffs would receive a royalty) in favour of other lands in the block. The evidence of Mr. Jones is that the updip part of the reservoir is the most desirable place to drill in the North Coleman field, and that portion of the reservoir is not within the Suffolk lands. His further evidence is that it is economically more advantageous to produce from the Mississippian zone because of the greater sulphur recovery from gas produced from that level.

26 The plaintiffs' allegations of unfair production practices are not substantiated by the evidence, and no claim is made out based on these allegations.

2. The board order

27 I am satisfied that it was not the defendants' intent to effect a compulsory unitization of the Suffolk and TransAlta lands, by the board order. The dominant motivation for the application by Coseka was to avoid the imposition by the Oil and Gas Conservation Board of a substantial off-target penalty that would otherwise have seriously restricted production from the 4-23 well. When the well was drilled the board agreed not to impose a penalty at that time, but in October 1977 the board announced its intention to impose an off-target penalty, on a retroactive basis, back to the first day of production in November 1975. This would have put well 4-23 into an overproduced status with the result that it would have been shut in for a period of about two years, to the great disadvantage of the plaintiffs. None of the other wells in the North Coleman field were subject to board-imposed limits on production. The board suggested to Coseka that the imposition of the penalty could be avoided if Coseka were to obtain a gas block order for the North Coleman field. Coseka acted on the board's suggestion, the Coleman Gas Block No. 1 order was granted, and the imposition of the off-target penalty on well 4-23 was avoided.

28 The application for the gas block order was advertised by the board in The Albertan, 19th May 1978, The Calgary Herald, 19th May 1978, and the The Edmonton Journal, 20th May 1978. Coseka did not consider it necessary to give any further notice to the plaintiff royalty holders as it was very much to the advantage of the royalty holders to avoid the imposition of the off-target penalty on the well on which they were drawing their royalties.

29 After the block order was granted there was no change in the way in which Coseka allocated production to the various wells in the field, nor in the calculation and payment of the plaintiffs' 3 per cent royalty. The royalty continued to be based solely upon 3 per cent of the actual production from the 4-23 well. Although the block order was issued on 29th June 1978, the plaintiffs did not complain about the method of calculating and paying their 3 per cent overriding royalty until roughly four years later. In February 1982 Carbon Brick claimed, for the first time, that the plaintiffs' 3 per cent gross overriding royalty should be calculated and paid on the basis of the pooled production from all the wells in the gas block. Its position was that the plaintiffs' royalty was an interest in land, and that the gas block order had resulted in a statutory or defacto unitization of the lands in the gas block. In 1979 and early 1980 the working interest owners had endeavoured to negotiate a unitization agreement which would have included both the working owners and the overriding royalty holders, but negotiations broke down when the Suffolk 3 per cent royalty group (the plaintiffs) insisted on receiving a participation factor of 37 per cent, and the TransAlta 5 per cent royalty group insisted on receiving a participation factor of 66 per cent which would leave only 34 per cent for the Suffolk group. The impasse was not resolved, and the unitization agreement was never achieved.

Is the plaintiffs' royalty an interest in land as claimed by the plaintiffs?

30 An informative publication of the Canadian Institute of Resources Law, entitled "Classifying Non-operating Interests in Oil and Gas", by Eugene Kuntz, dated 7th April 1988, discusses the legal nature of non-operating oil and gas interests and in particular whether royalties are an interest in land or a contractual right. The author reviews both the Canadian and United States authorities on the subject.

31 From this and other authorities to which I was referred it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:

32 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

33 2) the interest, out of which the royalty is carved, is itself an interest in land.

34 The court, in each case where it is claimed that a royalty agreement creates an interest in land, must examine the specific wording of the agreement to determine the intention of the parties. *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66, 72 D.L.R. (3d) 734, 4 A.R. 251 (C.A., Moore J., now C.J.C.).

35 In *Guar. Trust Co. of Can. v. Hetherington*, 50 Alta. L.R. (2d) 193 at 216, [1987] 3 W.W.R. 316, 44 R.P.R. 154, 77 A.R. 104 (Q..B.), Mr. Justice O'Leary, after a careful review of the authorities, reached a similar conclusion which, with respect, I adopt:

> It seems clear from the authorities that the characterization of the royalty interest granted or assigned in a given case depends upon the intention of the parties as expressed in the wording of the instrument.

36 In *Sask. Minerals v. Keyes*, [1972] S.C.R. 703, [1972] 2 W.W.R. 108, 23 D.L.R. (3d) 573, Martland J. doubts that the use of the word "royalty" implies an intention to create an interest in land.

37 In *Bensette v. Reece*, [1973] 2 W.W.R. 497, 34 D.L.R. (3d) 723 (Sask. C.A.), Woods J.A., at p. 499, holds that "royalty" is not a term of art, and its meaning must be deduced from the circumstances surrounding its use.

Interpretation of the royalty agreement

1. Is the language of the royalty agreement sufficiently precise to convey an interest in land?

38 In the circumstance of this case, the choice of language used in the royalty agreement was completely in the hands of the recipients of the royalty interest. The grantor, Suffolk Oil and Gas Ltd., held the farmout agreement to the benefit of the grantees, Suffolk Oil and Gas Ltd., Vandergrift Oil and Gas Ltd. and Kenneth Kary. When it came to drafting the royalty agreement, the grantor of the royalty and the recipient of the royalty were, for all practical purposes, one and the same. The choice of the language used was completely theirs. If they intended to grant an interest in land, it was open to them to do so without negotiation or consideration of outside parties. Their language could readily have been as precise as was required to create an interest in land, if that is what was intended.

39 In those circumstances, what language did the parties use to describe the grant of royalty:

> AND WHEREAS the Grantor has agreed to ... grant to the Royalty Owners a Three (3%) percent *gross overriding royalty on all petroleum substances recovered from the lands ...*
>
> **2. Gross Overriding Royalty**
>
> The Grantor does hereby grant and assign to the Royalty Owners a Three (3%) percent gross overriding royalty out of the 94.4% interest of the Grantor *in all petroleum substances found within, upon or under the lands ...*
>
> **3. Royalty Provisions**
>
> (a) The Royalty Owners' *share of production* shall be paid for ...
>
> (c) Notwithstanding anything to the contrary herein contained or implied Suffolk shall be entitled to use free *from the payment of the overriding royalty herein reserved such part of the production of petroleum substances ...*

(d) Suffolk shall keep and maintain, at all times and from time to time, true and correct books, records and accounts *showing the quantity of the petroleum substances sold from each and every well drilled by it* upon the lands ... for the purpose of *ascertaining the quantity and nature of the petroleum substances sold from any well.*

4. Books And Accounts

Suffolk shall deliver and furnish to The Royalty Owners on or before the last day of each calendar month a complete statement or statements with respect to the *quantity and kind of the petroleum substances produced and saved* during the preceding calendar month *from the lands* ...

6. Performance Of License By Suffolk

Suffolk shall pay all rentals, royalties, taxes and charges payable under the License and as to *production from the lands*, and shall keep the License in good standing until surrender thereof as herein provided, but *nothing herein shall be construed as requiring Suffolk to conduct exploratory operations or to drill a well or wells on the lands* ...

15. Miscellaneous Provisions

(a) All terms and conditions of this Agreement shall run with and be binding upon the lands. [emphasis added]

40 In reading the agreement one is struck by the fact that the first reference to the nature of the interest to be conveyed used the expression "royalty on all petroleum substances recovered from the lands", not petroleum within, upon and under the lands, but, those substances "recovered" from the lands. The next reference, in para. 2, is to a royalty on "petroleum substances found". Again, the reference is not to petroleum substances within, upon or under the lands, but to substances "found" within, upon or under the lands. The other references in agreement are to royalty in terms of "a share of production", "petroleum substances sold", "petroleum substances produced". Taken as a whole, I am of the view that the agreement conveys a contractual right to the payment of a royalty on petroleum substances produced from the lands, that is, a share of the petroleum after it has been removed, rather than on interest in land.

41 In *Vanguard Petroleums v. Vermont*, Moore J., after reviewing the decision of Allen J.A. in *Emerald Resources Ltd. v. Sterling Oil Properties Mgmt. Ltd.* (1969), 3 D.L.R. (3d) 630 (Alta. C.A.), affirmed 15 D.L.R. (3d) 256 (S.C.C.), stated that the Court of Appeal in that case (p. 71):

> ... was of the clear opinion that, where the royalty relates to a share after the petroleum had been removed from the land, this is not an interest in land but is to be treated as personalty.

With respect, I share the same view.

42 One of the incidents of an interest in land one would expect to find in a royalty agreement intended to create an interest in land would be the right to the royalty holder to enter upon the lands to explore for and extract the minerals. A mere entitlement to an overriding royalty, without more, does not, in my view, carry with it the right to explore for oil and gas. In this case the royalty agreement specifically provides that "nothing herein shall be construed as requiring Suffolk to conduct exploratory operations or to drill a well on the lands". Thus the royalty holders could not themselves extract the oil and gas, nor could they require the grantor to drill a well for that purpose. In addition, I regard it as significant that the parties who drafted the royalty agreement now seek to use the agreement to impose obligations on the defendants who were not parties to the agreement and had no part in the drafting of it. Where that is the case, it is not unreasonable, in my view, to require that the language used show clearly that the parties intended the royalty to be an interest in land.

43 On reviewing the whole of the agreement and the circumstances in which it was made, I am persuaded that the royalty agreement in this case did not create an interest in land, but gave a contractual right to a payment calculated on production.

2. Was the grantors interest, out of which the royalty was carved, an interest in land?

44 In *Telstar Resources Ltd. v. Coseka Resources Ltd.* (1980), 12 Alta. L.R. (2d) 187 at 191, 24 A.R. 562 (C.A.), Morrow J.A. describes an overriding royalty as " 'a percentage carved out of the lessee's working interest' " or a " 'charge on that working interest' ". If the interest, out of which the royalty is carved, is not itself an interest in land, then the royalty cannot be an interest in land.

45 When the royalty agreement was entered into, the grantor, Suffolk, had an interest in the farmout agreement from Imperial, and it had a natural gas licence from the Crown. At that time, Suffolk, which granted the royalty, did not have a lease, and it would not acquire a lease until it earned it by drilling a well. The farmout agreement stated that "if Suffolk drills the well to the contract depth", as required by the agreement, *then* Imperial would "convey to the Farmee an undivided sixty (60%) per cent of the Farmors' interest in the lands and the leases ... effective as of and from the release date of the rig used to drill the well to contract depth". The agreement went on to provide in para. 7(c):

> It is specifically understood by Farmee that if Farmee fails to complete ... the well ... Farmee has no interest whatsoever in the lands.

46 The effect of this was that Suffolk, at the time it granted the royalty, had the right to earn an interest in land by drilling a well, but it had not yet earned it. Suffolk did not acquire the lease until 13th August 1973, that is, more than two years after the royalty agreement was executed.

47 Insofar as the natural gas licence is concerned it did not create an interest in land in the grantor, Suffolk. The Natural Gas Licence Regula tions, 1962, Alta. Reg. 297/62, describe the rights which accompany a natural gas licence:

> 14. A licence conveys the right to drill a well or wells for natural gas that is the property of the Crown ... and the right to produce the same ...

48 In my view, a bare licence to drill and produce, in the hands of one who neither owns nor leases the lands or minerals, is not an interest in land.

49 The result is that when Suffolk granted the royalty it did not own an interest in land and could not, therefore, "carve out" or convey an interest in land to the plaintiffs.

50 Neither of the two conditions for the creation of an interest in land has been met: The language of the royalty agreement is not sufficiently precise to show an intention to create such an intent, and the grantor did not itself have an interest in land.

Did the gas block order alter or change the terms of the plaintiffs' royalty agreement?

51 Counsel for the plaintiffs submits that the issuance of the block order "pooled" the production from the Suffolk and TransAlta lands, and thereafter, natural gas should be treated as having come from the pool rather than from an individual well. The result, he says, is that the plaintiffs' royalties must be calculated not on the actual production from the Suffolk lands, as provided in the royalty agreement, but on a percentage of the pooled production from the entire block. In effect, he says that the block order constituted a compulsory unitization of the lands in the block.

52 The two most critical elements required for the unitization of a petroleum and natural gas area are:

53 1) The compulsory allocation of a percentage of the total amount of gas produced in the whole unit to individual parcels, or "tracts", of lands; and

54 2) A provision that previous contracts are deemed to have been amended by substituting for actual production the allocated percentage of the production from the entire unit. The issuance of the gas block order, in this case, did not achieve either of those requirements.

55 The operative part of the gas block order reads as follows:

> 1. The area outlined on the attachment to this order marked Appendix A to this order is a gas block, and shall be known as North Coleman Gas Block No. 1.
>
> 2. The application of Part 4 of the Oil and Gas Conservation Regulations for wells drilled or to be drilled for the production of gas from the North Coleman Rundle A Pool and the North Coleman Palliser A Pool in the North Coleman Gas Block No. 1 is suspended for the duration of the said block.
>
> 3. A well through which production is taken or will be taken from the said block shall be at least 800 metres from each other well producing from the same formation except the following wells which will produce at the interwell distance of 731 metres from each other:
>
> 4. A well through which production is taken or will be taken from the North Coleman Rundle A Pool and the North Coleman Palliser A Pool within the said block shall be at least 400 metres from the boundaries of the gas block.
>
> 5. The minimum distance provided in clause 3 shall be the minimum horizontal distance between the uppermost points of intersection of the well bores with the gas productive part of the pool, and the minimum distance provided in clause 4 shall be the minimum horizontal distance between the uppermost point of intersection of the well bore and the boundary of North Coleman Gas Block No. 1.

56 The Oil and Gas Conservation Act, s. 1(1)(*b*.1) defines "block" as follows:

> (*b*.1) "block" means an area or part of a pool consisting of production spacing units grouped for the purpose of obtaining a common, aggregate production allowable.

57 The primary effect of this gas block order was to relieve against the necessity of imposing an off-target penalty on well 4-23.

58 Generally, a gas block order permits the board to determine the production of gas which will be allowed, on the basis of total production from the entire block, rather than for each individual well or production spacing unit. However, there is nothing in the board order itself, or in the Act or the regulations, which requires a percentage of the total production from the block to be allocated to each parcel of land in the block. Nor is there a formula setting out the basis on which such allocation could be made.

59 This absence of any provision for the compulsory allocation of production is especially significant when the gas block legislation is contrasted with the compulsory pooling powers of the board under s. 72 of the Oil and Gas Conservation Act. That section provides "for the alloca tion to each tract of its share of production ..." Section 76.3, which also deals with compulsory pooling, provides that the allocation is binding upon each owner "or anyone entitled to a contractual benefit through an owner". The absence of such provisions in the gas block order or in the legislation governing such orders leads me to the conclusion that the issuance of the gas block order did not affect a compulsory unitization of the block.

60 I am of the view that, in the absence of clear provisions in the block order or in the legislation, pooling production from the block, allocating a percentage of total production to individual parcels of lands, and providing that such allocation binds the owner, and those contracting with them, the plaintiffs' royalty continues to be payable on production from the Suffolk lands, as provided in the royalty agreement.

61 In the absence of clear contractual provisions or legislative authority, the courts will not amend existing arrangements between working interest owners and royalty holders. As stated by Chief Justice Smith in *Alminex Ltd. v. Berkley Oil & Gas Ltd.*, [1972] 6 W.W.R. 412 at 413:

> It appears clear to me that, in the absence of specific provisions to the contrary in the contractual arrangements [unit agreements], unitization of oil-producing lands does not modify the terms of an initial or basic document such as an oil lease or a farm-out agreement.

62 In my view the plaintiffs' rights are governed by the terms of the royalty agreement and their royalty remains payable on production from the Suffolk lands alone.

63 One of the fundamental difficulties which the plaintiffs face is that they are unable to show that they have any right, contractual or otherwise, to control the manner in which the owners of the lease arrange the production of natural gas from their lands. The royalty agreement makes no provision for such production controls, and states specifically that the royalty holders do not have the right to require Suffolk to explore or to drill wells on the land, nor is there any provision for shut in royalties, delay rentals or a minimum guaranteed royalty. It is not the function of the court to modify a bargain which has been reached, or to impose one which has not been achieved. As stated by Lord Atkin in *Bell v. Lever Bros. Ltd.*, [1932] A.C. 161 at 226 (H.L.):

> Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just.

64 Further, the issuance of the gas block order did not change the way in which the wells in the gas block could be produced, except to avoid the threatened off-target production penalty on well 4-23. Prior to the block order the defendants could produce each of the wells at whatever rate they chose. After the gas block order was issued the defendants could still produce all the wells (including 4-23) at the rate they deemed appropriate. The only change was that the 4-23 well could be produced without being subject to a production penalty. This was, of course, a substantial benefit to the plaintiff royalty holders.

Misrepresentation as to common ownership

65 As I have concluded that the plaintiffs' royalty is not an interest in land, it is not necessary for me to deal with the plaintiffs' allegation that Coseka misrepresented the facts to the board when it stated in its application for the block order that the lands to be included have common working interest ownership. Having found that the royalty, in this case, is not an interest in land, the statement was an accurate representation of the facts.

66 In the result, I conclude that the plaintiffs are entitled to be paid their royalty on the actual production from the Suffolk lands as provided in the royalty agreement. The plaintiffs' action is dismissed. The defendants and the third and fourth parties will have their costs, to be taxed on col. VI of Sched. "C", including all proper disbursements, no limiting rule to apply, provided that the parties are at liberty to apply for further directions as to costs, if required.

Action dismissed.

Tab 12

2009 CarswellOnt 4582
Ontario Superior Court of Justice

St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.

2009 CarswellOnt 4582, [2009] O.J. No. 3266, 179 A.C.W.S. (3d) 826

St. Andrew Goldfields Ltd. v. Newmont Canada Limited, Barrick Gold Corporation, Royal Gold, Inc., and RGLD Gold Canada, Inc.

L.B. Roberts J.

Heard: January 30, 2009; February 2-5,11-12, 2009
Judgment: July 23, 2009
Docket: CV-08365533

Counsel: Peter E.J. Wells for Applicant, St. Andrew Goldfields Ltd.
Jessica Kimmel, Daniel Cappe for Respondent, Newmont Canada Limited
Kent E. Thomson, Luis Sarabia, Davit D. Akman, Derek Ricci for Respondent, Barrick Gold Corporation
David I.W. Hamer, Junior Sirivar for Respondents, Royal Gold, Inc., RGLD Gold Canada, Inc.

Subject: Natural Resources; Property; Civil Practice and Procedure; Contracts; Corporate and Commercial

APPLICATION by plaintiff seeking declaratory relief with respect to interpretation of royalty agreement.

***L.B. Roberts J.*:**

Overview

1 This application, converted into a trial of an issue [1], concerns the interpretation of the parties' respective rights and obligations under a net smelter return royalty agreement for the payment of royalties relating to net smelter returns for gold, silver and other minerals.

2 After several months of negotiation commencing in late 2003, in the fall of 2004, Newmont Canada Limited and Barrick Gold Corporation closed Newmont's purchase from Barrick of the Holt-McDermott mine, mill and mill-related facilities in Northern Ontario. Through the purchase, Newmont consolidated its existing adjacent Holloway landholdings with the Holt-McDermott mine to create the Holloway-Holt Gold Camp.

3 As part of the consideration for its purchase, Newmont entered into a net smelter return royalty agreement with Barrick. The Barrick royalty agreement required Newmont to pay to Barrick or its assigns royalties on the net smelter returns for gold, silver or other minerals produced from the Holt-McDermott mine. The Barrick royalty agreement also stipulated that Newmont would remain liable for any royalties to Barrick unless it obtained an assumption agreement from any transferee of those obligations and Barrick's approval of the assumption agreement.

4 Newmont misread the provisions of the Barrick royalty agreement, erroneously believing that the net smelter return royalty for gold was an insignificant flat rate of .013%.

5 In actual fact, the Barrick royalty for gold was a sliding scale royalty tied to the price of gold. The Barrick royalty agreement provides for a two-step process in calculating the royalty for gold: first, the royalty factor is determined by multiplying 0.00013 by the quarterly average gold price; and, second, the royalty factor is multiplied by the net smelter returns or revenues for gold.

6 Newmont had not appreciated that there were two steps involved in the calculation of the royalty for gold. Newmont closed the transaction unaware of its error.

7 In the fall of 2006, Newmont and St. Andrew Goldfields Ltd., through the Holloway Mining Company [2], concluded the purchase by St. Andrew of the Holloway-Holt Gold Camp, including the Holt-McDermott mine and mill, as well as other properties and assets. As part of the transaction, St. Andrew through Holloway agreed to assume certain obligations under the Barrick royalty agreement. Although it subsequently notified Barrick of the transfer, Newmont never obtained Barrick's approval of the assumption of Newmont's obligations under the Barrick royalty agreement by St. Andrew or Holloway.

8 At the time of the closing of the transaction with St. Andrew, neither Newmont nor St. Andrew was cognizant of the correct interpretation of the royalty provisions for gold under the Barrick royalty agreement. Both were operating under the shared belief that the royalty under that agreement was a flat rate .013% net smelter return royalty.

9 It was not until the fall of 2008, when Barrick gave notice to Newmont (and Newmont subsequently notified St. Andrew) that Barrick intended to sell its royalty interest under the Barrick royalty agreement to Royal Gold, Inc. [3] that Newmont and St. Andrew first learned of their misunderstanding with respect to the correct royalty calculation for gold under the Barrick royalty agreement.

10 The issues for determination in these proceedings are as follows:

(i.) Is the Barrick royalty agreement ambiguous regarding the calculation of the royalty for gold?

(ii.) Should Newmont be relieved of its obligations under the Barrick royalty agreement because of its misreading of the royalty provisions?

(iii.) If not, does Newmont continue to have direct responsibility to pay all royalties under the Barrick royalty agreement because it did not obtain Barrick's approval of any assumption agreement to be executed by St. Andrew?

(iv.) Should St. Andrew be liable to pay the royalty obligations under the Barrick royalty agreement because of its failure to read the royalty agreement?

(v.) Should St. Andrew be liable for the royalty obligations under the Barrick royalty agreement because of its amalgamation with Holloway in 2007?

(vi.) Should St. Andrew be directly liable for the royalty obligations to Barrick or its assigns under the Barrick royalty agreement because the royalty obligations run with the land transferred to St. Andrew or because St. Andrew agreed to assume the obligations?

(vii.) Is St. Andrew's claim against Newmont barred by the contractual one-year limitation period contained in the Purchase Agreement?

Summary Conclusion

11 For the reasons that follow, I hold that the Barrick royalty agreement is clear and unambiguous, that Newmont alone is responsible under the Barrick royalty agreement for payment of the royalties on net smelter returns for gold, silver and other minerals to Royal Gold, and that St. Andrew is required to indemnify Newmont up to the flat rate of .013% of the net smelter returns for gold, silver and other minerals.

Analysis

(i.) Is the Barrick royalty agreement ambiguous regarding the calculation of the royalty for gold?

12 The real issue among the parties is the meaning of the calculation of the royalty for gold. Newmont and St. Andrew assert that the calculation of the royalty factor for gold in the Barrick royalty agreement is ambiguous and unascertainable.

13 In particular, they contend that the agreement is ambiguous because it fails to specify the currency to be used for the quarterly average gold price in the royalty factor calculation: the definition of the "Quarterly Average Gold Price" as the "average London Bullion Brokers P.M. Gold Fixing for the calendar quarter of production" is not sufficiently precise because gold prices are reported in US dollars, Euros and British Pounds.

14 There was also the suggestion that the term "unit-less" was confusing.

15 In reading the Barrick royalty agreement, I have applied the following principles of contractual interpretation: the parties intended to enter into a comprehensible and an enforceable agreement; and, even when the terms of an agreement are not ambiguous, the evidence of surrounding circumstances and of custom or usage may be admitted as an aid in interpreting and giving business efficacy to those terms: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.), at para. 51.

16 On a plain reading of the Barrick royalty agreement, I do not find the royalty provisions to be in any way ambiguous. The royalty provisions in sections B. 1 and 2 of the Barrick royalty agreement reveal the simple mathematical calculation that can be summarized in the following mathematical terms:

net smelter return royalty for gold = [quarterly average gold price (unit-less) × .00013] x net smelter returns[4].

17 In particular, the term "unit-less" is not ambiguous. It is obvious from a mathematical point of view that the figure used for the quarterly average gold price must be expressed and multiplied as a number without currency or other "unit" in order to obtain a factor. By way of example, using a quarterly average gold price of $400.00, which is 400 "unit-less", multiplied by .00013, the royalty factor produced should be expressed as .052 and not as $.052.

18 Further, I do not find any ambiguity concerning the currency to be used in the royalty factor calculation. Reading the agreement as a whole in context, the only logical interpretation of the Barrick royalty provisions is that the royalty is to be calculated using a quarterly average gold price in US dollars.

19 Subsection 3 (b) of the Barrick royalty agreement states that the posted gold prices for the quarterly average gold price shall be obtained from the Wall Street Journal or Reuters, or another reliable source. The undisputed evidence was that the Wall Street Journal and Reuters publish gold prices only in US dollars.

20 Section 10 of the Barrick royalty agreement requires that the payment of the royalty be made in US dollars.

21 The evidence of all of the witnesses, including the expert witnesses, was that US currency is used in North American agreements between North American companies concerning North American mining claims. In the stipulation marked as Exhibit 1 to these proceedings, Newmont conceded that it has never entered into a North American royalty agreement where the currency used in the agreement was Euros or British Pounds.

22 Most important, as summarized in the paragraphs that follow, the unanimous and unambiguous testimony of all of the highly experienced and knowledgeable witnesses who were involved in the respective transactions at the relevant times, is that, had they read the Barrick royalty agreement carefully at the relevant time, they would have known and understood and been able to calculate correctly the royalty for gold.

23 None of the witnesses maintained that they could not understand or calculate the royalty provisions, or that they were confused concerning the currency to be used in the royalty formula. According to the evidence, Newmont's mistaken reading of the royalty provisions stemmed solely from its readers incorrectly focusing on the numbers rather than the words of the text, which words they uniformly admitted were unambiguous.

Sharon Dowdall

24 Sharon Dowdall is one of the most experienced lawyers in the mining business. She has had over thirty years of experience advising major mining companies. From February 2002 to December 2007, she was Vice President and Secretary of Newmont. In December 2007, she joined the newly formed Franco-Nevada Corporation, which was spun out from Newmont, as Chief Legal Officer and Legal Secretary.

25 By the time of the transaction with Barrick in 2004, Ms. Dowdall had considerable experience in mining matters, in particular, in drafting and negotiating hundreds of royalty agreements. She participated in the negotiation of the transactions with Barrick and St. Andrew, and, as Newmont's Vice President and Secretary, executed the contract documentation, including the Barrick royalty agreement, for Newmont's purchase from Barrick and subsequent sale to St. Andrew.

26 I was very impressed by Ms. Dowdall's frank and open demeanour during her testimony. For a seasoned professional like Ms. Dowdall, it must have been difficult for her to revisit and explain her misreading of the Barrick royalty agreement in 2004. Without hesitation, she admitted that she had misread the Barrick royalty provisions and had always assumed that the gold royalty was a flat rate royalty of .013%. She could not explain how she had misread the royalty provisions, except to suggest that she had mistakenly focused only on the figure of .00013 and missed that there was a two-step process to the calculation of the royalty for gold. She readily conceded the ease with which she is now able to read and understand the royalty provisions.

27 Ms. Dowdall discovered her error when, in 2008, she re-read the Barrick royalty agreement as one of the package of royalties that Franco-Nevada had contemplated purchasing from Barrick. When she re-read the royalty provisions in 2008, she realized that the royalty was a sliding scale royalty for gold and calculated using the two-step process outlined in the agreement. She acknowledged that other people in her group at Franco-Nevada were easily able to do the calculations and expected that those calculations were done in US currency.

28 Ms. Dowdall also testified that, even in 2004, when she had first looked at the drafts of the proposed Barrick royalty agreement, she had understood that the royalty was to be calculated and that any payments were to be made to Barrick in US currency. This is borne out by her handwritten calculation, using the then prevailing price of gold at $400.00 per ounce in US dollars, noted in the margin of the first draft of the Barrick royalty agreement dated March 15, 2004, which she received on March 31, 2004. She said that she had never contemplated doing the calculation in British Pounds or Euros.

David G. Dehlin

29 David G. Dehlin has a Bachelors of Science in Business Management and twenty-six years of experience in the mining industry. He has been the Director, International Land (or in similar roles), at Newmont Mining Corporation, the parent company of Newmont, for seven years. He has had the responsibility for managing Newmont's land holdings, including the Holt-McDermott mine property. He has acquired ample experience in negotiating royalty agreements. It has always been part of his job to read and understand royalty agreements and to perform basic mathematical calculations. Newmont has been a party to hundreds if not thousands of royalty agreements. He conceded that it would be hard to find another company with as great experience with royalty agreements as Newmont.

30 Mr. Dehlin was Newmont's "land man", with the responsibility for ensuring that the land holdings in each of the relevant transactions were properly catalogued and described in the schedules to the contract documents for the transactions with Barrick and Newmont. During the transaction with Barrick, it was part of Mr. Dehlin's job, collectively with others, to raise any issues with respect to the Barrick royalty agreement, although Mr. Dehlin testified that Ms. Dowdall had the primary responsibility for the royalty agreement with Barrick. He agreed that it would have been a reasonable expectation that he could read an agreement like the Barrick royalty agreement and understand it.

31 Mr. Dehlin could not explain why no one at Newmont had correctly understood that the Barrick royalty agreement provided for a sliding scale royalty in respect of gold. He confirmed the considerable experience and expertise in reading and interpreting royalties and royalty agreements of Ms. Dowdall, as well as of Steven Aaker, an employee of Newmont Capital Limited, who also had responsibility at Newmont for the Barrick transaction. Mr. Dehlin said that he did not put his mind to it nor did he appreciate that it was a sliding scale royalty; he merely glanced over it. He had never before seen a royalty factor like the one in the Barrick royalty agreement. He had no explanation why he did not recognize it before as a sliding scale royalty. He acknowledged that, in hindsight, it is a very straightforward calculation.

32 In cross-examination by counsel for Barrick, Mr. Dehlin was taken step by step through the calculation of the royalty under the Barrick royalty agreement, including the use of US currency for the quarterly average gold price. Mr. Dehlin agreed with Mr. Thomson's description of the calculation of the royalty; he did not question the use of US currency in Mr. Thomson's examples, nor did he disagree that the calculation should be performed using US currency. He also agreed that payments were to be made to Barrick in US dollars. As stipulated, Mr. Dehlin did acknowledge that he is not aware of any royalty agreements, including royalty deeds, between Newmont and any other North American-based company in respect of a mining project (or projects) in North America where the price of gold is in Euros or British Pounds.

33 Notwithstanding his quick and ready acknowledgement of the simplicity of the calculation, Mr. Dehlin became evasive when Mr. Thomson asked him to agree that the royalty factor was to be calculated using US dollars. He refused to answer the question directly; instead, Mr. Dehlin repeated that the agreement did not expressly state that the royalty factor was to be calculated using US dollars. It is notable, however, that Mr. Dehlin did not disagree that the royalty factor was to be calculated using US dollars.

34 More important, Ms. Dowdall and Mr. Dehlin both testified that no one at Newmont had expressed any confusion to Barrick as to the manner in which the royalty was to be determined, how the price of gold was to be determined for purposes of the royalty calculation, or which currency was to be used for the purposes of the royalty calculation.

35 Based on the entirety of Mr. Dehlin's evidence, I am left with no doubt that, like Ms. Dowdall, Mr. Dehlin expected that US currency would be used in the Barrick royalty calculation.

David Harquail

36 David Harquail was the President and Managing Director of Newmont Capital Limited, a division of Newmont Mining Corporation, from 2002-2007. He is currently the President and Chief Executive Officer of the new Franco-Nevada. He is a geological engineer by training and a very senior mining executive, and has worked in the mining industry for all twenty-eight years of his professional working career. By the time of the transaction with Barrick in 2004, he had considerable experience in reading and understanding hundreds of mining royalties and royalty agreements.

37 Mr. Harquail played a significant role in Newmont's purchase of the Holt-McDermott mine and mill from Barrick in 2004 and the sale of the Holt-McDermott mine and mill to St. Andrew in 2006. From the beginning of the discussions between the respective mine managers in 2003, he provided strategic guidance and was involved in making the ultimate decisions concerning the transactions.

38 Mr. Harquail did not read the Barrick royalty agreement at the relevant time, relying on Ms. Dowdall and the other members of the Newmont negotiating team, but believed from the information that he received from his team that the royalty for gold under the Barrick royalty agreement was a flat rate royalty of .013% of net smelter returns. He conceded on cross-examination that if the agreement had been read in a patient and considered fashion, Newmont would have realized that the royalty fluctuated with the price of gold and that the calculation of the royalty provisions was easy and straightforward. Mr. Harquail stated that he was "astounded that we allowed this mistake to happen".

Glenn Laing

39 Glenn Laing, the former President and Chief Executive Officer of St. Andrew, is a very experienced executive in the mining industry. He has been involved in natural resources and mining for most of his long career. When he joined St. Andrew in March of 2001, he had close to thirty years of experience in mining and was very familiar with mining royalties and royalty agreements.

40 Mr. Laing was the person primarily responsible for St. Andrew's acquisition of the properties from Newmont in 2006, and, in particular, for negotiating and executing the documentation relating to the purchase of the Holt-McDermott mine and mill in 2006. Mr. Laing testified that he did not read the Barrick royalty agreement and admitted that he would have easily understood the royalty provisions had he read them at the relevant time. He also understood that US currency should be used in the calculation of the royalty factor.

Jacques Perron

41 Jacques Perron, the current President and Chief Executive Office of St. Andrew, is a mining engineer by training and, by the time that he joined St. Andrew in the spring of 2008, had twenty-four years of experience in the mining industry and extensive experience with mining royalties and royalty agreements.

42 Repeating the evidence in his affidavits of November 10 and December 31, 2008, filed in these proceedings, Mr. Perron testified that he had no difficulty in understanding the provisions of the Barrick royalty agreement when he first read them in September 2008.

43 Mr. Perron's understanding is also evidenced by his letter to the other parties to these proceedings dated September 23, 2008, in which he advised of his interpretation of the royalty agreement as between Barrick and Newmont that the royalty due to Barrick "was stated to be a 0.013% net smelter return royalty" and that the royalty "is calculated to be 0.00013 multiplied by the Quarterly Average Gold Price, which at a gold price of $850, would result in a royalty of 11.05%."

44 During his testimony, Mr. Perron confirmed that the gold price noted in his September 23, 2008 letter was in US dollars and that his understanding was that the royalty factor was to be calculated using US currency.

45 In response to Mr. Perron's statement of the royalty calculation in his September 23, 2008 letter, Newmont did not dispute or claim that it could not understand the royalty calculation; on the contrary, Newmont's position, as set out in its counsel's letter of October 13, 2008, was that the terms of the Barrick royalty agreement were clear and unambiguous and, "would have been clear to [St. Andrew] had it undertaken even a cursory review" of the agreement.

Expert evidence

46 The experts called respectively by St. Andrew and Newmont, Gordon Watts and Barry Simmons, also agreed that the royalty provisions, although unusual because of the calculation of the royalty factor, were not ambiguous and were easy to calculate.

47 In my view, the clear admissions by Newmont and St. Andrew are sufficient to dispose of the arguments that the Barrick royalty agreement was vague or uncertain. It is clear to anyone -not simply those in the mining industry, but anyone with a calculator - that the calculation of the royalty for gold, using US currency, under the Barrick royalty agreement is a straightforward operation. I therefore find that the Barrick royalty agreement is clear and ambiguous and should be enforced.

(ii.) Should Newmont be relieved of its obligations under the Barrick royalty agreement because of its misreading of the royalty factor provisions?

48 Newmont asserts that there was no meeting of the minds between Barrick and Newmont about the royalty factor and how it was supposed to operate. In particular, Newmont argues that the parties had no "common objective intention" about the currency to be used in the royalty factor calculation.

49 Newmont argues that the unfamiliar form of Barrick's two-step sliding scale royalty set out in words, instead of the familiar appearance of a chart showing the changes in the sliding scale royalty varying with the price of gold, was the initial cause for Newmont's confusion that the royalty was a flat rate royalty; and that, by choosing to use a novel royalty calculation, Barrick was obligated to explain or at least highlight the royalty provisions to Newmont.

50 For the reasons already noted, I have determined that the Barrick royalty provisions are clear and unambiguous on the face of the agreement and are readily understood by Newmont's representatives who participated in the negotiations with Barrick, including the usage of US currency in the calculation of the royalty factor.

51 Further, it does not follow from Newmont's unilateral misreading of the royalty as a flat rate of .013% that the Barrick royalty agreement should not be enforced. Unless Barrick knew or should have reasonably known of Newmont's unilateral mistake and sought to take advantage of it, or led Newmont to make the mistake, there is no basis for this court to relieve Newmont of its own unilateral error: see, for example, *Farmer Construction Ltd. v. Surrey (District)*, [1997] 10 W.W.R. 770 (B.C. S.C.), at paras. 21 to 25; and *Stafford v. British Columbia (Chicken Marketing Board)*, [1998] B.C.J. No. 2783 (B.C. S.C.), at paras. 22 to 23.

52 I also reject Newmont's suggestion that Barrick was required to explain the meaning of the royalty factor to Newmont because the calculation of the royalty factor was unusual. Again, absent fraud or intentional misleading or misrepresentation, in the circumstances of this case, involving highly sophisticated corporations bargaining at arm's length and represented by skilled and experienced counsel, Barrick had no duty to Newmont to offer any explanation regarding the meaning of the Barrick royalty agreement. Barrick was entitled to assume "a significant level of sophistication" on Newmont's side: *Stafford v. British Columbia (Chicken Marketing Board)*, *supra*.

53 All of the witnesses, including the expert witnesses, testified at the hearing that, while royalty agreements often contain "boilerplate" clauses concerning certain terms, there is no one single standard form of royalty agreement; they differ from property to property, project to project, company to company, and type to type. All royalties and royalty agreements are unique and have to be read with care. Having never seen a sliding scale royalty expressed in terms of the formula contained in the Barrick royalty agreement, Newmont should have been particularly careful to read and understand the royalty provisions. Unfortunately, mistakes happen; and Newmont's mistake was to focus on the .00013 figure alone, treat it as a flat rate royalty, and then ignore the royalty as worthless.

54 There is no evidence that Barrick was aware of Newmont's unilateral error or that Barrick misstated or clouded the meaning of the Barrick royalty agreement and, in particular, the calculation of the royalty for gold.

55 Richie D. Haddock, Vice President and General Counsel, North America, of Barrick, was the legal manager for the transaction with Newmont. He had primary responsibility for negotiating the Barrick royalty agreement. He had the royalty agreement drafted and sent to Newmont. Prior to the transaction in 2004, Mr. Haddock had negotiated many transactions with Newmont. He found that Newmont's representatives, in particular, Ms. Dowdall, were tough, skilful negotiators. He knew that if Ms. Dowdall had any comments or concerns, he would have heard from her.

56 The evidence establishes that Newmont placed no reliance on Barrick. At all times, Newmont was represented by acknowledged experts in the gold mining business who had particular and substantial expertise in reading and negotiating mining royalties and royalty agreements. Indeed, one of those experts, Ms. Dowdall, commenting on the initial draft of the Asset Purchase Agreement from Barrick, in her February 16, 2004 e-mail transmission to Mr. Harquail, captured the expected arm's length nature of the negotiations by writing, "We should have some fun with this now that the battle is engaged."

57 Newmont's witnesses, Mr. Dehlin and Ms. Dowdall, readily conceded in cross-examination that it was entirely reasonable for Barrick to expect that Newmont would read whatever it was sent and ask whatever questions that it had. In particular, they acknowledged that it was entirely reasonable that Barrick would expect that they and others at Newmont would read the Barrick royalty agreement, read it carefully, and respond to it.

58 As the following review of the chronology of the negotiations demonstrates, Newmont had ample opportunity and numerous opportunities to consider the nature of the royalty to Barrick and to review and revise the various drafts of the Barrick royalty agreement that were exchanged from the end of March to the beginning of July 2004 when the Barrick royalty agreement was executed by the parties, and that its failure to appreciate the correct calculation of the royalty stemmed solely from its initial misreading of the relevant provisions:

> i.) The evidence discloses that, from at least August 2003 onwards, Newmont internally planned and considered the purchase of the Barrick landholdings. It was also clear that, as part of the purchase price, Newmont would give to Barrick a royalty over the mineral rights. Initially, Newmont contemplated offering a royalty in the order of 1 to 2%; as part of his strategic direction, Mr. Harquail determined that Newmont would offer only to pay a royalty to be agreed upon by the parties and would leave the first proposal and the drafting of the royalty to Barrick.
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> ii.) On receipt of the first draft royalty agreement from Mr. Haddock on March 31, 2004, Ms. Dowdall sent it on the same day to Messrs. Dehlin and Aaker and asked for any comments that they might have. On April 1, 2004, Mr. Dehlin sent to Ms. Dowdall detailed paragraph by paragraph comments about the draft royalty agreement. His comments about the royalty consisted of his query that he "was curious how the .00013 number was arrived at." As Newmont later determined incorrectly that the Barrick royalty was insignificant, Mr. Dehlin did not receive an answer to his question, nor did he pursue a response.
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> iii.) On May 21, 2004, Ms. Dowdall sent to Mr. Haddock comments with respect to the schedule to the royalty agreement, none of which related to the amount or calculation of the proposed royalty. There were no discussions between Mr. Haddock and Ms. Dowdall concerning the proposed royalty. Mr. Haddock had the impression that Newmont was not attaching a lot of value to the mineral properties and was not focused on the value of the mineral properties.
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> iv.) Black-lined drafts of the Barrick royalty agreement and the other agreements were sent by e-mail transmission to Ms. Dowdall on June 18, 2004 by external counsel for Barrick; the covering e-mail noted that revisions had been made to the royalty agreement. Ms. Dowdall forwarded the drafts on the same day to her colleagues, Mr. Dehlin and Brent Kristof, Newmont's mine manager, who, between them, also exchanged the drafts.
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> v.) Ms. Dowdall responded on June 23, 2004 with no comments regarding the Barrick royalty agreement other than changes to the real property schedules.
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> vi.) On June 24, 2004, Barrick's counsel sent further revised drafts. Newmont forwarded no further comments. On July 8, 2004, Barrick's counsel forwarded clean copies of the agreements to Newmont, which were executed on July 9, 2004.

59 Newmont submits that Barrick made concerted efforts to strip from its proposed royalty factor anything that would make it recognizable as a sliding scale royalty. Newmont's counsel even suggested to Mr. Haddock that he had tried to "slip one by" Newmont, to which Mr. Haddock's response was an unequivocal: "Absolutely not."

60 In particular, Newmont disputes whether Mr. Haddock sent his e-mail transmission to Ms. Dowdall of March 17, 2004, to which he attached the first draft of the royalty agreement and queries as suspect that he did not re-send the March 17, 2004 e-mail to Ms. Dowdall on March 31, 2004, when he forwarded again the draft royalty agreement.

61 In his March 17, 2004 e-mail, Mr. Haddock highlighted that the proposed royalty for gold was a sliding scale royalty tied to gold prices. Although I have no doubt that Mr. Haddock sent his March 17, 2004, it also appears that Ms. Dowdall did not receive Mr. Haddock's e-mail because her e-mail address was incorrectly noted. When Mr. Haddock was subsequently advised by Ms. Dowdall by e-mail on March 31, 2004 that she had not received his draft, Mr. Haddock immediately forwarded the draft of the Barrick royalty agreement, attached to another brief covering e-mail.

62 I accept as completely reasonable Mr. Haddock's explanation that, because of the passage in time, he was concerned about delivering the draft of the agreement to Ms. Dowdall without further delay and that it was faster to append the draft to another e-mail rather than find the original e-mail transmission.

63 There is no evidence that establishes any improper conduct by Barrick. On the contrary, it was Newmont that deliberately kept silent about the Barrick royalty agreement in order to take advantage of what Newmont had erroneously concluded was Barrick's typographical error in its statement of the royalty factor in the agreement.

64 As written in a string of e-mails that were exchanged among Newmont's representatives involved in the transaction, Ms. Dowdall, Mr. Dehlin, Mr. Kristof, and Mr. Harquail, on June 10 and 11, 2004, and as confirmed in the oral evidence of Ms. Dowdall, Mr. Dehlin and Mr. Harquail, they mistakenly believed that Barrick had made an error in stating the royalty as a flat rate of .013% because they knew that such a royalty was absurdly small and unheard of in the mining industry. The Newmont representatives assumed that Barrick meant to write that the royalty was a flat rate of 1.3%.

65 The evidence of Ms. Dowdall, Mr. Dehlin and Mr. Harquail was that they expressly decided not to disclose what they thought was Barrick's error so that they could reap the benefit of a royalty obligation that, in what they thought was the miniscule form of .00013, would be essentially worthless to Barrick or to any subsequent holder of the royalty. The great irony is of course that Newmont was the party in error, which error coloured and shaped its negotiations and agreement with St. Andrew two years later.

66 Having deliberately concealed what Newmont thought was Barrick's error, it is unreasonable for Newmont to argue that Barrick should have highlighted the meaning of a royalty factor which, as Newmont now admits, was easily understood if read.

67 The Barrick royalty provisions are clear and unambiguous. Barrick is not responsible for Newmont's error. There is no basis for relieving Newmont of its obligations to Barrick or its assigns under the Barrick royalty agreement. Newmont has no one to blame but itself and must bear full responsibility for its own mistakes.

(iii.) Does Newmont continue to have direct responsibility to pay all royalties under the Barrick royalty agreement because it did not obtain Barrick's approval of any assumption agreement to be executed by St. Andrew?

68 The assignment provisions of the Barrick royalty agreement are also clear and unambiguous: section D9(a) of the Barrick royalty agreement requires Newmont to obtain from the transferee of its interests in the Holt-McDermott property a written assumption of Newmont's obligations under the Barrick royalty agreement, which assumption agreement must be in form and substance satisfactory to Barrick. If Newmont fails to obtain the required agreement of the transferee and the approval of Barrick, Newmont remains directly liable for the payment of royalties to Barrick or its assigns under the Barrick royalty agreement.

69 The evidence of Newmont's representative, Mr. Dehlin, is equally as unequivocal: Newmont did not seek Barrick's consent to St. Andrew's assumption of Newmont's obligations under the Barrick royalty agreement because Newmont thought that the Barrick royalty was insignificant. Newmont was therefore prepared to assume the risk of remaining primarily liable to Barrick. Mr. Dehlin testified that he and his colleagues understood that if Newmont did not obtain Barrick's agreement, then Newmont would not be relieved of its obligations under the Barrick royalty agreement. With that clear understanding, Newmont chose to move ahead with the transaction and not seek Barrick's consent at the time of the transaction with St. Andrew.

70 Presumably for the same reasons, Newmont did not comply with the notice provisions contained in section 3 in the Barrick royalty agreement that required Newmont to deliver written notice addressed to the General Counsel for Barrick.

71 The other reason that can be inferred to explain why Newmont did not seek Barrick's consent or give proper notice is that Newmont did not likely wish to take any steps that would cause Barrick to discover what Newmont believed was Barrick's typographical error with respect to the royalty rate.

72 As a result, I find that Newmont remains directly liable for payment of the royalties under the Barrick royalty agreement.

(iv.) Should St. Andrew be liable to pay the royalties under the Barrick royalty agreement because of its failure to read the Barrick royalty agreement?

73 St. Andrew argues that the description of the royalty as a flat rate net smelter return royalty of .013% in the schedules to the various agreements documenting the transaction with Newmont [5] constitutes a term of their agreement or a contractual representation made by Newmont that the Barrick royalty is a flat rate of .013% of all net smelter returns for gold, silver and other minerals.

74 Newmont argues that its mistaken notation in the schedules that the royalty under the Barrick royalty agreement is a flat rate of .013% of net smelter returns does not constitute a term of the agreement with or a representation to St. Andrew. Newmont insists that St. Andrew should be bound by the provisions of the Barrick royalty agreement and that its failure to read the provisions does not relieve it of its obligations.

75 The difficulty with Newmont's argument is that the characterization of the royalty as a flat rate of .013% was not a mere typographical error on the part of Newmont. The evidence of Mr. Dehlin was that Newmont expressly included that figure in the schedules based on its mistaken belief that the royalty was a flat rate of .013%. This was the only description that was erroneous; all of the other royalty descriptions were correct.

76 Newmont's understanding of the Barrick royalty is also evidenced by the description contained in the list of the third party royalties in Appendix C to Newmont's Holloway-Holt Gold Camp Information Memorandum dated May 12, 2006, where the Barrick royalty is stated to be "0.013% NSR (Au)(Barrick)", the same description inserted by Newmont in the agreements with St. Andrew and Holloway.

77 Whether, as Mr. Dehlin testified, Newmont intended the description contained in the schedules to be a complete description is irrelevant in the circumstances of this case where Newmont clearly believed that the description was accurate. It is not a case where Newmont mistakenly put the wrong description in the schedules; the description of the royalty in the schedules was an accurate notation of Newmont's understanding and belief about the royalty. Indeed, in section 3.11 of the Purchase Agreement, Newmont expressly represents that the mining claims and assets, including the Barrick royalty, "are accurately described" on Schedule 1.1(w).

78 Further, Newmont did not attach the Barrick royalty agreement (or the other agreements) listed in the various schedules to the Purchase Agreement or any of the other agreements that documented the transaction with St. Andrew and Holloway. If Newmont had intended that the description of the Barrick royalty contained in the Barrick royalty agreement itself should govern, rather than Newmont's description of the Barrick royalty that Newmont had intentionally inserted into the various schedules, Newmont should have attached a copy of the Barrick royalty agreement or used express language indicating that no reliance should be placed on the description and reference should be made to the Barrick royalty agreement: *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.* (2006), 218 O.A.C. 71 (Ont. C.A.), at paras. 26-27. Newmont did not do this for the very simple reason that it believed that its description in the schedules was adequate and correct.

79 As a result, I find that the statement of the royalty as a flat rate net smelter return royalty of .013% formed part of the agreement between St. Andrew and Newmont. The agreement between Newmont and St. Andrew, as evidenced by the description in those schedules and as confirmed by all of the witnesses called for Newmont and St. Andrew, was that St. Andrew would assume a flat rate royalty of .013% of all net smelter returns.

80 Although parties to an agreement are generally held to the agreement they sign regardless if they choose to read the agreement, in the present case, the evidence also establishes that it was reasonable that St. Andrew did not request to see a copy of the Barrick royalty agreement because, based on its agreement with Newmont, it believed that the royalty was a flat rate of .013% and therefore too trivial to investigate.

81 Mr. Laing confirmed that no one at St. Andrew reviewed the Barrick royalty agreement before the closing of the transaction with Newmont. Although Mr. Laing admitted that he could have requested a copy of the Barrick royalty agreement prior to closing, he did not do so because he felt that the Barrick royalty as described was insignificant and he therefore did not want to incur the costs and risk the transaction through any delay required to investigate such a small royalty. He testified that a flat rate royalty of .013% is unheard of in the mining industry.

82 Mr. Laing admitted in cross-examination that, after receiving on August 17, 2006, a draft of what would later become Schedule 1.1(w) to the Purchase Agreement, because there were so many documents on the schedule to review, he made a conscious decision not to look at any of the royalty agreements associated with the mining assets and claims that St. Andrew was purchasing because none of them was material.

83 Mr. Laing's assessment of the Barrick royalty of .013% as insignificant and not worth investigating was also the evidence and opinion of all of the other witnesses, including the expert witnesses, at the hearing of this matter. No one had ever seen such an "absurdly small" royalty. As succinctly stated by Mr. Haddock in his January 27, 2009 affidavit and at the hearing, "a royalty as small as this would be essentially meaningless. It is unlikely that a royalty this small would even cover the legal costs associated with preparing an agreement that required a royalty of this nature to be paid."

84 The dealings between Newmont and St. Andrew serve also to evidence the mutually held belief that the Barrick royalty was worthless:

(i.) There was no discussion of the Barrick royalty during their negotiations.

(ii.) As a result, the Barrick royalty did not factor into the negotiation of the consideration given by St. Andrew for the purchase of the Holt-McDermott mine and other property interests making up the Holloway-Holt Gold Camp. In addition to the $40 million cash payment, the consideration given to Newmont for the transaction included a sliding scale royalty on minerals produced from the properties transferred, which royalty could vary, depending on the price of gold, from 2% to 10%. In 2007, Newmont monetized that royalty by selling it to Franco-Nevada.

(iii.) Newmont was content to remain liable for the Barrick royalty that it believed to be worthless and chose not to obtain Barrick's agreement to the assumption of the royalty by St. Andrew.

85 Newmont argues that it had invited St. Andrew on a number of occasions to look at the relevant documents in Newmont's possession and that St. Andrew could and should have viewed the documents prior to the closing of the transaction on November 6, 2006. In particular, Newmont points to the express invitation to St. Andrew by Mr. Dehlin prior to the closing of the transaction.

86 According to Mr. Laing, it was very difficult for St. Andrew to get information and documentation from Newmont, including a list of the mining claims, because the information and documentation were located in at least four different places - at the Holloway-Holt Gold Camp, Toronto, Denver and Nevada. St. Andrew was relying on Newmont to prepare the schedules of documentation. No one said to Mr. Laing that he should look at any particular agreement.

87 On October 13, 2006, Mr. Dehlin sent by e-mail transmission to Mary Quinn, a legal secretary at St. Andrew who was assisting Mr. Laing, a list of the Holloway/Holt property files. In his e-mail, Mr. Dehlin advised Ms. Quinn that St. Andrew "may wish to consider having someone from [St. Andrew] travel to Denver to review and/or make copies of these files for your records. We could make arrangement for the files to be digitally copied. I'm guessing that would take a couple of weeks and cost upwards of US$10,000+. The files are quite extensive, and many of which are likely not on site at Holloway-Holt."

88 Attached to Mr. Dehlin's original e-mail transmission was a list of property files, one of which contained the following oblique reference to the Holt-McDermott transaction: "the Holt-McDermott amended and restated asset purchase agreement - description: Newmont's purchase of the Holt-McDermott Mine, Ontario - Purchase finalized October 8, 2004." There is no identification of any royalty. [6]

89 In my view, Newmont's general invitations to come to Denver to view all of its "extensive files" were meaningless and not likely to be accepted without particulars of the documents in question. It is significant that, on October 17, 2006, St. Andrew did request that Newmont copy all of its documents. There is no explanation by Newmont why the documents were not produced until the closing on November 6, 2006. As a result, it is hardly reasonable for Newmont to argue that St. Andrew could and should have looked at the Barrick royalty agreement prior to closing.

90 In the circumstances of this case, Mr. Laing's decision on behalf of St. Andrew not to look at the Barrick royalty agreement was reasonable and understandable and a course of action that was also followed by Newmont.

91 Ms. Dowdall noted in her June 10, 2004 e-mail to her colleagues, Messrs. Harquail, Dehlin and Kristof, and confirmed during her examination at the hearing that, "since the rate is so low, the rest of it doesn't really matter." Mr. Harquail also testified that, once he knew the rate and type of the royalty, he was able to derive 90% of what he needed to know to assess the economic impact of a royalty. As a result, notwithstanding Mr. Dehlin's query concerning the genesis of the .00013 figure, no one at Newmont felt the need to examine more carefully the royalty provisions under the Barrick royalty agreement.

92 It is the evidence of the parties that governs the outcome in this case. The evidence of all witnesses clearly establishes that Newmont and St. Andrew believed that the royalty was a flat rate of .013% and therefore insignificant. It formed no part of their discussions or negotiations, and did not affect the purchase price. The description of the Barrick royalty as a flat rate "0.013% NSR" or "0.013% NSR (Au)" in the schedules to the various agreements that documented the transaction accurately reflects the agreement that Newmont and St. Andrew had made concerning the Barrick royalties that St. Andrew agreed to assume.

93 Accepting Newmont's position would produce an inequitable result that is contrary to the parties' common intention and agreement. It is only fair to enforce the bargain that the parties reached after some six months of negotiations, with the assistance of a phalanx of sophisticated and experienced representatives. (*Ryan v. Moore*, [2005] 2 S.C.R. 53 (S.C.C.) at paras. 59, 61 and 62.)

v.) Should St. Andrew be liable for the royalty obligations under the Barrick royalty agreement because of its amalgamation with Holloway in 2007?

94 Newmont contends that, by amalgamating with Holloway in 2007, St. Andrew assumed all of Holloway's obligations. While this is true, it begs the question of what those obligations were.

95 For the reasons stated above, I have determined that the agreement between St. Andrew, Newmont and Holloway was that the royalty for gold, silver and other minerals was a flat rate of .013% of the net smelter returns. By the amalgamation, St. Andrew assumed Holloway's obligation to pay a royalty for gold, silver and other minerals at a flat rate of .013% of net smelter returns.

vi.) Should St. Andrew be directly liable for the royalty obligations to Barrick or its assigns under the Barrick royalty agreement because the royalty obligations run with the land transferred to St. Andrew or because St. Andrew agreed to assume the obligations?

96 Newmont maintains that St. Andrew is also directly responsible to Barrick or its assigns because the obligations arising under the Barrick royalty agreement are an interest in the land transferred to St. Andrew; and that, as a result, the failure of Newmont to obtain Barrick's consent to the assumption agreement does not affect St. Andrew's liability to pay royalties under the Barrick royalty agreement.

97 Royal Gold argues that it is unnecessary for me to decide this issue because, for practical purposes, Royal Gold would likely look only to Newmont to pay the royalty under the Barrick royalty agreement. While that may be so, it is necessary for me to determine whether, as between Newmont and St. Andrew, St. Andrew bears the responsibility for payment of any royalty under the Barrick royalty agreement.

98 Royalty interests can be interests in land if the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the substances recovered from the land, and the interest, out of which the royalty is carved, is itself an interest in land. The intentions of the parties, judged by the language creating the royalty, determine whether the parties intended to create an interest in land or to create contractual rights only. (*Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146 (S.C.C.), at paras. 12, 14 and 22.)

99 Turning then to the language of the Barrick royalty agreement, Newmont "*covenants and agrees...to pay*...a net smelter return royalty...with respect to all valuable minerals *produced* from mining rights and surface leases known as the Holt-McDermott mining claims and leases" (my emphasis added).

100 While I agree with Newmont that there is no magical "incantation" that must be used to create an interest in land, it is trite to say that language used in an agreement is intended to have and does have a certain meaning. As all the witnesses at this hearing acknowledged, each royalty agreement is different. It is therefore necessary to examine the specific wording used by the parties to determine the meaning that they ascribed to the royalty in this case and the rights that they intended to create.

101 The use of the words "covenants and agrees to pay" and "produced" in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.

102 The case law that the parties have submitted makes a valid distinction between the "granting" of royalties attached to or "in" the land or the minerals themselves, thus creating an interest in the land, and the payment of royalties attached to the minerals or revenues "produced" or "removed" from the land, resulting in the creation of contractual rights to the payment of a share of the revenue from the minerals after they have been extracted: see, for example, *Bensette v. Reece*, [1973] 2 W.W.R. 497 (Sask. C.A.), at p. 500; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Alta. Q.B.), at pp. 26 to 28; *Guaranty Trust Co. of Canada v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Alta. Q.B.), at pp. 216 to 222 and 224; *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.* (1963), 45 W.W.R. 26 (S.C.C.), at pp. 31 to 33; and *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, [2008] N.B.J. No. 360 (N.B. Q.B.), at paras. 34 and 40.

103 Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Ltd.*, *supra*, at pp. 28 to 29; and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, *supra*, at pp. 32 to 33.

104 Under the Barrick royalty agreement, the royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out and, as an express condition or limitation of the royalty, the royalty holder has no right to claim a reversionary interest in any of the property should the owner seek to relinquish all or any portion of the property. The royalty holder's rights to re-enter upon the property are only for accounting and auditing purposes with respect to the protection of the royalty holder's contractual rights to payment of the royalty.

105 In light of the other noted terms of the Barrick royalty agreement, the provision in section 14 for registration of a notice of the agreement is not sufficient by itself to demonstrate that the parties intended to create an interest in land. As noted in the cases submitted by the parties, a contractual provision for registration of a royalty is not determinative of the issue. The notice of the agreement was not registered on the title to the transferred property at the time of the closing of the purchase by St. Andrew.

106 From my reading of the provisions of the Barrick royalty agreement, I cannot see that the parties intended by the royalty to create an interest in land. The provisions are consistent with the creation only of a contractual right to payment of the royalty. It would have been a very simple thing for the parties to have used specific language to create an interest in land. The effect of the Barrick royalty agreement is to create only a contractual right to the payment of the royalty.

107 Newmont argues that, even if the royalty obligations do not run with the transferred land, having agreed to assume Newmont's obligations under the Barrick royalty agreement, St. Andrew is directly liable to Barrick for the royalty.

108 Under the Purchase Agreement, St. Andrew clearly undertook to be responsible for the amount of the Barrick royalty up to a flat rate of .013% for gold, silver and other minerals and to indemnify Newmont up to that amount. St. Andrew does not dispute its contractual obligations to Newmont in that regard. During his testimony, Mr. Perron agreed that there was no question that St. Andrew is responsible for its obligations under the other royalty agreements and that it accepts its obligations to Newmont under the Barrick royalty agreement up to an indemnity of a flat rate royalty of .013% on all net smelter returns for gold, silver and other minerals.

109 It is well established law that contractual benefits but not burdens may be freely assigned to a third party, except in certain narrow circumstances, such as, in accordance with contractual terms that permit the substitution of a contracting party, or when a novation occurs and the obligee consents to the substitution of the third party for the original obligor: *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 (S.C.C.), at paras. 30 to 32; *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.*, 41 O.R. (3d) 321, 1998 CarswellOnt 4156 (Ont. C.A.), at para. 28; *Rodaro v. Royal Bank*, 59 O.R. (3d) 74, [2002] O.J. No. 1365 (Ont. C.A.), at para. 33.

110 That St. Andrew agreed with Newmont to be responsible for the Barrick royalty does not make St. Andrew directly liable to Barrick. As noted above, the Barrick royalty agreement required that Newmont obtain Barrick's consent to the assumption of Newmont's liabilities by St. Andrew; however, Newmont did not seek or obtain Barrick's consent. Barrick did not enter into any agreement directly with St. Andrew nor otherwise consent to substitute St. Andrew for Newmont as the new obligor under the Barrick royalty agreement. Notice of the transfer to Barrick after the transaction was completed does not serve to relieve Newmont of its obligations nor to render St. Andrew liable to Barrick or its assigns for Newmont's obligations. As a result, while St. Andrew is liable to Newmont for a portion of Newmont's share of the Barrick royalty and Newmont can enforce that payment from St. Andrew, Barrick cannot look directly to St. Andrew for payment of that share.

111 In consequence, St. Andrew is not liable directly to Barrick or its assigns for payment of the royalty under the Barrick royalty agreement; Newmont remains solely liable to Barrick for the Barrick royalty; and St. Andrew is required to indemnify Newmont to the extent of a flat rate of .013% on net smelter returns for gold, silver and other minerals.

vii.) Is St. Andrew's claim against Newmont barred by the contractual one-year limitation period contained in the Purchase Agreement?

112 Newmont argues that the one-year contractual limitation period contained in section 9.1 of the Purchase Agreement applies to any claim that St. Andrew may wish to bring relating to the contractual representations or warranties that Newmont may have made, including the representation of the Barrick royalty as a flat rate royalty of .013% for all net smelter returns; and that, as a result, St. Andrew is precluded from seeking relief based on any representation that Newmont may have made because St. Andrew did not bring its application on or before November 6, 2007, that is, one year following the closing of the transaction after the October 31, 2006 amendment to the Purchase Agreement.

113 Newmont says that the two-year limitation period set out in the *Limitations Act*, S.O. 2002, c. 24 does not apply because of the October 31, 2006 amendment to the Purchase Agreement that serves as a permitted agreement to alter the two-year statutory limitation period under section 22 of the *Limitations Act*.

114 Under section 22 of the *Limitations Act*, parties may not alter any limitation period under the *Act* by way of any agreement made between January 1, 2004 and October 19, 2006. Accordingly, to resolve this question, I must decide which of the two agreements between Newmont and St. Andrew purports to alter the statutory limitation period.

115 Newmont's representations and the contractual limitation period concerning the Barrick royalty were contained in the September 18, 2006 Purchase Agreement. The October 31, 2006 amendment did not revoke, replace or nullify the September 18, 2006 Purchase Agreement; section 4.1 of the October 31, 2006 amendment clearly provides that the Purchase Agreement remains in full force and effect and was ratified and confirmed by the amendment.

116 The September 18, 2006 Purchase Agreement is the relevant agreement with respect to the operation of section 22 of the *Limitations Act*. As the September 18, 2006 Purchase Agreement was made during the prohibited time period pursuant to section 22 of the *Limitations Act*, the contractual one-year limitation period is not effective and the two-year statutory limitation period applies.

117 Even if the contractual limitation period is valid, I agree with Royal Gold's submissions: first, it is doubtful that the limitation period in section 9.1 of the Purchase Agreement applies to St. Andrew's claim for a declaration of its rights and obligations based on Newmont's inaccurate description of the Barrick royalty; and that, second, the reference in subsection 9.1(b) of the Purchase Agreement to "other applicable period", which may be greater than one year, is consistent with the reasonable interpretation that the discoverability principle applies to any contractual limitation period under the Purchase Agreement, so that time under it did not begin to run until St. Andrew discovered the facts which give rise to its claim.

118 In either event, St. Andrew's claim is not barred.

Order

119 As a result, the following declaratory relief is granted:

> A) Royal Gold is entitled, as against Newmont, to payment of a net smelter return royalty with respect to all gold produced from the mining rights and surface leases known as the Holt-McDermott mining claims and leases, all such rights and leases being described more particularly in the Net Smelter Return Royalty Agreement executed by Barrick and Newmont effective October 8, 2004, such royalty being equal to:
>
> > i) the Royalty Factor (as defined in the Net Smelter Return Royalty Agreement) in respect of gold produced from the Property (as defined in the Net Smelter Return Royalty Agreement) for any calendar quarter equal to the Quarterly Average Gold Price in US dollars (as defined in the Net Smelter Return Royalty Agreement) (unit-less) for such quarter multiplied by 0.00013; and
> >
> > ii) multiplied by the Net Smelter Return (as defined in the Net Smelter Return Royalty Agreement).

B) For the purposes of paragraph A) above the term "Quarterly Average Gold Price" refers to US dollars and the term "unit-less" refers to a number without its related currency or weight unit.

C) St. Andrew's sole obligation is to indemnify Newmont for the royalty payable under the Net Smelter Return Royalty Agreement to a limit of a flat rate royalty of .013% of net smelter returns for gold, silver and other minerals.

Costs

120 If the parties cannot agree on the issue of costs, they may make brief written submissions to me through Judges' Reception at 361 University Avenue as follows: St. Andrew shall deliver its submissions by August 6, 2009; Newmont shall respond to those submissions by August 20, 2009; Barrick and Royal Gold shall deliver their respective submissions by August 6, 2009; Newmont shall respond to those submissions by August 20, 2009.

121 I repeat here the commendation that I made to counsel at the closing of the hearing. I was tremendously assisted by and greatly indebted to counsel for their co-operation and courtesy, which allowed the hearing to take place as quickly and smoothly as it did, and their excellent advocacy, which resulted in the fair and full presentation of all relevant evidence and issues.

APPENDIX "A"

Procedural Background

The present application was commenced on November 3, 2008. Over the course of several case conferences before me, the parties came to the agreement that this application would proceed by way of a trial of an issue or issues. Also on the agreement of the parties, the affidavits filed are considered as read as part of the oral evidence given during the hearing of this proceeding and the out-of-court cross-examinations are treated as part of the cross-examinations at the hearing of this proceeding.

The parties also prepared and submitted a joint document brief. With the exception of only one document, the March 17, 2006 e-mail transmission from Richie Haddock to Sharon Dowdall, as noted in these Reasons, the authenticity of the documents contained in the document briefs is not in dispute.

Application granted.

Footnotes

1 See Appendix "A" for the procedural background.

2 On June 7, 2006, Holloway was incorporated in order to have transferred to it the Holt-McDermott mining assets and liabilities in the transaction between Newmont and St. Andrew. On August 11, 2006, Newmont transferred to Holloway Newmont's interests in the assets that St. Andrew sought to acquire. In conjunction with that transfer, Newmont and Holloway entered into the Assignment and Assumption of Intangible Assets and Assumed Contracts Agreement dated August 11, 2006, by which Holloway purchased and assumed all of Newmont's right, title and interest in certain mining claims and interests, permits and contracts, and also agreed to assume certain liabilities and contracts that included the Barrick royalty agreement. Under paragraphs 2 and 3 of that Assumption Agreement, Holloway agreed to assume and perform all of the covenants and obligations under each of the assumed liabilities. Under the Purchase Agreement dated September 18, 2006 and the Amendment to the Purchase Agreement dated October 31, 2006, St. Andrew acquired all of the shares of Holloway as part of the purchase transaction with Newmont and assumed directly all of the same obligations that

had been assumed by Holloway. The closing of the transaction took place on November 6, 2006. On January 1, 2007, Holloway amalgamated with St. Andrew, continuing as St. Andrew.

3 By agreement dated July 30, 2008, as amended by letter dated October 1, 2008, on October 1, 2008, RGLD Gold Canada Inc., a wholly owned subsidiary of Royal Gold, acquired all of Barrick's rights, title and interest under the Barrick royalty agreement. For ease of reference, I shall refer to the transferee of Barrick's interest as Royal Gold.

4 "Net smelter return" is defined in section A of the Barrick royalty agreement as, essentially, revenues from the mine less certain defined "allowable costs" and "underlying royalties". Those terms are not in dispute in these proceedings.

5 The royalty description appears as follows in the following schedules: Asset Purchase Agreement dated August 11, 2006, between Newmont and Holloway, Schedule F - Assumed Contracts: "0.013% NSR"; Assignment and Assumption of Intangible Assets and Assumed Contracts Agreement dated August 11, 2006, between Newmont and Holloway: Schedule A - "0.013% NSR [Net Smelter Royalty] (Au[Gold]) (Barrick)"; and Schedule C - "0.013% NSR"; Purchase Agreement dated September 18, 2006, signed by Newmont, St. Andrew and Holloway: Schedule 1.1(w) - Mining Assets: "0.013% NSR (au) (Barrick)"; and in Schedule 3.25 - Third Party Royalties: "0.013% NSR"; and the Royalty Agreement between Newmont and Holloway dated September 18, 2006: Schedule A -"0.013% NSR (au) (Barrick)".

6 A true copy of the original index could not be located. Instead, a reconstructed index was produced at the hearing of this proceeding, which contained information that was subsequently added by Newmont staff and not part of the original document. In particular, Mr. Dehlin explained during his testimony that the reference to "Barrick retains royalty" on the copy produced at the hearing had been added to the original index for the Holt-McDermott file and did not appear on the copy of the index that Newmont had sent to St. Andrew.

TAB 13

1977 CarswellAlta 192
Alberta Supreme Court

Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.

1977 CarswellAlta 192, [1977] 1 A.C.W.S. 172, [1977] 2 W.W.R. 66, 4 A.R. 251, 72 D.L.R. (3d) 734

Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd., Westersund et al.

Moore J.

Judgment: January 24, 1977
Docket: Calgary

Counsel: *R. B. Low*, for plaintiff.
R. S. Dinkel, Q.C., for defendants.

Subject: Natural Resources; Civil Practice and Procedure; Property

Moore J.:

1 The plaintiff, Vanguard Petroleums Ltd. (hereinafter referred to as "Vanguard"), seeks an order of this court confirming and continuing a caveat filed by Vanguard on 29th February 1956. The defendants counterclaim for a declaration that the caveat is of no force and effect.

2 The parties filed an agreed statement of facts as follows:

1. The plaintiff, Vanguard Petroleums Ltd. ('Vanguard') is a body corporate carrying on business in the Province of Alberta. The Defendant, Vermont Oil & Gas Ltd. ('Vermont') is a body corporate carrying on business in the Province of Alberta. The Defendants, Varno C. Westersund and Juanita Westersund ('the Westersunds') are man and wife and are residents of the Province of Alberta.

2. On or about March 15th, 1951 the Westersunds as Lessors and Vanguard as Lessee entered into a Petroleum and Natural Gas Lease ('the Lease'). A true copy of the Lease is attached as Exhibit '1' hereto.

3. On or about February 16th, 1956 the Westersunds and Vanguard entered into an Agreement ('the Gross Royalty Agreement'). A true copy of the said Gross Royalty Agreement is attached as Exhibit '2' hereto.

4. Concurrently Vanguard Petroleums Ltd. executed a letter agreement dated February 16th, 1956 ('the Surrender Agreement'). A true copy of the said Surrender Agreement is attached as Exhibit '3' hereto.

5. On or about February 29th, 1956 Vanguard filed at the Land Titles Office for the South Alberta Land Registration District a certain Caveat dated February 16th, 1956 which was registered as Instrument No. 7924 G.W. A true copy of the said Caveat is attached as Exhibit '4' hereto.

6. On or about June 12th, 1975 the Westersunds as Lessors and Vermont as Lessee entered into a Petroleum and Natural Gas Lease ('the Vermont lease'). A true copy of the said Vermont lease is attached as Exhibit '5' hereto.

7. Attached hereto and marked Exhibit '6' is a true copy of a certified copy of Certificate of Title 79 S 90A being the Certificate of Title in the South Alberta Land Registration District for the mines and minerals which are the subject matter of these proceedings.

DATED at the City of Calgary, in the Province of Alberta, this 28th day of May, A.D. 1976.

3 The petroleum and natural gas lease between the defendants Westersund and Vanguard was entered into on 15th March 1951. The Westersunds are the registered owners, as joint tenants of what will hereinafter be referred to as the said "lands":

> The South Half (S. $^1/_2$) and Northeast Quarter (N.E. $^1/_4$) of Section Fifteen (15), Township Twenty (20), Range Twenty- five (25), West of the 4th Meridian, in the Province of Alberta, containing Four Hundred and Eighty (480) acres more or less, EXCEPTING out of the S.E. $^1/_4$ 6.15 acres more or less for Railway Right of Way, and 2.59 acres more or less, for extra lands, and out of the S.W. $^1/_4$ 6.38 acres more or less for Railway Right of Way, all as shown on a plan of record in the Land Titles Office for the South Alberta Land Registration District as R.W. 321, the lands herein comprised containing 464.88 acres, more or less.
>
> RESERVING unto the Canadian Pacific Railway Company all coal.

4 The lease was to be held by the lessee Vanguard as tenant for the term of 30 years from the date of the lease, and so long thereafter as the leased substances, or any of them, are produced from the said lands, or any operations are conducted thereon for the discovery and or recovery of the leased substances or any of them.

5 On 16th February 1956 the Westersunds (as "Owners") and Vanguard (as "Grantee") entered into an agreement wherein Vanguard surrendered the 1951 lease on certain terms and conditions, and paras. (1) and (3) are as follows:

> Now THIS AGREEMENT WITNESSETH that in consideration of the premises and the sum of TEN ($10.00) DOLLARS now paid by the Grantee to the Owners (receipt whereof by the Owners is hereby acknowledged) the Owners covenant to and with the Grantee as follows: —
>
> 1. The Owners will pay to the Grantee a gross royalty of Seven (7%) percent of the proceeds of sale of the petroleum substances that may be produced, saved and marketed out of the said lands such gross royalty to be calculated and paid as follows: —
>
> (a) Seven (7%) percent of the current market value at the well of all petroleum oil produced, saved and marketed from the said lands.
>
> (b) Seven (7%) percent of the current market value of gas produced from the said lands and marketed or used off the said lands or in the manufacture of casing head gasoline.
>
> (c) Seven (7%) percent of the amount actually received by the lessee on products obtained by absorption or other similar processes and on residue gas resulting therefrom provided that if the owners themselves conduct development operations upon the said lands or an operator other than a lessee is entitled to the receipts the subject of this sub-clause (c) this sub-clause shall apply in respect of the owners or such operator ...
>
> 3. Upon the surrender of the lease of the petroleum substances presently in effect between the Owners and the Grantee the Owners covenant that they will upon the grant of any subsequent lease or other disposition of the petroleum substances and similarly upon any successive surrender or termination and grant of lease or other disposition of the petroleum substances thereafter make provision for the due payment of the gross royalty hereby granted and the Grantee is hereby given and granted the continuing right to file and maintain a caveat against the said lands in respect of the said gross royalty hereby granted.

6 Vanguard then filed a caveat also on 16th February 1956 at the Land Titles Office against title to the lands, claiming an interest as grantee of a gross royalty of seven per cent of all petroleum and natural gas and related hydrocarbons other than coal within, upon or under the said lands pursuant to the provisions of the gross royalty agreement.

7 On 12th June 1975 the Westersunds entered into a new petroleum and natural gas lease with their co-defendant Vermont covering the said lands for $20,800 for a term of five years, quite obviously ignoring the royalty agreement. Soon thereafter notice was given to the plaintiff Vanguard to take proceedings to enforce the validity of its caveat.

8 The sole issue in these proceedings is whether the royalty agreement entered into in 1956 gives Vanguard an interest in land which would support the 1956 caveat.

9 It is interesting to observe the provisions of The Land Titles Act, R.S.A. 1970, c. 198, and in particular s. 136, which states in part:

> 136. Any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission or under an unregistered instrument, ... in any land, mortgage or encumbrance, may cause to be filed on his behalf with the Registrar a caveat ...

10 And s. 144 of the Act states in part:

> 144.(1) ... every caveat lodged against any land, mortgage or encumbrance shall be deemed to have lapsed after the expiration of 60 days after notice has been either served as process is usually served, or sent by registered mail, ...

11 Notice was given Vanguard to take proceedings to enforce the caveat, which resulted in the issuance of the statement of claim in this action.

12 Much has been written in both the United States and Canada about the meaning of the word "royalty".

13 In the Saskatchewan decision of *Bensette v. Reece*, [1973] 2 W.W.R. 497, 34 D.L.R. (3d) 723, the Saskatchewan Court of Appeal considered whether a royalty interest is an interest in land. In August 1927 Bensette and Graham acquired a six per cent royalty in the minerals in a certain parcel of land. In 1928 Bensette and Graham filed a caveat to protect the royalty interest. In the years that followed the land changed hands a number of times until 1957, when the caveat of Bensette and Graham was lapsed by the registrar, pursuant to notice at the request of Reece. The notice never reached the caveators, and the caveat lapsed. In 1965 Bensette and Campbell (administratrix de bonis non of the estate of Graham) filed another caveat under the royalty agreement. Bensette and Campbell brought action against Reece claiming, inter alia, a declaration that they are entitled to six per cent royalty on all oil, gas, petroleum and mines and minerals in Reece's title already produced from the land and which may be produced from the land and also an order that the caveat was validly registered. It was held that Reece was bound by the royalty agreement in 1927 and that the agreement gave them an interest in land necessary to support a caveat. Woods J.A. stated at p. 499:

> While definitions of 'royalty' are numerous, a perusal of the cases shows that it is not a term of art. Its meaning must be deduced from the circumstances surrounding its use.

14 And at p. 500:

> Had the words 'interest' or 'property' been used instead of 'royalty', it would be clear that an interest in the minerals themselves was to pass ...
>
> The words 'royalty in' connote an interest of some kind 'in' the minerals. If it were 'royalty on' the minerals, some kind of a commission would be readily inferable.

15 And further at p. 501:

> Here then is a transfer and sale of a six per cent royalty in minerals. Under the circumstances obtaining here, this connotes a conveyance of an interest in the minerals them selves in situ and hence an interest in the land which could properly be the subject of a caveat.

16 The granting provision in the Bensette case was "to give, grant, bargain, sell, assign and transfer and by these presents ... give, grant, bargain, sell, assign and transfer unto the parties of the second part [Bensette and Graham] a six per cent (6%) royalty in all the oil, gas, petroleum and mineral oils, mines and minerals acquired by the party of the first part ... which may be found in, under or upon the said lands". The granting provision was held to be a royalty on the petroleum substances then in place in the ground.

17 Allen J.A. of the Appellate Division of the Supreme Court of Alberta in *Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd.* (1969), 3 D.L.R. (3d) 630, affirmed 15 D.L.R. (3d) 256 (Can.), considered whether a gross overriding royalty was an interest in land. The granting provision is set forth at p. 633 as follows:

> High Crest covenants and agrees to grant and assign to Sterling a gross overriding royalty of Two per cent (2%) of High Crest's share of all petroleum, natural gas and related hydrocarbons produced, saved and sold from each property acquired by or for High Crest after the date hereof and during the term of this agreement ...

18 Allen J.A. stated at p. 640:

> The royalty clause in these agreements has been previously quoted in these reasons. Taking the High Crest agreement as typical it will be noted that there is to be assigned to Sterling 'a gross overriding royalty of Two per cent (2%) of High Crest's share of all petroleum, natural gas and related hydrocarbons produced, saved and sold from each property acquired by High Crest after the date hereof and during the term of this agreement'. This clearly indicates that the royalty is to be calculated and payable only upon the products mentioned after they have been taken from the ground and severed from the realty. It may follow from this that the royalty share of production which accrues to Sterling is personalty and not land or an interest therein.

19 Although the Court of Appeal referred the matter back to the trial judge on another point, it is clear that the court was of the clear opinion that, where the royalty relates to a share after the petroleum had been removed from the land, this is not an interest in land but is to be treated as personalty.

20 In *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.* (No. 2), 41 W.W.R. 210, 35 D.L.R. (2d) 574, affirmed 45 W.W.R. 26, [1963] S.C.R. 482, 41 D.L.R. (2d) 316, the Bailey company had agreed to drill a well and, the participant having agreed to participate in the drilling, entered into an agreement which provided that the participant, upon putting up a part of the cost of drilling the test well, would "be entitled to receive the percentage of net proceeds of production from the said well". Net proceeds of production were defined in the agreement to mean [p. 211]:

> 'Net proceeds of production' as used in this agreement and in any Schedule shall with respect to any well mean the proceeds from the sale of the Company's share of the production less a 10% carried interest.

21 Johnson J.A. stated at pp. 214-15:

> If this clause conveys any interest in the oil or gas, it was an interest which would only come into existence when these substances had been reduced to physical possession.

22 Clearly the court felt in the *Bailey* case that the wording of the clause only conveyed an interest in the petroleum substances after they had been removed and reduced to physical possession.

23 It is interesting to note the Supreme Court of Canada decision in *Sask. Minerals v. Keyes*, [1972] 2 W.W.R. 108, [1972] S.C.R. 703, 23 D.L.R. (3d) 573. The majority of the Supreme Court of Canada decided the case on a point not requiring a consideration of the nature of the royalty interest. The court was dealing with an agreement which provided in cl. 3, inter alia, a royalty [p. 110]:

> (b) a royalty of twenty-five cents (25 ¢) per ton on all anhydrous salt produced and sold from the said leasehold property

24 Martland J. in delivering the majority judgment found that it was not necessary to determine the question as to whether or not the use of the word "royalty" implied an intention to create an interest in land. Martland J. stated at pp. 110-11:

> The respondent contends that cl. 3(b) of the agreement created an interest in him in the land covered by lease No. A-4010, and that the appellant, when it took an assignment of the lease from Astral, took it subject to that property interest. The appellant claims that the clause created only a contractual right enforceable against Astral, but not as against the appellant.
>
> If the clause had used the word 'payment' instead of 'royalty' I would doubt whether the respondent's position would be arguable. Does the use of the word 'royalty' imply an intention by Astral to create an interest in land in the respondent?
>
> I would doubt that it does. Astral's commitment under the clause is to make money payments in relation to salt which has been both produced and sold. It is similar to the provision contained in the agreement under consideration by this Court in *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.* [supra], under which the appellant in that case was entitled to receive a percentage of net proceeds of production from an oil well. 'Net proceeds of production' were defined as proceeds of the sale of a share of production from a well after various deductions were made. The appellant's rights under this provision were considered to be 'as a matter of contract' (p. 488). The case was chiefly concerned with the effect of a further provision giving to the appellant a defined interest in the petroleum and natural gas within, upon, or under certain lands. There is no such provision in the present case.
>
> However, in my opinion, it is not necessary to state a final opinion upon this point because, if it was intended by cl. 3 (b) to create any interest in the lands comprised in the lease, Astral was prohibited from creating it, by virtue of s. 11 of the Alkali Mining Regulations of Saskatchewan, previously cited, unless the written consent of the Minister of Mineral Resources had first been obtained.

25 In the *Saskatchewan Minerals* case, Laskin J., as he then was, wrote a dissenting judgment. He stated at p. 119:

> There is no decision of this Court which either pronounces upon or examines royalties under so-called mining leases on the question whether they are or in what circumstances, if any, they can be interests in land. I speak here of royalties not in the sense of a vested interest in mineral deposits, or in oil or gas, as the case may be, in situ (which is a sense that has been sometimes attributed to them, particularly in a line of American cases, and see *Gowan v. Christie* (1873), L.R. 2 Sc. & Div. 273), but rather in the sense of a share in or a return on production for permission to exploit certain property or in respect of such exploitation: see *Re Dawson and Bell*, [1945] O.R. 825 at 838 , 842, [1946] 1 D.L.R. 327 (C.A.). This is the sense in which it is spelled out in the agreement of 3rd June 1948 between Keyes and Astral.

26 In this case the plaintiff contends that the reasoning of Laskin J. in the minority judgment is valid and that the parties' intention governs. It is argued that the royalty is being paid in return for the use of land and can be characterized as in the nature of "rent" and thus is an interest in land. It is suggested that cl. (3) of the royalty agreement overrides cl. (1) in that it clearly indicates that it was intended that the mineral interest should be subject to the plaintiffs' interest at all times and accordingly must be construed as intending to create an interest in land.

27 This much is clear from the authorities, and that is that a court must examine the wording of the documents in order to determine the question. In this case there was no parol evidence but only an agreed statement of facts. The court must therefore examine the documents in the light of the agreed statement.

28 Clause (1) of the royalty agreement, Ex. 2, states that the owners (Westersunds) will pay to the grantee (Vanguard) a gross royalty of seven per cent of the proceeds of sale of the petroleum substances that may be produced, saved and marketed out of the said lands. This is an obligation to pay Vanguard a sum of money out of the proceeds of sale of the petroleum substances *after* they have been removed from the land. The wording in the royalty agreement herein cannot be construed as an interest in situ. In my view, the royalty herein is on the proceeds of the sale of the petroleum substances after removal from the land. In other words, the owner and the grantee agreed to share in the proceeds of the sale of mineral substances after removal. This amounts to an obligation to pay by the owner to the grantee a sum of money based on a percentage of the sale proceeds.

29 I cannot agree that the payment can in any way amount to a rent. Rent is something that is due periodically for the use of property. Indeed "rent" is defined in Black's Law Dictionary, 4th ed., as "consideration paid for use or occupation of property". There are many definitions of "rent", but generally it is a payment made by one person to another for the use of property whether it be real or personal.

30 It is conceivable that no payment might ever become due to the grantee (Vanguard) if indeed petroleum substances are never removed from the land. In such case no payment would ever be due the grantee, Vanguard. Rent is something that by its very nature accrues due to the lessor over a period of time and from time to time.

31 Courts in the United States have debated the meaning of the word "royalty" for many years. The American courts have held that it is necessary to examine the language under particular sets of circumstances to determine the nature of a royalty.

32 Clause (3) of the royalty agreement herein cannot change the clear meaning of cl. (1). A caveat is merely a warning to everyone of an interest in land claimed by a party or parties. A caveat does not create an interest in land. Although cl. (3) of the royalty agreement purports to give the grantee, Vanguard, the right to file and maintain a caveat, the caveat, nevertheless, cannot be maintained if it is not based on something that is an interest in land.

33 The royalty granted to Vanguard does not create an interest in land, and accordingly the caveat filed by Vanguard cannot be maintained.

34 The argument of estoppel is not open to the plaintiff, not having been pleaded. In any event I do not believe estoppel applies in this case. The plaintiff is entitled to take proceedings against the defendant for an accounting of whatever funds are owing by the defendant to the plaintiff as a result of the agreement.

35 The action is dismissed. The defendants will be entitled to costs in the appropriate column with no limiting rule.

TAB 14

2011 CarswellOnt 18837
Ontario Superior Court of Justice

Ally Credit Canada Ltd. v. All-Ontario Towing and Storage Inc.

2011 CarswellOnt 18837

Ally Credit Canada Limited, Applicant and All-Ontario Towing and Storage Inc., Respondent

J. Robert MacKinnon J.

Judgment: October 24, 2011
Docket: Barrie 11-0691

Counsel: Edward M. Hyer, for Applicant

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

APPLICATION by creditor regarding priority of security interest.

***J. Robert MacKinnon J.*:**

1 Application granted for reasons and on terms set out in written endorsement issued this day and attached.

2 A, a secured creditor with a perfected security interest in 3 motor vehicle, brings application claiming, amongst other relief, priority over R's claims storage lien over the vehicle pursuant to the Repair and Storage [illegible text] Act ("RSLA" [illegible text]

3 Although R argued that this relief sought was [illegible text]judicated due to the July 21/11 endorsement of Mullins J. which dismissed the application, it is clear and I find that Mullins J.'s order was solely in relation to interlocutory but not the final relief which is now claimed before me. R's sale of the vehicles has not been completed. A full record is now before me, unlike the initial materials before Mullins J. on July 21/11.

4 Ted George Construction Limited ("TGCL") defaulted under the terms of its finance contracts on Apr 14/11, Jan 28/11, and Mar 30/11. Although it was petitioned into bankruptcy on June 21/11, it is clear that as of Apr 4/11 when it signed the "vehicle pick up authorization agreement" with Bankruptcy Ontario both R and TGCL knew TGCL was insolvent. Page 2 of the document refers to its Trustee in Bankruptcy. Following the Court Order of Bankruptcy on July 18/11, the preliminary report of the Trustee states that all the assets of TGCL (including the 3 vehicles, I find) had been impounded by R.

5 I find that R is not a storer within the meaning of S1 (1) of RSLA, and that it did not recieve the 3 vehicles in the usual and ordinary course of business *as a storer* (underlining mine). It owns no storage facilities, nor does it control any. It is not in the business of storage but rather to support Bankruptcy Ontario, a division of New Start Financial Services Inc. whose business purpose is to profit from individual and corporate insolvensies. R clearly did not recieve the 3 vehicles on the understanding it would be paid by TGCL. To the contrary, R knew full well TGCL was insolvent. Neither did it receive them on the understanding that it would be paid by any creditors, including A, a secured creditor with a perfected security interest. To the contrary it failed to notify A of its control of the vehicles until after A's bailiff discovered that fact at the end of May/11.

6 Only thereafter, on May 30/11, did R first fax invoices for storage to A's bailiff - and on June 6/11 R delivered a Notice of Intent to sell under RSLA, claiming a storer's lien backdated to Apr 13/11.

7 In addition, R has not established the amount of its lien. RSLA provides in S4(1) that the lien of a storer is for an amount equal to either the amount agreed upon for the storage (and it is clear no agreement existed as to quantum) or, failing that, to the fair value of the storage. Fair value includes, in S4(1)(b) such items as insurance, labour or other expenses. Phillipe Theophilus for R admitted in cross-examination that there was no agreement to pay any specific amount and refused to answer questions on what R pays for storage or for what R pays for expenses. R has failed to meet its onus of establishing any amount of its lien. It's evidence of $180/day for storage is grossly excessive when compared to monthly storage rates of other stores, on this record.

8 In addition, R has not met its onus of satisfying the court that it has compiled with the time requirements of RSLA. Section 4(7) provides that a storer may commence the sale process only on the expiration of 60 days following the day on which the amount required to pay for the storage becomes due. Not only was the notice of sale deficient in that it failed to set out the amount required to satisfy the lien, but it was delivered only a week after the R delivered its invoices. Its unclear when the invoices were due. The notice of sale failed to comply with S4(7).

9 As well, R has failed to demonstrate the sale it entered into was commercially reasonable. R`s proposed sale is well below Black book value and demonstrably improvident. A reqested access to the vehicle to conduct its own inspection but R refused. R neither advertised the sale nor conducted any auction process.

10 I am accordingly of the views and order and final basis that R is not entitled to a lien under RSLA, or at all, against any of the 3 motor vehicles set out and described at para 1(a) of A's application.

11 A further order and [illegible text] R to *forthwith* deliver possession of the 3 described vehicles to A (underlining mine).

12 Finally, A is entitled to its costs of the application. There is an outstanding issue as to both the level and the quantum of costs, and the parties have agreed to make submissions in writing.

13 A shall by Nov 7/11 noon file a serve its Bill of Costs and written submissions not exceeding 4 pages, single spaced. R shall file and serve its responding submissions of the same maximum length by no later than Nov 21/11 noon. A shall deliver its reply submissions, if at all, by Nov 28/11 noon.

Application granted.

End of Document

TAB 15

2012 ONSC 2522
Ontario Superior Court of Justice (Divisional Court)

1258917 Ontario Inc. v. Daimler Truck Financial

2012 CarswellOnt 5499, 2012 ONSC 2522, 19 P.P.S.A.C. (3d) 273, 216 A.C.W.S. (3d) 22, 292 O.A.C. 136, 3 B.L.R. (5th) 224

1258917 Ontario Inc. carrying on business as 417 Truck Center, Plaintiff/Defendant by Counterclaim/Respondent and Daimler Truck Financial, a division of DCF'S Canada Corp., Defendant/Plaintiff by Counterclaim/Appellant

R. Smith J.

Heard: March 30, 2012
Judgment: May 4, 2012
Docket: L'Orignal 11-DV-1723

Proceedings: affirming *1258917 Ontario Inc. v. Daimler Truck Financial* (2011), 2011 CarswellOnt 15925 (Ont. S.C.J.); additional reasons at *1258917 Ontario Inc. v. Daimler Truck Financial* (2012), 2012 CarswellOnt 8970, 2012 ONSC 4094 (Ont. Div. Ct.)

Counsel: Robert E. Tolhurst, for Plaintiff / Respondent
Talar Beylerian, for Defendant / Appellant

Subject: Corporate and Commercial; Insolvency; Contracts; Property

APPEAL by defendant from judgment reported at *1258917 Ontario Inc. v. Daimler Truck Financial* (2011), 2011 CarswellOnt 15925 (Ont. S.C.J.), allowing action with respect to lien claims.

***R. Smith J.*:**

Overview

1 Daimler Truck Financial ("Daimler") appeals from the decision of Deputy Judge Leclaire who held that 417 Truck Centre ("417")'s unregistered non-possessory lien for repairs to the Truck under the *Repair and Storage Liens Act* ("*RSLA*") had priority over Daimler's registered security interest in the Truck.

2 Daimler claims that its security interest, namely a conditional sales agreement, had priority over 417's non-possessory lien for repairs performed on the Truck, because 417 never registered a claim for its non-possessory lien.

3 Daimler also appeals from the deputy judge's decision granting 417 a lien for storing the Truck on its property for approximately twelve (12) months, which had priority over Daimler's security interest in the Truck.

4 Daimler submits that a storage lien never arose in favour of 417 because there was no evidence of an understanding, either expressly or implicitly, that 417 would be paid for storing the Truck when possession of the vehicle was initially given to 417.

5 417 argues that the deputy judge was correct to give priority to its unregistered non-possessory lien for repairs to the Truck because it did further repair work on the Truck and as a result acquired a valid possessory lien under the *RSLA*. It submits that no prejudice was caused to any party as a result of its failure to register a claim for a non-possessory lien.

6 417 further submits that Daimler was not a third party that had acquired its rights against the Truck, *after* 417's non-possessory lien arose, as Daimler had acquired its conditional sales agreement two years before 417's non-possessory lien arose.

7 417 further submits that there was evidence at trial of an understanding between 6110975 Canada Inc. ("611") and 417, that 417 would be paid for the storage of the Truck. 417 submits that the storage fee of $30 per day was a reasonable amount and was a finding of fact supported by the uncontradicted evidence at trial.

8 The following issues must be decided in this appeal:

(1) Does 417's unregistered non-possessory lien under the *RSLA* have priority over Daimler's previously registered security interest in the Truck?

(2) Did the deputy judge err in finding that 417 had a valid storage lien under the *RSLA*?

Factual Background

9 I have adopted the summarized facts from the factums filed by both 417 and Daimler.

10 The appellant Daimler Truck Financial, is a division of DCFS Canada Corp., now known as Daimler Truck Financial, a business of Mercedes Benz Financial Services Canada Corporation ("Daimler"). On March 13, 2006, Fairview Garage Limited ("Fairview") agreed to conditionally sell to 611 a new 2006 Freightliner Coronado truck (the "Truck"). François Charlebois ("Charlebois") is the principal of 611.

11 The conditional sales contract was assigned by Fairview to Daimler, a business unit of Daimler Chrysler Financial Services Canada Inc. ("Chrysler") which was a predecessor of Daimler.

12 In March of 2008, Charlebois brought the Truck to be repaired by the respondent 1258917 Ontario Inc. carrying on business as 417 Truck Centre ("417"). 417 completed the repairs in March of 2008 and returned the truck to 611 without being paid.

13 417 claims a non-possessory lien for the sum of $3,661.52 for repair work performed on the Truck as set out in work order number 7449 dated March 21, 2008 and in the corresponding invoice number 58048 dated March 31, 2008. 417 never registered its claim for a non-possessory lien.

14 On or about April 7, 2008, Charlebois and 611 took the Truck back to 417 for further repairs. 417 performed additional repairs and retained possession of the Truck. 417 claimed a possessory lien under the *RSLA* for the additional repair work in the amount of $6,304.87. 417's claim for a possessory lien in the Truck is not disputed by Daimler.

15 417 was unaware that Daimler held a security interest in the Truck until November of 2008 when Charlebois advised it that 611 was going bankrupt. About the same time, Daimler learned that the Truck was located on 417's premises.

16 Daimler and 417 were unable to reach an agreement on the amount claimed for repair and storage liens against the Truck. As a result, Daimler paid the following sums into Court pursuant to the s. 24 of the *RSLA*; $3,661.52 for the non-possessory lien, $6,304.87 for the possessory lien, and $3,433.50 for the storage lien claimed by 417. The payments were made on April 20, 2009 and the Truck was released to Daimler on the same day.

17 The trial of the action took place at the Small Claims Court in L'Orignal on January 14, 2011.

18 At trial, Mr. Herb Vink, the principal of 417, testified that he had notified Daimler in the fall of 2008 that storage fees for the Truck would continue to be charged. Vink also testified that he had discussed with Charlebois that 417 would start charging storage fees for the Truck after a reasonable period of time. This conversation occurred several months after the second repair was made to the Truck by 417.

19 The trial judge found that representatives of Daimler spoke to Mr. Vink and to Gilbert Séguin in November of 2008 and told them that they would not pay more than 60 days of storage at $30 per day. Thereafter, 417 invoiced Daimler for storage fees at $30 per day for only 60 days. The date of the invoice was November 20, 2008. At that time, 417 had stored the Truck on its premises for approximately seven months.

20 The evidence at trial was that Herb Vink had notified Daimler, after the initial invoice for storage was sent, that storage fees would continue to be charged on a daily basis until the Truck was removed from 417's storage yard. The Truck was finally removed six months later when the amount claimed for liens was paid into court.

21 The deputy judge expressly held that $30 per day as a storage fee was reasonable and found that there was no evidence to the contrary.

Issue #1 Does 417's unregistered non-possessory lien under the RSLA have priority over Daimler's previously registered security interest in the Truck?

Deputy Judge's Decision on Non-Possessory Lien

22 Deputy Judge Leclaire held that 417's non-possessory lien was enforceable and had priority over Daimler's security interest even though it was not registered.

23 In his reasons, the deputy judge stated as follows:

> I do not believe that section 10 is to be applied as counsel suggests. Here the non-possessory lien was created by the work done in March of 2008. Daimler's interest in the vehicle preceded that in the role, time of the sale and the financing of the truck in 2006. Section 10 addresses "Right against an article after" and not before a "non-possessory lien arises".
>
> Section 10 in my view is of no assistance to the defendant.

Analysis

(a) Priority of the Non-Possessory Lien

24 The issue is whether 417's non-possessory lien retained its priority over Daimler's security interest in the circumstances where:

(a) 417 also held a valid possessory lien against the Truck and had retained possession of the Truck;

(b) Daimler had received notice of 417's claim for a non-possessory lien for repairs performed on the Truck before Daimler acquired any additional interest in the Truck;

(c) 417 never registered its claim for a non-possessory lien;

(d) 417's possessory and non-possessory repair liens were discharged and became a charge on the amount paid into Court pursuant to s. 24 of the *RSLA*.

25 Daimler's position is that the trial judge erred in his interpretation of s. 10 of the *RSLA* and that 417's failure to register its non-possessory lien claim prevented it from enforcing its lien against the funds paid into Court by Daimler. As a result, Daimler submits that its security interest had priority over the amount of 417's unregistered non-possessory lien.

26 Part II of the *RSLA* deals with non-possessory liens. Section 7(1) gives a lien claimant entitled to a lien under Part I (Possessory Liens) who gives up possession of the article without having been paid in full, a non-possessory lien against

the article. The lien takes effect from when the lien claimant gives up possession of the article and a non-possessory lien has priority over the interest in the article of any other person, other than a possessory lien claimant under Part I.

27 Section 7(1)(2) and (3) of the *RSLA* read as follows:

> 7. (1) A lien claimant who is entitled to a lien under Part I (Possessory Liens) against an article, and who gives up possession of the article without having been paid the full amount of the lien to which the lien claimant is entitled under Part I, has, in place of the possessory lien, a non-possessory lien against the article for the amount of the lien claimed under Part I that remains unpaid.
>
> **When lien arises**
>
> (2) A non-possessory lien arises and takes effect when the lien claimant gives up possession of the article.
>
> **Priority**
>
> (3) A non-possessory lien has priority over the interest in the article of any other person other than a lien claimant who is claiming a lien under Part I, and, where more than one non-possessory lien is claimed in the same article, priority shall be determined according to the same rules of priority as govern the distribution of proceeds under section 16.
>
> [Emphasis added]

28 The evidence is not disputed that 417 acquired a non-possessory lien under the *RSLA* in March 2008 when it performed $3,661.52 worth of repair work on the Truck. 417 gave up possession of the article in this case the Truck to 611 on March 26, 2008 without having been paid for the repair work it performed. The non-possessory lien in favour of 417 therefore arose on March 26, 2008.

29 Section 10 of the *RSLA* reads as follows:

> A non-possessory lien is enforceable against third parties only if a claim for lien has been registered, and, where a person acquires a right against an article after a non-possessory lien arises, the right of the person has priority over the non-possessory lien of the lien claimant if a claim for lien was not registered before the person acquired the right.

30 In *Royal Tire Service Ltd. v. Shelleby Transportation Ltd.* (1999), 1 B.L.R. (3d) 250 (Ont. C.A.), the Court of Appeal held that Little Bros.' security interest in the trailers had priority over the non-possessory repair lien of Royal Tire. Little Bros. had seized the trailers pursuant to its security interest and resold them before Royal Tire registered its non-possessory lien. In this decision, the Court of Appeal stated that Little Bros. was a third party within the meaning of s. 10 of the *RSLA* as long as it retained any interest in the trailers. However, Little Bros. no longer retained any interest in the trailers because they had been repossessed and sold pursuant to the terms of the security agreement before the non-possessory repair lien was registered.

31 The critical fact underlying the Court of Appeal's reasoning in *Royal Tire Service Ltd. v. Shelleby Transportation Ltd.*, *supra*, was that the secured party had repossessed the trailers and sold them pursuant to its security agreement before the non-possessory lien was registered. While not explicitly stated, the decision fits squarely within the provisions of s. 10 as Little Bros. was a third party who acquired "a right against an article after a non-possessory lien arises and before the lien was registered". Little Brothers had acquired the additional right to possession of the trailers and the right to sell them as a result of the default under its security agreement. In addition, Little Bros. had not received notice of the claim for a non-possessory lien because it had not been registered.

32 The distinguishing factors in the case before me are that Daimler did not acquire a right to possess the Truck after the non-possessory lien arose, because 417 already had this right pursuant to its possessory lien. Daimler also had

received prior notice of 417's non-possessory lien claim before it exercised any of its rights under its pre-existing security agreement and before it paid the money into court to acquire possession of the Truck.

33 In *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43 (S.C.C.), at para. 26, the Supreme Court adopted the statutory interpretation as set out in *Driedger on the Construction of Statutes*, 2nd Ed., Toronto: Butterworths 1973, at page 87 as follows:

> Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

34 The sections of the *RSLA* must be read in context, harmoniously with the scheme and object of the *Act*, and in accordance with the intention of Parliament. Section 7(3) of the *RSLA* gives a claimant, who is entitled to a non-possessory lien in an article, priority over any other person other than a possessory lien claimant. This section clearly expresses the intention of the legislature to give priority to a non-possessory lien claimant over a person holding a prior security interest in the article such as Daimler. This is also consistent with the object and scheme of the *RSLA* which is to protect the interest of the repairer, who improves the value of the article by supplying his or her labour and materials.

35 The purpose of the *RSLA* is to provide a mechanism for a repairer to acquire a lien and security for payment for repairs performed to an article. This may be acquired either by way of a possessory lien or alternatively a non-possessory lien. Both types of liens are given priority over all other interests in the article. The intention and purpose of the legislation is to protect a repairer who enhances the value of the article, in this case the Truck, by repairing it for the benefit of the owner and any party with a prior security interest. Generally, repairs to a vehicle such as a truck would be performed after the vehicle was sold and after the initial security interest was registered to finance the vehicle. Security interests in the vehicle, such as conditional sales agreements, leases or other security interests are generally taken as security for financing at the time of purchase. This was the case for Daimler.

36 In *General Electric Capital Canada Inc. v. Interlink Freight Systems Inc.* (1998), 42 O.R. (3d) 348, [1998] O.J. No. 4910 (Ont. Gen. Div.), G.E. Capital was a lendor in connection with a fleet of trucks owned by Interlink. G.E. Capital held a prior security interest over Interlink's vehicles. Mr. Front-End was a repairer who performed repairs on a number of Interlink's trucks resulting in it acquiring a non-possessory lien and Interlink had not paid for the repairs. Interlink went bankrupt on July 4, 1997 and Mr. Front-End registered its claim for a non-possessory lien ten days later on July 14, 1997. The Court had to determine the priority between GE Capital as a prior security holder and Mr. Front-End as a non-possessory lien holder. At paras. 4-5, the Court stated as follows: "The only issue remaining for me to determine is whether or not one is entitled to register a lien under the *RSLA* after an intervening bankruptcy."

37 In the *General Electric Capital* case, the Court interpreted s. 10(1) of the *RSLA* to give the non-possessory lien claimant priority over G.E. Capital, even after an intervening bankruptcy. The Court held that the only exception to acquire priority over a non-possessory lien was for *bona fide* purchasers and financiers who acquired their interest in the subject matter of the lien, after it arose but before registration.

38 I agree with the reasoning in *General Electric Capital*, *supra*, and I find that by enacting s. 10 of the *RSLA*, the legislature intended to protect a third party who acquired an interest in the article, after the non-possessory lien arose and before it was registered. This interpretation would accord with basic fairness and commercial reasonableness as a purchaser or other party who acquired an interest in the article for valuable consideration would not generally have notice of the non-possessory lien claim. In most circumstances, the third party would not have notice because the article or vehicle would not be in the possession of the non-possessory lien claimant. As a result, the third party would be unaware of the non-possessory lien claimed if it was not registered.

39 Where a third party acquires a right against an article after the non-possessory lien arose and before the claim for a non-possessory lien is registered, then this third party's right is unaffected by the unregistered non-possessory lien's

priority given in s. 7(3) of the *RSLA*. This interpretation is consistent with the object and scheme of the *Act* which is to give priority to those parties who acquire rights in an article that is not in the possession of a repairer, without notice of any non-possessory lien claim by a repairer.

40 However, on the facts before the deputy judge, Daimler had notice of 417's non-possessory lien claim in November of 2008 and as a result, it did not acquire any further right against the Truck without notice of 417's non-possessory lien claim. If Daimler had taken possession and sold the Truck from 611 without notice of 417's non-possessory lien claim, then Daimler would have priority over 417 following the reasoning of *Royal Tire Service Ltd.*, *supra*. However, these were not the facts before the deputy judge.

41 Section 10(1) of the *RSLA* carves out an exception to the priority granted to a non-possessory lien claimant in s. 7(3). It states that a non-possessory lien is enforceable against third parties only where: (a) the claim for lien has been registered, and (b) where a person acquires a right against an article (i) after the non-possessory lien arose, and (ii) before the claim for lien was registered.

42 I find that the third parties referred to in s. 10 of the *RSLA* are those persons or parties who are individuals other than the owner, who acquired an interest in the Truck after the first non-possessory lien arose and before the claim for a non-possessory lien was registered. In this case, Daimler did not acquire its security interest in the Truck after 417's first lien arose however 417 also never registered its claim for a non-possessory lien.

Did Daimler acquire any right against the Truck when it paid the amount claimed for liens into court pursuant to s. 24 of the RSLA?

43 Section 24(13) of the *RSLA* states that where the amount of the claim for lien is paid into court and the article is released to the applicant, in this case Daimler, and the lien is discharged as against the article and "becomes instead a charge upon the amount paid into court".

44 Daimler acquired the right to possession of the Truck on April 20, 2009 when it paid the amount claimed for liens into court, which included the amount claimed for the non-possessory lien. The Truck was then released to Daimler by 417. However, Daimler had full notice of 417's claim for a non-possessory lien before it acquired possession of the Truck and therefore did not acquire a new right without notice of a prior claim for a non-possessory lien. In addition, the money paid into court was substituted as security for the claims for both the possessory and the non-possessory liens against the Truck.

45 Upon payment into court, 417's possessory and non-possessory liens were discharged as against the Truck, but instead the liens became a charge on the amount paid into court. I find that 417's possessory claim for lien did not lose its priority over Daimler's security interest when payment was made into court and by analogy, I find that there is no rational reason why the non-possessory lien claimant would lose its priority in the Truck as a result of payment into Court.

46 Daimler does not dispute that if 417 had registered its claim for a non-possessory lien at any time before April 20, 2009 that 417's claim for a non-possessory lien would have had priority over Daimler's security interest in the Truck. If 417 registered its claim for lien against the funds held in court, would its claim for a non-possessory lien become enforceable and entitled to priority over Daimler's claim under its security interest? This would allow 417 to comply with the technical requirement of registration and if no other third party had acquired rights in the funds paid into Court before the claim was registered, then 417 would have priority following this reasoning.

47 However, no practical or valid commercial purpose would be served by requiring 417 to register notice of its claim for a non-possessory lien in these circumstances other than to meet the technical requirements of s. 10 of the *RSLA*, as Daimler was fully aware of 417's claim for a non-possessory lien since November of 2008. Notice of 417's claim for a non-possessory lien was given to Daimler approximately five months before Daimler acquired possession of the Truck by paying the amount claimed into Court as substitutional security.

48 In *General Electric Capital Equipment Finance Inc. v. Transland Tire Sales & Service Ltd.* (1991), 6 O.R. (3d) 131 (Ont. Gen. Div.), at para. 61, the Court held that the *RSLA* addressed itself both to the priority interest of the non-possessory liens as well as the enforceability of the non-possessory liens against third parties. In the *Transland Tire, supra*, case, the repairer registered a claim for a non-possessory lien before the secured party lendor repossessed the trailer on which the repairs had been performed. However, the registration contained an error, namely that the incorrect debtor's name was used. The Court held that the secured lendor had priority over the erroneous registered claim for a non-possessory lien. In the *Transland Tire, supra*, case, an innocent third party would have been misled by failing to discover the non-possessory lien due to the error in the registration and as a result, the integrity of the registry system was compromised by the error. This case is distinguishable as Daimler had received notice of the claim for a non-possessory lien and there was no erroneous registration of the claim.

49 In *Lease Truck Inc. v. 375603 Ontario Ltd.* (1996), 4 O.T.C. 97, 11 P.P.S.A.C. (2d) 351 (Ont. Gen. Div.), the repairer carried out repairs on 12 different occasions. After each repair, except for the last repair, the repairer returned the truck to the possession of the lessee. The repairer never registered a financing statement with respect to any amount claimed to be owing for the repairs. The secured party lessor paid the repairer the full amount claimed for both the possessory and non-possessory liens under protest and then sued for the return of the amount it had paid for the non-possessory lien.

50 In *Lease Truck Inc., supra*, the Court held that the payment under protest was not voluntary. It held that it was commercially responsible and prudent for the lessor to recover the truck as quickly as possible rather than to proceed under the dispute resolution sections set out in Part IV of the *RSLA*.

51 In the *Lease Truck Inc., supra*, decision, the Court also held that pursuant to s. 10 of the *RSLA*, the non-possessory lien was only enforceable against third parties if the claim for lien had been registered. In *Lease Truck Inc.*, the Court did not address the situation of whether the person acquired a right against an article after the non-possessory lien arose, and also did not address the issue of priorities where payment was made into Court, which replaced the Truck as security and as such is distinguishable.

52 In the decision of *Canadian Imperial Bank of Commerce v. Kawartha Feed Mills Inc.* (1998), 41 O.R. (3d) 124, [1998] O.J. No. 2828 (Ont. Gen. Div.), Ferrier J. held that the unregistered non-possessory lien under the *RSLA* had priority over the previously registered security interest of CIBC. This case is very similar to the facts before me.

53 In the *CIBC* case at p. 5, Ferrier J. stated as follows:

> I find that this part of the statutory scheme, s. 10, is directed at protecting the interests of third parties who are not other lien holders, and that s. 10 achieves this effect by protecting someone who may have searched the register after the lien has arisen but before its registration.

54 Ferrier J. further stated:

> In any analysis of a question regarding registration, two complementary concerns must be paramount: commercial efficacy, and the integrity of the register. If an otherwise reasonable interpretation would lead to a flaw in the register, then it must be avoided. Commercial efficacy is served by maintaining the integrity of the register. By the same token, if a possible interpretation of the statute does not affect the register, then it may be acceptable. In this case the register is not impaired, because of the subordination protection provided to third parties in s. 10.

55 At page 5, Ferrier J. continued:

> By aggregating, or not registering individual repairs, the repairer or storer will be taking their chances as against each other and subsequently registered rights holders. This is a choice that is up to the repairer or storer to make, whether or not to go to the trouble of registration for what may be small individual amounts. Given, however, that

the *RSLA* is an expeditious procedure, meant to assist these individuals, I think it serves commercial efficacy not to add further burdens to the repairers or storers.

56 I agree with Ferrier J.'s reasoning in the *Kawartha Feed Mills Inc.*, *supra*, case and prefer this reasoning over that of the *Lease Truck Inc.* decision. Daimler did not acquire any rights which were dependent on searching the register after 417's non-possessory lien arose and therefore the integrity of the registration system and commercial efficacy would be maintained by allowing 417's non-possessory lien to take priority over Daimler's previously acquired security interest pursuant to s. 7 of the *RSLA*.

Disposition of Non-Possessory Lien Issue

57 The appeal of the deputy judge's finding that 417 Truck Centre had priority for its claim for a non-possessory lien over Daimler's security interest is dismissed for the above reasons which are summarized below.

(a) Daimler was not a third party who had acquired an interest in the Truck after 417's non-possessory lien first arose.

(b) The efficacy of the register would be maintained as there was no error in registration and Daimler had prior notice of the non-possesssory lien claim.

(c) In circumstances where 417 retained possession of the Truck and also had a valid possessory lien and gave notice of its claim for a non-possessory lien to Daimler, before Daimler acquired any further right in the article, commercial efficacy does not require registration by small repairers where no party suffers any prejudice from the lack of registration.

(d) There was no prejudice to Daimler because it had prior notice of 417's claim for a non-possessory lien, before it paid the amount of the non-possessory lien into Court.

(e) Daimler did not acquire a further right in the Truck when it paid the money into court, as it only substituted cash security in place of the Truck.

(f) By not registering its claim for a non-possessory lien, 417 took the risk that a third party could have acquired some interest in the Truck after its non-possessory lien arose and before it was registered. However, there was no third party who acquired an interest in the Truck after 417's non-possessory lien arose, as Daimler security interest was acquired before 417's non-possessory lien arose.

(g) This interpretation is consistent with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament to protect repairers and grant them priority for the reasonable value of the repair work performed on an article, in this case, the Truck, unless some third party acquired an interest subsequent to the non-possessory lien arising and before notice of such lien was registered.

Issue #2 Did the deputy judge err in finding that 417 had a valid storage under the RSLA?

Deputy Judge's Decision on Storage Lien

58 Deputy Judge Leclaire held that Daimler was liable for the storage charges for 60 days as invoiced and also for an additional amount of extra storage from November 20, 2008 to April 20, 2009 in the amount of $3,433.50 because Daimler "waited until April to pick up the truck after having been advised in November of its location".

59 Daimler appeals the deputy judge's finding that 417 was entitled to a storage lien calculated at $30 per day under the *RSLA*.

60 The definition of storer is contained in s. 1 of the *RSLA* and reads as follows:

"storer" means a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be. ("entreposeur")

61 Section 4(1) of the *RSLA* is also relevant and reads as follows:

4. (1) Subject to subsection (2), a storer has a lien against an article that the storer has stored or stored and repaired for an amount equal to,

(a) the amount agreed upon for the storage or storage and repair of the article;

(b) where no such amount has been agreed upon, the fair value of the storage or storage and repair, including all lawful claims for money advanced, interest on money advanced, insurance, transportation, labour, weighing, packing and other expenses incurred in relation to the storage or storage and repair of the article,

and the storer may retain possession of the article until the amount is paid. R.S.O. 1990, c. R.25, s. 4 (1).

62 The appellant submits that in order to claim a lien for storage costs, the respondent must prove there was an understanding that 417 would be paid for the storage and repair of the Truck at the time the Truck was delivered to 417. Daimler submits that in the absence of any understanding, express or implied, when the Truck was initially delivered into 417's possession that 417 would be paid for storage and repair, then no storage lien would arise.

63 I find that there was evidence on which the deputy judge could find as a fact when 611 initially brought the Truck to 417, that the parties implicitly agreed and understood that 417 would conduct the repairs and store the Truck until the repairs were completed and until 611 attended to pick up the Truck. As a result, there was an understanding that 417 would repair and store the Truck however he amount of the storage charges and when they would commence were not agreed upon.

64 The uncontradicted evidence at trial was that Herb Vink discussed with the owner of the Truck, Mr. Charlebois, that 417 would need to start to charge it for storage of the Truck. This discussion occurred after the Truck had been repaired and had been left on 417's premises for several months.

65 Section 4(1)(b) of the *RSLA* states that where no amount has been agreed upon for the storage cost, the lien will be for an amount equal to the fair value of the storage. Deputy Judge Leclaire found as a fact that the storage fee of $30 per day plus applicable taxes was reasonable and there was no evidence contradicting this factual finding.

66 Discussions concerning storage charges also took place between 417 and Daimler after Daimler became aware that the Truck was located a 417 premises. 417 submits that there was evidence on which the deputy judge could find that there was an understanding between Daimler and 417 that storage costs would be paid to the storer, in this case, 417. The deputy judge held that additional storage costs of $3,403.50 should be paid from the date 417 sent its invoice for storage charges for 60 days namely on November 20, 2008 until April 20, 2009 when Daimler finally removed the Truck from 417's storage yard.

Was the Truck received by 417 from a person other than the owner?

67 Daimler argues that it is not required to pay any storage charges because it was the legal owner and the Truck was received by 417 from a person other than the owner and therefore notice had to be given pursuant to s. 4(4)(c) of the *RSLA*.

68 Section 4(4) of the *RSLA* reads as follows:

4. (4) Where the storer knows or has reason to believe that possession of an article subject to a lien was received from a person other than,

(a) its owner; or

(b) a person having its owner's authority,

the storer, within sixty days after the day of receiving the article, shall give written notice of the lien,

(c) to every person whom the storer knows or has reason to believe is the owner or has an interest in the article, including every person who has a security interest in the article that is perfected by registration under the *Personal Property Security Act* against the name of the person whom the storer knows or has reason to believe is the owner; and

(d) in addition to the notices required by clause (c) where the article is a vehicle,

(i) to every person who has a registered claim for lien against the article under Part II of this Act,

(ii) to every person who has a security interest in the vehicle that is perfected by registration under the *Personal Property Security Act* against the vehicle identification number of the vehicle, and

(iii) if the vehicle is registered under the *Highway Traffic Act*, to the registered owner. R.S.O. 1990, c. R.25, s. 4 (4).

69 In this case, 611 delivered the Truck to 417 for repairs and to be stored until the repairs were completed. 611 was the beneficial owner and Charlebois as the principal of 611, was also a person having the owner's authority. I find that s. 4(4) of the *RSLA* does not apply because the Truck was delivered to 417 by 611, the beneficial owner of the Truck. This was not a vehicle, abandoned at the side of a highway which was towed to a storage facility by someone other than the owner or without the owner's authority and consent.

70 *Black's Law Dictionary*, Ninth Edition, Thomson Reuters, 2009, defines an owner as "one who has the right to possess, use, and convey something; a person in whom one or more interests are vested".

71 In this case, 611 was the beneficial owner and had the right to possess, use and convey the Truck and as such, I find was the owner within the meaning of s. 4(4) of the *RSLA*. Daimler retained legal title to the Truck under its conditional sales agreement. However, I find that the definition of owner in s. 4(4)(a) and (b) includes 611 who was the registered owner of the Truck, the beneficial owner of the Truck, and had possession and the right to use the Truck. 611 also had the legal owner's authority to have possession of the Truck and to make repairs to the Truck, and as a result, s. 4(4)(b) would also apply.

Can costs of storing the Truck be added as an expense to the possessory lien under s. 28(2) of the RSLA?

72 I have also reviewed s. 28(2) of the *RSLA* which states as follows:

Unless otherwise agreed, a lien claimant is entitled to recover the commercially reasonable expenses incurred in the custody, preservation and preparation for sale of an article that is subject to a lien, including the cost of insurance and the payment of taxes or other charges incurred therefor, and the expenses are chargeable to and secured by the article and may be included by the lien claimant in determining the amount required to satisfy the lien.

[Emphasis added]

73 In this case, Daimler has acknowledged that 417 had a valid possessory lien for the amount of $6,304.87. Pursuant to s. 28(2) of the *RSLA*, the possessory lien claimant would be entitled to recover the commercially reasonable expenses incurred in the custody and preservation of the Truck, which would include the reasonable storage charges for the Truck. These storage expenses may be included by the lien claimant in determining the amount required to satisfy the lien. I

find that 417 can also rely on s. 28(2) to claim storage charges for the Truck, especially in these circumstances where it stored the Truck for approximately 12 months (April 2008 - April 2009).

74 The deputy judge made a finding of fact that the $30 per day was a commercially reasonable storage cost. There was evidence before the deputy judge that this amount was reasonable and that greater amounts were charged to other customers of 417 and there was no evidence contradicting the plaintiff's evidence at trial as to the reasonableness of the storage cost.

Disposition of the Claim for a Storage Lien

75 I find that there was evidence to support the following findings of fact made by the deputy judge namely, the Truck was initially delivered to 417 on the understanding it would be repaired and stored, that no amount for storage was agreed upon, that a $30 per day storage charge was reasonable, that there was an implied understanding between 611 and 417 that storage charges would be claimed by 417 after a reasonable period of time when 611 was advised by Herb Vink that 417 would start charging for storage of the Truck, and that 417 had a valid storage lien for the amount awarded pursuant to s. 4 and also as a reasonable expense for custody and preservation under s. 28(2) of the *RSLA*.

Overall Disposition of Appeal

76 For the above reasons, Daimler's appeal is dismissed on all issues.

Costs

77 417 shall have ten (10) days to make brief submissions on costs, Daimler shall have ten (10) days to respond and 417 shall have seven (7) days to reply.

Appeal dismissed.

TAB 16

1910 CarswellOnt 145
Ontario Court of Appeal

Coniagas Mines Ltd. v. Cobalt (Town)

1910 CarswellOnt 145, 15 O.W.R. 761, 20 O.L.R. 622 at 632

Coniagas Mines Ltd. v. Town of Cobalt and Jamieson Meat Company

Coniagas Mines, Ltd. v. Jacobson & Blais

Sir Chas. Moss, C.J.O., Hon. Mr. Justice Osler, Hon. Mr. Justice Garrow and Hon. Mr. Justice Maclaren, Hon. Mr. Justice Meredith

Judgment: April 9, 1910

Proceedings: reversing in part *Coniagas Mines Ltd. v. Cobalt (Town)* ((1909)), 1909 CarswellOnt 38, 13 O.W.R. 333 ((Ont. C.P.))

Counsel: *E. D. Armour, K.C.*, for appellants in both cases.
H. H. Collier, K.C., for respondents in both cases.

Subject: Property; Natural Resources

Appeals by the respective defendants from the judgment of Sir John Boyd, C., after trial of these actions, in so far as it was adverse to them; and cross-appeal by the plaintiffs against so much of the judgment as denied them further relief.

The circumstances giving rise to the litigations are set forth at length in the learned Chancellor's judgment (13 O. W. R. 333), and they need not be repeated.

The appeal to the Court of Appeal was heard by Sir Chas. Moss, C.J.O., Hon. Mr. Justice Osler, Hon. Mr. Justice Garrow, Hon. Mr. Justice Maclaren and Hon. Mr. Justice Meredith.

Sir Chas. Moss, C.J.O.:

1 It is sufficient to state that the plaintiffs are by virtue of letters patent from the Crown, dated the 9th of December, 1905, and several mesne conveyances, the owners in fee simple of the mines, minerals, and mining rights in, upon and under the whole of a parcel of land composed of and known as mining claim J.B. 6 in the township of Coleman, containing 40 acres; and also that by virtue of a deed of transfer from the Temiskaming & Northern Ontario Railway, dated the 2nd of May, 1906, and several mesne conveyances, they are the owners in fee simple of a portion of the land known as mining claim J.B. 6, described as lot number 42, on a plan of the town site of Cobalt, and said to contain an area of between 20 and 25 acres of the 40 acres comprising mining claim J.B. 6.

2 So far, therefore, as lot No. 42 is concerned, the plaintiffs are the proprietors in fee of the land and of all mines and minerals and mining and surface rights connected with it. Mining claim J.B. 6 is now part of the town site of the town of Cobalt as shewn on a plan of the town site made by L. O. Clark, an Ontario Land Surveyor.

3 The plaintiffs' plant, mining works and buildings are situated upon the part of J.B. 6 known as No. 42, and in order to gain access with vehicles and teams to and from this portion of their property to the remaining parts of claim J.B. 6, and to and from Cobalt railway station, they constructed a roadway which they used for the purpose of bringing in machinery, fuel, supplies and other necessary freight, and carrying away from their works the ores and product of their mining operations. The evidence clearly establishes that at the time of the commencement of the actions, and up to the

time of the trial, this road was the only practicable route, and that an alley-way or lane shewn in the plan, and said to be 15 feet in width, put forward by the defendants as a practicable and sufficient route for the purposes of the plaintiffs' business, was wholly inefficient and inadequate as a substitute for the plaintiffs' roadway.

4 The defendants having interfered with the plaintiffs' user of their roadway by the erection of a fence and building, and in other ways; and having also interfered with the plaintiffs in and prevented them from searching for minerals upon portions of claim J.B. 6 not comprised in lot No. 42, the plaintiffs brought these actions. The defendants claimed the right to prevent the plaintiffs' further use of the roadway in so far as it crossed town site lots, and to exclude the plaintiffs from searching for minerals in or upon the streets or town site lots as laid out on claim J.B. 6. And — as the learned Chancellor states — at the trial two questions were presented for decision: (1) As to the right of the plaintiffs to use the roadway from their now worked mines, and (2) as to the plaintiffs' right to search for minerals, such user and search affecting the streets in the town of Cobalt and certain town site lots to which the individual defendants claimed title.

5 The Chancellor held with the defendants that the plaintiffs were no longer entitled to use their roadway over the town site lots, and that as regarded the right to search for minerals in the streets it was subject to the provisions of secs. 23 and 24 of the Act, 7 Edw. VII. ch. 18, prescribing certain preliminary conditions to be observed by mine owners, and that the plaintiffs having failed to observe them were not entitled to relief in respect of the acts of prevention complained of. He held, however, that the plaintiffs were entitled to carry on their mining operations in, upon or under the streets and highways of the town, subject to the provisions of the 23rd and 24th secs. of the Act, and also that they were entitled to the use and possession of the surface of the town site lots owned or claimed by the individual defendants so far as required to enable them to prosecute their mining rights and privileges. And the judgment restrained the defendants from interfering with the plaintiffs in their use of the streets and lots to the extent declared.

6 Neither party being satisfied, and each claiming the full extent of their asserted legal rights, the same questions are again presented for consideration.

7 Apart from the effect of the statutory provisions already referred to, the questions seem to resolve themselves into an enquiry into the extent of the rights of a grantee or owner of mines, minerals and mining rights in, upon and under lands as against the grantee or owner of the surface whose title has been acquired subsequently to that of the owner of the mines, etc. Having regard to the course of dealing and the order of conveyancing, if it may be called such, there is no reason to think that the title of the individual defendants is not subject to all the rights which are expressed to be granted to the plaintiff by the letters patent of the 15th of Dec., 1905. It appears clear that sec. 42 of the Revised Statutes is not applicable for the reasons pointed out by the Chancellor, and therefore these defendants have no status to claim compensation for anything properly done by the plaintiffs in the exercise of their rights. This is a case in which the ores, mines and minerals were dealt with separately from the surface of the land, but such dealing was before and not after the surface rights had been granted, leased or located in the manner contemplated by sec. 42. It is conceded that they had not been granted or leased, but it is said they were located. But in connection with public lands the term "Located" has a well known meaning, and it is not to be presumed that it was intended to be used in sec. 42 in a different sense. It is clear that in its ordinary sense it would not comprise such dealings with these lands as took place under the direction of the department or the commissioners of the Temiskaming & Northern Ontario Railway prior to the issue of the grant to the plaintiffs. The case of the defendants, corporate and individual, must rest upon whatever rights remained to be acquired and were acquired after the plaintiffs' grant, aided, however, as to the former by any subsequent legislative enactments by which the plaintiffs' rights may be affected. What, then, are the plaintiffs' rights?

8 The learned Chancellor has held that they may no longer use the roadway across the surface of the lots in question, resting his view chiefly upon the fact of the streets and lots in the town site having been delineated and shewn on a plan before the construction of the plaintiffs' roadway. It is not questioned that the plan was not properly recorded until after the issue of the letters patent to the plaintiffs' predecessors in title.

9 The grant thereby made unquestionably carried with it everything that was reasonably necessary to the proper enjoyment and use of the thing granted, including, of course, such convenient way or ways, or means of ingress and egress

as were required. The delineation on a plan of courses of streets for the use of the town dwellers could not conclude the question of what was reasonable as a way or means of access to the plaintiffs' mining works which had been in operation before the preparation or recording of the plan.

10 Upon the evidence the plaintiffs appear to have decided upon their present roadway after due consideration of the topography and the engineering difficulties to be overcome.

11 It appears to be at the present the only practicable way by which the plaintiffs can bring whatever is required for the prosecution of their mining operations and the due and proper working of their mines, including the carrying away of the ores, metals and other products. The defendants have shewn no good reason for interfering at the present time, and under present conditions, with the reasonable user by the plaintiffs of the roadway for their necessary purposes. And to the extent of enjoining the defendants from interfering with and obstructing the way, the plaintiffs' cross-appeal should be allowed.

12 In support of their claim to begin and carry on mining operations upon the streets without the hindrance of the defendant corporation, the plaintiffs contend that the provisions of secs. 23 and 24 of the Act, 7 Edw. VII. ch. 18, do not apply to them or affect their rights. It is said that to give effect to them as against the plaintiffs would be to deprive them of vested rights. The authority of the Legislature to do so if it deems it proper and right, must be conceded. The real question is what has been intended and effected by the legislation.

13 Section 23 seems to be intended mainly for the protection of the title and rights of owners of mines, minerals and mining rights, and to be declaratory of the existing law in that respect. Section 24 is intended to regulate the manner in which owners shall exercise their rights, and in that sense is restrictive. But that alone is not sufficient for concluding that it should not apply to owners who acquired their titles before the passing of the enactment. The obvious policy is, not to prevent the use and enjoyment of the mining rights but to so order them in the public interest that the highways and those travelling in and upon them may be kept secure and free from danger owing to mining operations being carried on. And the language of the enactment may well be read as applying to conditions as they arise, and as so far affecting all owners of mining rights such as the plaintiffs have in the lands in question here. The plaintiffs' cross-appeal as to this part of the judgment fails.

14 The defendants' appeal fails for the reasons given by the learned Chancellor.

15 The rights of the individual defendants as owners of the surface rights have been already touched upon in dealing with their claim to be entitled to compensation. The conclusion on that branch of their case is substantially a determination of their other contentions as against the plaintiffs' rights in, upon and under their respective lots. There is nothing to shew that the plaintiffs were doing anything upon the defendants' lots to justify the acts of obstruction and prevention on their part of which the plaintiffs complained; and the learned Chancellor so found.

16 The result is that the defendants' appeal should be dismissed and the plaintiffs' cross-appeal allowed to the extent indicated, with costs to the plaintiffs.

Hon. Mr. Justice Osler, Hon. Mr. Justice Garrow **and** ***Hon. Mr. Justice Maclaren*****, concurred.:**

Hon. Mr. Justice Meredith**:**

17 The respective rights of the parties in such a case as this seem to me to be so plain and reasonable that litigation over them could not but be avoided if each would have some regard for the other's rights and not concentrate all thought and energy upon his own interests and gain only.

18 The plaintiffs are the owners of all the mining rights in the lands; the defendants who have acquired any title to them acquired it with a knowledge of, and expressly subject to, such mining rights.

19 The mining rights include all such things as are reasonably necessary in seeking minerals and in working mines; but must be exercised so as to do as little injury as reasonably can be to the land, and consequently the defendants' interests; and such rights include all reasonable necessary ways.

20 These views are, I think, quite in accord with those expressed, and intended to be acted upon, by the trial Judge. I differ from him only in the application of them in one respect. He thought that the allowances for public roads afforded a sufficient means of ingress and egress for the plaintiffs: I find that, in their present state, they do not and therefore, that the plaintiffs are entitled to continue to use the one way in and out, which they made and have always used, until the public ways are made fit for traffic — at least as reasonably fit as the present road.

21 In regard to the legislation in question, no one, who has a knowledge of the circumstances under which it was enacted, as we all have, can have any doubt that it was intended to apply to such ways as those in question; and the words used are wide enough to include them; though having regard to the general rules respecting the interpretation of statutes, the intention to make this enactment retrospective should have been more clearly expressed. To adjudge it prospective only would in all probability be but wasted adjudication; to be promptly followed by legislation declaring, and enacting, that it was and shall be retrospective.

22 I would dismiss the defendants' appeal; and allow that of the plaintiffs' to the extent before indicated.

End of Document

TAB 17

1942 CarswellOnt 406, [1942] 1 D.L.R. 462

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1942 CarswellOnt 406, [1942] 1 D.L.R. 462

Fuller v. Howell

Fuller v. Howell et al.

Ontario Supreme Court, High Court of Justice

McFarland J.

Judgment: January 10, 1942
Docket: None given.

Counsel: *A. M. Lewis, K.C.*, and *B. H. Slater*, for plaintiffs

R. B. Steele, for defendants

Subject: Contracts

***McFarland J.*:**

The plaintiff as executor of Ethel Puller and in his individual capacity, sues for a declaration that he is entitled to one-seventh of all oil produced by the defendants, MacMillan and Marvin, and generally of all other rights of the plaintiff under an agreement which is the basis of the action. He also claims an accounting by the defendants, Mac-Millan and Marvin and Howell of all such oil taken to date, and for recovery from the defendants MacMillan, Marvin and Howell, of one-seventh part of all such oil, or, in the alternative, damages for breach of the provisions of the said agreement. The defendant Howell is the present owner of the property in question. The defendants MacMillan and Marvin are oil operators and lessees of the defendant Howell, of oil and gas rights in the said land.

The agreement on which the plaintiff bases his claim is dated October 9, 1920, and was made between C. Evan Lueas, of the first part, and the Hamilton-Bothwell Oil Co. Ltd., of the second part. By the agreement, Lucas, who was then the owner of Lot Number 17, River Range, in the Township of Zone, in the County of Kent, containing 124 acres more or less, granted to the Hamilton-Bothwell Oil Co. Ltd. "the exclusive right of searching for, producing, storing and

selling petroleum and natural gas in and under and upon that certain tract or parcel of land", etc. The agreement further provided that "the term was for three years from the date of the agreement and as much longer as oil or gas may be produced in paying quantities." A further term of the agreement (which was called a "lease") is as follows: "The party of the second part agrees, first, to deliver to the first party free of charge, in tanks or pipe-lines upon the premises, oneseventh part of all oil produced and saved on the premises, the first party to have free gas for household purposes during term of lease." The document provided that the Hamilton-Bothwell Oil Co. was to pay all damages done to growing crops by reason of its operation, bury all pipe-lines below plow depth, etc. It is further provided that in case no well is commenced within 12 months of the date of the document, the grant should become null and void unless the Company paid to the party of the first part a rental of 50 cents per acre per year pending delay in commencement of drilling.

By virtue of certain assignments, filed as exhibits, the interest of the Hamilton-Bothwell Oil Co. in the said agreement became vested in the Summit Oil Co. Ltd. In 1931 the sheriff of the County of Kent conveyed all property of the Summit Oil Co. Ltd., including its interest in the above land, to Robert D. McCrie, who, according to the evidence given by him at the trial, abandoned forthwith the said agreement of June 9, 1920, signed an informal surrender thereof in 1934 and executed a formal surrender in 1939.

By indenture dated December 6, 1920, and designated "Assignment of Royalty" the right to one-seventh part of the oil given to the said G. Evan Lucas by the said agreement of October 9, 1920, was transferred and assigned absolutely to the said Ethel Puller.

By conveyance dated December 23, 1920 the lands above mentioned were conveyed by the said Lucas to the defendant Howell, and it was expressly provided therein that the same was subject to the royalty interest of one-seventh part of the oil in favour of he said Ethel Fuller.

Operations were conducted by the Hamilton-Bothwell Oil Co., and its successors in title, on the property from October 1920 until some time in the year 1931, when operations were discontinued by the Summit Oil Co., and during that period the operators in succession paid the said Ethel Fuller, and after her death, the plaintiff, the amounts realized from the sale of oneseventh of the oil so produced. In 1933 the defendant Howell obtained an equitable assignment to himself of the rights granted to the Hamilton-Bothwell Oil Co. by the said agreement of October 9, 1920, by agreement with the said Robert D. McCrie, the latter of whom, by indenture dated January 3, 1940, assigned the same to him. By indenture, dated May 25, 1939, the defendant, Howell, granted to the defendants, MacMillan and Marvin, the exclusive right for 10 years, and so long thereafter as oil or gas should be produced in paying quantities, to drill for and remove the same from the northerly 80 acres of the above-mentioned lands, on condition of paying the said Howell for one-eighth of all oil taken, and it is alleged by the plaintiff that the defendants, MacMillan and Marvin, have operated and continued to operate the oil wells on the said lands and produced oil therefrom in paying quantities, but that both they and the defendant Howell have refused to acknowledge the rights of the plaintiff, or to pay the royalty or portion of oil to which he claims to be entitled under the original agreement of October 9, 1920.

The defendants set up several defences; First, the defendants claim that no lease was created by the document of October 9, 1920, but merely a contractual right in the nature of *profit à prendre*, and that he [the plaintiff] thus has the contractual rights of the party of the first part only, and that he did not acquire from the said Lucas, or any other party

through whom he claims, a covenant to see that the royalty was paid, and that, therefore, his claim (if any) is against the Hamilton-Bothwell Oil Co. and not against any other person. A *profit à prendre* has been described as something more than a license and less than a lease, but it is defined in the "Mining Law of Canada" (Morine) as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil . . . . It is incorporeal and incapable of creation except by grant or prescription." [pp. 177-8] In this connection it is pointed out that Lucas retained possession of the land after the so-called lease was executed, and that the "document" contained clauses calling for the burying of all pipes "below plow depth" etc.

It is submitted by the defendants also that no covenant can be implied from the surrender from McCrie to Howell, because it is signed by McCrie only and gives up any claim he may have. The defendants, MacMillan and Marvin, do not claim under the agreement of October 9, 1920, and their lease involves only part of the land covered by the agreement of October 9, 1920. They have never at any time claimed the interest of the Hamilton-Bothwell Oil Co. in the original agreement. The main defence, therefore, is that the plaintiff has no right of action against the defendants, or any of them, because he has no interest in the land involved, and none of the defendants is bound to him in any way by contract.

The defendants allege also that even if the original agreement exists in full force and effect at the present time, there has been failure of consideration in violation of the contract to supply free gas for household purposes, and the breach of the agreement to pay 50 cents per acre per year pending delayed commencement of drilling. They also allege that if the document of October 9, 1920 is considered a lease, that it is void for uncertainty. They also plead the *Statute of Limitations*.

In my opinion it is not necessary to deal with any defence except the first one submitted, because I must come to the conclusion that any rights which the plaintiff had are contractual rights only and can be enforced only against persons liable by contract to him — in this case, the Hamilton-Bothwell Oil Co. — and no others. The action is therefore dismissed with costs.

END OF DOCUMENT

TAB 18

File No. MA 022-09

M. Orr)
Deputy Mining and Lands Commissioner)

Friday, the 24th day
of September, 2010.

THE MINING ACT

IN THE MATTER OF

An application under subsections 51(4), 51(6) and 80(2) of the **Mining Act** in respect of certain portions of the surface rights of Mining Claims TB-1239573 and 1239574, situate in the Township of Ashmore, in the Thunder Bay Mining Division, recorded in the name of Michael Malouf, (hereinafter referred to as the Malouf Mining Claims");

AND IN THE MATTER OF

A referral by the Minister of Northern Development and Mines and Forestry to the tribunal pursuant to subsection 51(4) of the **Mining Act**;

AND IN THE MATTER OF

An application for a direction from the tribunal to the Minister of Northern Development and Mines and Forestry that the surface rights over particular portions of the Malouf Mining Claims be removed from staking pursuant to section 35 of the **Mining Act**, as being required for the use of the Crown, as contemplated by subsection 51(6) of the **Mining Act**.

B E T W E E N:

MINISTER OF NATURAL RESOURCES &
MUNICIPALITY OF GREENSTONE

Applicants

- and -

MICHAEL MALOUF

Respondent

O R D E R

1. **IT IS ORDERED** that this application be and is hereby granted.

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2. **IT IS FURTHER ORDERED** that the Respondent, Mr. Michael Malouf and his assigns shall retain and preserve all such rights to access and work his mining rights pursuant to the **Mining Act**, **AND FURTHER t**he Applicants, the Minister of Natural Resources and the Municipality of Greenstone shall allow the aforementioned Respondent, Mr. Michael Malouf and his assigns to conduct and perform all phases of assessment work, exploration and extraction permitted by the **Mining Act** and shall allow access to the aforementioned Respondent, Mr. Michael Malouf and his assigns for the purposes of conducting and performing such activities as are permitted by the **Mining Act**.

3. **IT IS FURTHER ORDERED** that the Applicant Municipality shall grant an easement to the Respondent and that the Respondent shall pay for the cost of the survey for such easement as directed and described below.

4. **IT IS DIRECTED** that the easement to be surveyed will consist of that part of Access Road "A" (as shown in Schedule "A" attached hereto and forming part of this Order) that begins at Highway 11 and proceeds north crossing patented mining claim TB-10700 and then breaks off to the west to cross the Malouf Mining Claim TB-1239574, terminating at the boundary of that mining claim and the Koroscil patented mining claim TB-12738 **AND FURTHER** the easement should include that part of Access Road "B" (as shown in Schedule "B" attached hereto and forming part of this Order) that cuts across the landfill site in a northeasterly direction until it touches the boundary of patented mining claim TB-12737. Upon completion of the Applicant's land acquisition needs along the northwest boundary of the landfill site (Koroscil TB-12737), the easement will proceed through the buffer created by any such acquisition and ending at the outer boundary of the buffer zone acquired through disposition of surface rights of Malouf Mining Claim TB-1239573.

5. **IT IS FURTHER ORDERED** that no costs shall be payable by any party to this application.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this Order shall be forwarded to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 24th day of September, 2010.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

File No. MA 022-09

M. Orr) Friday, the 24th day
Deputy Mining and Lands Commissioner) of September, 2010.

THE MINING ACT

IN THE MATTER OF

An application under subsections 51(4), 51(6) and 80(2) of the **Mining Act** in respect of certain portions of the surface rights of Mining Claims TB-1239573 and 1239574, situate in the Township of Ashmore, in the Thunder Bay Mining Division, recorded in the name of Michael Malouf, (hereinafter referred to as the Malouf Mining Claims");

AND IN THE MATTER OF

A referral by the Minister of Northern Development and Mines and Forestry to the tribunal pursuant to subsection 51(4) of the **Mining Act**;

AND IN THE MATTER OF

An application for a direction from the tribunal to the Minister of Northern Development and Mines and Forestry that the surface rights over particular portions of the Malouf Mining Claims be removed from staking pursuant to section 35 of the **Mining Act**, as being required for the use of the Crown, as contemplated by subsection 51(6) of the **Mining Act**.

B E T W E E N:

MINISTER OF NATURAL RESOURCES &
MUNICIPALITY OF GREENSTONE

Applicants

- and -

MICHAEL MALOUF

Respondent

REASONS

Appearances:

Applicant Municipality of Greenstone: Mr. Vance Czerwinsky,
Director of Public Services

Respondent: Mr. Michael Malouf

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The tribunal notes that while a senior technician was present from the Ministry of Natural Resources and while the Ministry was named in the matter, the Ministry itself did not participate, nor was there any need for them to do so.

Introduction

This matter focuses primarily on a history of opposing needs regarding the use of certain surface rights. On one side is the owner of various unpatented mining claims (as well as patented mining claims) with a need to access those claims and on the other is a municipality attempting to work within regulatory constraints to manage a landfill site. The owner of the claims (and the Respondent in this matter), has refused to give his consent to the disposition of surface rights over two of his unpatented mining claims sought by the Municipality (a co-applicant in this matter) under the **Public Lands Act**, R.S.O., 1990, c. P.43, as amended. The Municipality has found itself at odds with regulatory requirements regarding buffer zones for its landfill site, which is still in use. It needs to acquire abutting surface rights in order to address certain environmental buffering needs. The Respondent claims that a long history of dealings with the Municipality has made it necessary for him to ask for something more than just a letter acknowledging his right to access minerals below the surface.

Issues

Should an application for the disposition of certain surface rights be granted? Should the Respondent's request for easements delineating access roads be granted?

Overview of Facts Not in Dispute

The referral of an application for the disposition of public lands (under the **Public Lands Act**) was made by the Minister of Northern Development and Mines to the Mining and Lands Commissioner as the lands in question had been staked and the holder of the mining claims had refused to consent to the disposition of the surface rights.

Greenstone's landfill site dates back to the 1970's. According to the materials filed by the Municipality, a Land Use Permit was issued by the Ministry of Natural Resources in 1973 and revised in 1977 (HM 215). An application for a Certificate of Approval (to operate the site for waste disposal) was submitted to the Ministry of the Environment in 1972. It may be that approval for a waste disposal site was given in the late 1970's. In any event, the landfill site's existence pre-dates the Respondent's staking activities for the affected mining claims being (TB-1239573 and TB-1239574) which were staked in June of 2002. In both cases, there were certain reservations including sand, gravel and peat.

Both the landfill site and the Respondent's mining claims lie north of Highway No. 11 in the Municipality of Greenstone. The landfill site is actually called the Geraldton Landfill Site. A small triangle of Malouf Mining Claim TB-1239573 crosses Highway No. 11. This highway also provides the jumping-off point for the access roads used by the parties.

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The Municipality's disposal activities apparently triggered a non-compliant status with its Certificate of Approval and in order to bring itself back into compliance, it went about seeking to acquire additional abutting land. Some abutting lands are owned privately. The mining claims at issue were staked on Crown lands. Under the **Public Lands Act**, the Minister of Natural Resources has charge of the disposition of public lands. However, prior to disposition, the consent of any mining claim holder must be obtained and failing that, an Order must be made by the Mining and Lands Commissioner under the **Mining Act,** R.S.O., 1990, c. M.14, as amended.

Both parties have discussed the issues facing them at length; however, the Respondent has refused to consent to the disposition of surface rights that would go to providing (in part) additional land to the Applicant Municipality for its landfill needs.

Analysis

Statutory Context and Parties' Positions

The disposition of public lands takes place pursuant to the **Public Lands Act**. Pursuant to section 51 of the **Mining Act**, where disposition is of surface rights on an unpatented mining claim, the holder of the mining claim must provide consent before disposition can occur. If consent is forthcoming, then an entry is made on the record of the claim (respecting the consent) and the surface rights can be disposed of by the Ministry of Natural Resources. A survey of the surface rights may be required by the Minister of Northern Development, Mines and Forestry, at the expense of the person acquiring the surface rights.

If consent is not forthcoming, then the Minister of Northern Development, Mines and Forestry may refer the matter, pursuant to section 51 of the **Mining Act**, to the Mining and Lands Commissioner, who will make a decision weighing the interests of both sides in the matter. This assessment of competing interests has been called the application of the "multiple use principle". It has its origins in the report of a government committee called the "Public Lands Investigation Committee, 1959". "[A] number of principles related to multiple use of Crown lands" were drawn up and "a method of resolving, if feasible, conflicting uses or the prevention in a proper case of the subsequent acquisition of surface rights through a hearing before the Commissioner" was achieved.[1] The interests of those who stake mining claims is preserved by way of the **Mining Act**, and their prior rights to use the surface to explore and develop mines is well documented. Indeed, the actual "consent" form for the disposition of surface rights acknowledges this fact. However, while this document forms part of the public record under the **Mining Act**, it may be that circumstances can arise where a variety of competing interests come into existence whereby publicity pursuant to the **Mining Act** is not sufficient.

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[1] Kamiskotia Ski Resorts Limited v. Lost Treasure Resources Ltd., 6 M.C.C., page 462.

The Municipality is caught between the proverbial "rock and a hard place". It has, in the past, deposited waste in such a way that it has run afoul of environmental regulations. Cost issues make it expensive to dig up and relocate the waste that is the source of the problem. It is also running out of space as far as the current site is concerned and it will have to find another site. While it estimates that it has three to five years of usage left at the current site, in order to make that time line feasible, it must negotiate with neighbouring interests to secure additional land needed for buffering and attenuation purposes. It retained an expert (Trow Associates Inc.) to update the designs and operation at the landfill site, but did not call this expert to the hearing. The expert's report (the "Trow report") was produced at the hearing to support the Municipality's contention that it needed additional buffering lands on the east and west sides of the site as well as additional lands to the west to accommodate the attenuation zone which addresses potential leaching. These buffering needs and standards are set by the MOE and measure 30 – 50 metres in width. In this case, 30 metres is needed. The Municipality has made it clear that it has no intentions of doing anything within this border and that mining activity could continue.

Since neither party was represented by counsel, it was frequently necessary for the tribunal to extract relevant information by asking numerous questions. The Trow report provided the basis for the Municipality's request and it was clear from submissions that public consultation regarding the Municipality's plans had been sought. The Municipality was of the opinion that it had no choice but to proceed with expanding the overall size of the landfill boundaries in order to comply with MOE requirements and to protect it against present and future liabilities associated with landfill sites. Indeed, the MOE has stipulated the terms to be fulfilled – the production of the Trow report being one of them; the creation of buffers at the edges of the site being another. The tribunal made it clear to the parties that it was not in a position to determine the merits of changing the boundaries of the landfill site. In fact, the Respondent asked for a number of points of relief which were outside the jurisdiction of the tribunal.

If one describes the shape of the landfill site as a quadrangle or quadrilateral, then two sides on the north side form a peak, the third side to the south forms a base and the fourth side to the west is a short connecting line between the top two sides and the bottom base side. If one were to describe the shape of the mining claims, one might conclude that they formed the shape of a "U" without the curves. The landfill site would be found at the bottom of the "U". The mining claims were staked after the landfill site had been in existence and based on mapping that dates back to 1977, it appears that access roads date back to that time. They traverse the lands covered by the landfill site as well as the lands now staked by various mining claims and patents. Based on the documentation submitted by the Municipality, these roads appear to originate some time in the 1970's or perhaps earlier. One can safely assume that they provided access both to the landfill site and to mining claims in the area at one time or another.

The Respondent is the president of a company called "Hardrock Extension Inc.", which holds an option on mineral rights to the two mining claims affected by the application brought before this tribunal. The company also has interests in other mining claims to the north of the landfill site. The Respondent himself says that he owns the surface rights to a number of patents located to the north as well. This is where the Respondent's chief interest lies – to the

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north and all of the access roads he claims to use now are routed in such a way that they head north from Highway 11, past or through the landfill site.

The Respondent produced a myriad of documents (including planning documents) that while not relevant to the issues before the tribunal in themselves, they formed the basis (in his mind at least) for his unwillingness to trust the Municipality to keep its word regarding any right on his part to access his mining claims over lands acquired by it. Whether the Respondent's allegations are baseless or not is of no relevance to the issues before this tribunal. However, documentation was accepted to explain the foundation for the Respondent's belief that he could not trust the municipality to carry through on its promise to provide access to his mining claims once he had consented to disposition of the surface rights. It was for the Respondent to provide relevant evidence that the tribunal could use to understand his reluctance to give consent and this he did do.

The Respondent has been working his mining claims around and to the north of the landfill site. He produced five maps which depicted five access routes that he has utilized over the years to access claims north of the landfill site. Some are used more than others. Two roads use Highway 11 as the starting point and make their way north of the landfill site. The Respondent provided maps delineating the access roads he has used and would like to use. Access Road "A" cuts north (from Highway 11) through TB-10700 and forks to the west just south of the landfill site so that it continues in a northwesterly direction through mining claim TB-1239574 and heads into TB-12738 (the Koroscil lands). The Respondent obtains permission from Koroscil to cross into his claims further north. Access Road "B" again starts at Highway 11, (on the east side of the landfill site) but after heading north for a bit through Mining Claim TB-1239573, it jogs to the west and follows the periphery of the landfill site and crosses over into TB-12737 before heading into the landfill site and connecting with Road "A". These appeared to be the Respondent's routes of choice.

Mr. Malouf sees much potential in the mining claims and patents that he or his company own. However, he is concerned that his heirs (and his company) will inherit more than just mining claims – they could also inherit the same problems he is encountering with accessing these mining claims and those that lie to the north of the landfill site. For example, he has encountered locked gates, electric fencing and boulders blocking his path. No one from the Municipality gave him notice of these things happening. The Municipality's explanation was that the site had to be fenced in order to discourage people and animals from entering the site to dump garbage and to rummage in it.

It was also mentioned by the Respondent that he has had to consider access issues with the Ministry of Transportation as the Ministry has gravel pit interests on lands covered by his mining claims. That Ministry also suggested that the Respondent rely on having a key to a gate to access his mining claims.

Given these experiences, the Respondent feels that he (and any future owners of the mining claims) requires something on title that would give notice to others of his right to access. Putting an easement on title for instance would achieve this goal and at the same time reduce the potential for legal actions were the access to be denied. The Respondent was there-

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fore wary of granting consent to the disposition of surface rights without obtaining something tangible in return.

The Municipality countered by saying that a letter (from the Municipality) stating that the Respondent had access and that the providing of keys to gates would be adequate to the Respondent's needs. It was pressed to obtain the surface rights and was also loathe to spending money on costs associated with surveys and easements. The tribunal notes that both the Municipality and the Respondent made the tribunal aware of the fact that a survey would accompany any disposition of the surface rights.

Findings and Conclusions

The tribunal finds that the Applicant Municipality has demonstrated an important public need – namely, bringing the Geraldton Landfill site into compliance with provincial environmental regulations. Taking jurisdiction into account, the tribunal has not made any determinations with respect to whether the buffer on the west side of the landfill site could be justified by the Municipality (the Respondent claimed that the buffer on the west side of the landfill site was not needed.) The tribunal further finds that the Municipality's need should be addressed and dealt with through the application of the "multiple use principle" of land. The tribunal finds that based on the submissions of the Applicant Municipality a disposition under the **Public Lands Act**, should be granted.

The tribunal also finds that the Respondent has demonstrated a reasonable need to have dependable and recognizable access to his mining claims both now and in the future. His access has been negatively affected in the past and there is reason to believe that the future could present him (and anyone else owning the affected mining claims) with the same situation.

There is no doubt that the mix of competing interests concerning the surface rights in this area is causing some confusion and unease. It is apparent to the tribunal that the Respondent's activities, which take place under the **Mining Act**, are not always taken into account in the day to day administration of the Municipality. While the Municipality's offer to put something in writing regarding the Respondent's access rights is laudable, based on the Respondent's evidence concerning electric fencing, locked gates and boulders on the roadway, it appears that his fears that such assurances will get lost or be forgotten are not without foundation. He was not provided with any information regarding the Municipality's need to control access with locked gates, nor were his activities taken into account when the Municipality took more drastic action by placing boulders in his way. In reviewing the Trow Report, the tribunal noted that one of the recommendations for the future dealing with "post closure and monitoring" of the site was that "fencing and lockable gate should be kept in place, with no changes to the existing controlled site access."[2] So it appears that the challenges faced by the Respondent today will undoubtedly exist as long as the landfill site needs maintenance. The tribunal therefore finds that the Respondent should have at least one access route recognized with an easement and the survey that accompanies it. The tribunal also finds however, that the

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[2] "Updated Design and Operations Plan", Trow Associates Inc., see Exhibit 2a, page 18.

Respondent should pay for the cost of the survey only as it affects his route since his ability to access his mining claims is already a statute based right under the **Mining Act,** R.S.O., 1990, c. M.14, as amended. As for the choice of route, the tribunal finds that the routes depicted in Exhibit 4 (a) & (b), being named as Access Road "A" and Access Road "B" by the Respondent should serve as base line information for purposes of a survey for the easement. To be specific, the access to be surveyed will consist of that part of Access Road "A" that begins at Highway 11 and proceeds north crossing TB-10700 and then breaks off to the west to cross the Malouf Mining Claim TB-1239574 terminating at the boundary of that mining claim and the Koroscil patented mining claim TB-12738. The easement should include that part of Access Road "B" that cuts across the landfill site (and the Malouf Mining Claim TB-1239574) in a northeasterly direction until it touches the boundary of TB-12737 (additional Koroscil land). In the future, should the Municipality succeed in purchasing the Koroscil interest in this area for its buffer, then the easement should be plotted through the buffer acquired through that purchase and proceed through the buffer being acquired through the disposition of surface rights on the Malouf Mining Claim TB-1239573. The tribunal is not prepared to grant a request for an easement located on the east side of the landfill site. The security of access provided through the **Mining Act** is sufficient. The tribunal leaves it to the parties to determine their liabilities and responsibilities as both providers of and users of access across a landfill site.

The tribunal finds that it will be unnecessary to make any determination pursuant to sections 35 or 80 of the **Mining Act**.

The circumstances of this case, where an ongoing public need to address regulatory requirements comes up against the public interest in developing the rich mineral resources of the province through the hard work of prospectors, calls for certainty. Both sides should be able to take comfort in knowing what their responsibilities and rights are for now and the future. This disposition should not be taken as a precedent for other such applications.

There will be no costs payable by any of the parties to this application.

TAB 19

1994 CarswellNS 543, 135 N.S.R. (2d) 259, 119 D.L.R. (4th) 518, 386 A.P.R. 259, 51 A.C.W.S. (3d) 170

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1994 CarswellNS 543, 135 N.S.R. (2d) 259, 119 D.L.R. (4th) 518, 386 A.P.R. 259, 51 A.C.W.S. (3d) 170

Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.

Dennis Forgeron, Wilfred Moore, William Faulkner and Thomas Faulkner, Appellant and Nova Scotia Business Capital Corporation, a body corporate, Respondent and Coxheath Gold Mines Limited, a body corporate, and Michael J. Riddell and Doane Raymond Limited, Trustee under a Proposal in Bankruptcy made by Coxheath Gold Holdings Limited, Respondents

Nova Scotia Court of Appeal

Freeman J.A., Jones J.A., Matthews J.A.

Heard: September 21, 1994
Judgment: October 21, 1994
Docket: C.A. 100225

Proceedings: Affirmed 128 N.S.R. (2d) 118, 359 A.P.R. 118, 1993 CarswellNS 260 (N.S. S.C.)

Counsel: *R.A. Cluney, Q.C.* for Appellants.

David P.S. Farrar, *Claire E. Milton* for Respondent.

Subject: Natural Resources; Property

Mines and Minerals --- Ownership and acquisition of mineral rights — Mining lease — Rents and royalties

The Court:

Appeal dismissed with costs to the respondent, Nova Scotia Business Capital Corporation in the amount of $1500.00 per reasons for judgment of Jones, J.A.; Matthews and Freeman, JJ.A. concurring.

1994 CarswellNS 543, 135 N.S.R. (2d) 259, 119 D.L.R. (4th) 518, 386 A.P.R. 259, 51 A.C.W.S. (3d) 170

Jones, J.A.:

The main issue on this appeal is whether certain royalty interests claimed by the appellants, Wilfred Moore, William Faulkner and Thomas Faulkner affected the mineral rights of Coxheath Gold Mine Limited (Coxheath). The appellant, Dennis Forgeron, no longer holds any interest in the royalties.

In 1986 Forgeron was the holder of four exploration licenses giving him the right to search and prospect for minerals under the *Mineral Resources Act* 1975, S.N.S. c. 12, in certain areas at Tangier and Mason Cove in Halifax County.

By an agreement dated April 1, 1986, Forgeron assigned to Coxheath the right to earn a 100% working interest in the mineral claims represented by the licenses. Paragraphs 2, 3 and 4 of the agreement provide:

> Forgeron shall grant to Coxheath the right to earn a One Hundred Percent (100%) interest in the Property in consideration of:
>
> (a) The completion of a preliminary drill program consisting of a minimum of 1000 feet of diamond drilling prior to June 25, 1986;
>
> (b) The expenditure of a minimum total of Two Hundred and Fifty Thousand Dollars ($250,000) by February 28, 1987 on exploration, development and other work on the Property;
>
> (c) The payment to Forgeron of a Five Percent (5%) Net Smelter Return Royalty on all Production from the Property;
>
> (d) Subject to the approval of the appropriate regulatory authorities and the Alberta Stock Exchange, the payment to Forgeron of 200,000 common shares from treasury.
>
> Thereafter Coxheath shall have earned a One Hundred Percent (100%) undivided interest in the Property and the following clauses shall apply.
>
> 3. Forgeron may sell all or any part of his 5% Royalty on Net Smelter Return; however, such disposition is subject to a Thirty (30) day right of first refusal in favour of Coxheath on terms not less favourable than those offered by Forgeron to the third party and thereafter any third party purchaser must be bound by the terms of this Agreement.
>
> 4. Forgeron shall deliver transfers of the Mineral Claims to Coxheath, which transfers shall be ratified by the Nova Scotia Department of Mines and Energy and Coxheath shall hold the Mineral Claims subject to the terms of this agreement.

Upon fulfilment of the terms under paragraph 2 of the agreement, Forgeron transferred the exploration licenses to Coxheath on November 12, 1986 subject to the reservation of the 5% royalty. The policy of the Department of Mines did not permit official transfers of exploration licenses to show any royalty or other partial interests in the lands subject to the licenses. The transfers document to Coxheath did not refer to the royalty reservations.

On February 4, 1988, Forgeron and Coxheath amended the 1984 agreement to include an additional 22 mineral claims and to reduce the royalty from 5% on the original licenses to 2.5%. On or about August 18, 1989 Forgeron filed copies of the 1986 agreement and the 1988 amendment with the Registrar of Mineral Titles for the Province.

By agreement dated November 15, 1990 Forgeron transferred 1.0% of his royalty interest to Wilfred Moore. On or about September 9, 1991 he transferred the remaining 1.5% interest in the royalty to Mr. Moore. Subsequent transfers by Moore resulted in the royalty being owned as follows:

Wilfred Moore	1.0%
William Faulkner	1.0%
Thomas Faulkner	0.5%

The three claimants filed caveats with the Registrar of Mineral Rights pursuant to s. 88 of the *Mineral Resources Act* on September 20, 1991, October 19, 1991 and October 14, 1993.

The financial statements of Coxheath dated September 30, 1988 recognized the obligation of Coxheath to pay the royalty.

On January 16, 1989 Coxheath executed a debenture in favour of Nova Scotia Business Capital Corporation (B.C.C.) to secure a loan. The debenture created a charge on the property and assets of Coxheath. Clause 1.02C(a) of the debenture provided:

> 1.02C The Company hereby agrees to pay to BCC in reduction of the Principal Amount outstanding from time to time:
>
> (a) the net proceeds from the sale of its sulfide concentrate inventory. For such purposes the net proceeds shall be after provision for all costs of producing and selling such inventory including shipment, insurance, supervision, smelting and related costs and charges and provincial and vendor royalty charges.

Coxheath defaulted on the loan and Coopers & Lybrand Limited was appointed receiver. The receiver granted an option to Tangier Mining Incorporated to acquire all of the assets of Coxheath including Coxheath's interests in certain mineral licenses and leases in respect to its operations at Tangier. On November 19, 1993 B.C.C. applied in the Supreme Court for an order approving the granting of the option. The application also requested a determination of the priority of the royalty interests claimed by the appellants. The application was heard by Associate Chief Justice Palmeter. After reviewing the authorities in a written judgment he concluded that the royalty interests as evidenced by the caveats did not constitute interests in land but were contractual in nature and accordingly the receiver could dispose of the mining interests free of any rights claimed by the appellants.

The appellants have appealed from that decision. The issues are set forth in the appellants' factum as follows:

> 1. Did the Learned Chambers Judge err in law in failing to find that the NSR Royalties held by the Appellants constitute an interest in land and are not mere contractual rights?

2. Have the Appellants lost their NSR Royalty rights due to registration deficiencies?

3. If required, will this Honourable Court order rectification of the agreement between Dennis Forgeron and Coxheath Gold Holdings Limited to make it clear that the NSR Royalties that he retained were interests in land and binding upon any subsequent owners of the subject exploration licences.

With reference to the first issue the appellants in order to sustain their position that their rights constitute an interest in land rely on a number of Canadian cases and in particular the decision of the Supreme Court of Canada in *Saskatchewan Minerals v. Keyes* (1971), 23 D.L.R. (3d) 573. In that case the court had to consider two mineral leases each of 20 years duration. Other cases referred to by appellants' counsel also involved leases. It is apparent from the dissenting judgment of Laskin J., in *Keyes* that his conclusion as to whether royalty rights constituted interests in land depended on an interpretation of the agreements. The following is from his judgment at p. 583:

I turn now to the question whether the royalty in respect of lease A-4010 gave Keyes an interest in land. The relevant language of the agreement of June 3, 1948, is as follows, as found in cl. 3(b):

> The consideration to be paid by Astral ... shall be ... a royalty of twenty-five cents (25) per ton on all anhydrous salt produced and sold from the said [lease A-4010]...

This royalty as a burden on Astral's interest was to come out of Astral's right to "the naturally occurring accumulations of alkali, as defined in the Alkali Mining Regulations under the **Mineral Resources Act**, on or in [described land] together with the full and exclusive liberty, power and authority ... to search for, dig, work, mine, procure and carry away the said accumulations of alkali wherever the same may be found within the limits of the said land". These quoted words are from the grant to Harvie of January 30, 1948, of the interest which Harvie assigned to Astral.

An examination of that grant discloses a difference in the formulation of the interest thereby conveyed as compared with that conveyed by the earlier grant of January 31, 1944, covering lease A-163. Under this earlier grant the Crown as lessor granted and demised to Harvie as lessee "the sole and exclusive licence and authority to win and work all the deposits and accumulations of alkali ... together with the sole and exclusive licence and authority ... to search for, dig, work, mine, procure and carry away the said alkali" for the renewable 20-year term mentioned earlier in these reasons. In addition to an annual acreage rental of 25 cents per acre, this indenture provided for a royalty in the following words:

> And Also Rendering and Paying therefor unto the lessor a royalty of twelve and one-half cents per ton of two thousand pounds on shipping weight as determined from transportation returns at the first point of shipment on all products raw or refined, taken from the demised lands, provided that when the said products are shipped in solution the royalty shall be two cents for each gallon shipped; which royalty shall be due and payable on the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year;

What was granted in respect of lease A-163 was a profit *à prendre* for a term of years only. There is no provision for continuation of the interest so long as production continues, but, of course, the transaction did not involve fugacious substances. I note also that the royalty was fixed not in respect of the mineral in place but as a sum which depended on its prior extraction from the soil and determinable on the basis of its chattel character.

> The grant in respect of lease A-4010 is by the Crown as lessor to Harvie as lessee, demising and leasing for a 20-year renewable term "the naturally occurring accumulations of alkali ... together with full and exclusive liberty, power and authority for the lessee ... to search for, dig, work, mine, procure and carry away the said accumulations of alkali wherever the same may be found within the limits of the [defined] land". The grant does not here, as it did not in respect of lease A-163, stipulate for any extension of the term according to continuing production. As previously stated, there is an annual rental of 25 cents per acre, and the royalty is flexibly described as such as may from time to time be prescribed by or pursuant to the **Mineral Resources Act** or the Regulations thereunder. This grant appears to be more than one of a profit *à prendre* for a term of years; it is couched in language of a leasehold of the mineral in place, with a right of extraction. In ***Berkheiser v. Berkheiser and Glaister*** (1957), 7 D.L.R. (2d) 721, [1957] S.C.R. 387, a so-called lease of all petroleum and natural gas within, upon or under certain land for a ten-year term, "and so long thereafter as the leased substances or any of them are produced", was held to be, in the light of all the provisions thereof, a profit *à prendre* only. This Court reversed the Court below which had held that, having regard to the form of the lease, a sale of a portion of the land had been effected, with liberty to enter, search for and carry away the substances mentioned. There is, of course, a difference between the fugacious subject-matter in the **Berkheiser** case and the solid mineral involved in respect of lease A-4010, but the present case does not compel a decision on whether the interest of the appellant is a leasehold or a profit *à prendre* for a term. Being in either case an interest in land, I see no reason to differentiate on this ground the characterization of a royalty whether mounted by the holder of the interest upon assigning it to another or imposed by such holder upon his interest in favour of a third person.

Martland J. in delivering the judgment for the majority held that the option was invalid in the absence of a written consent of the Minister of Mineral Resources as required by the alkali mining regulations. He doubted that the option in question created an interest in land.

The problem is considered in the text *Canadian Law of Mining* 1993, 3rd ed. at p. 466:

> Among the oil and gas cases, there has been some disregard of important differences between the lessor's royalty, landowner's royalty, and gross overriding royalty. This is a serious concern where an authority holding against an interest in land is relied upon out of context. The first of these is the lessor's royalty, paid by the lessee under a lease of freehold minerals. Being an incident of a reversion, it is generally comprehended as a rent and an interest in land. It is uncommon in mining. The second, not seen in mining at all, is the landowner's royalty, paid by a freehold owner of minerals to another party out of production that may occur from those minerals. This has often been held not to be an interest in land. Each of these two royalties concerns privately-owned minerals and is therefore less relevant to the hardrock mining situation. The third is the overriding royalty, which is very relevant to hardrock mining. It is a royalty paid by a lessee out of his or her interest in the property to a third party. Typically, the Crown holds the fee simple ownership of minerals and grants lesser interests as claims and mining leases. Overriding royalties tend to appear as offshoots of subleases, options, transfers of undivided interests, or the like.
>
> Many cases acknowledge the importance of the intention of the parties to the original instrument and suggest that all that is required is sufficiently precise language, but give little consideration to what intention is being sought, what language indicates it, or what language in the particular agreement justifies the conclusion that no interest in land is intended. A number of cases assume that where the royalty is measured as a percentage or money payment on minerals produced, there

can be no intention to create an interest in land because once produced or severed, the minerals lose their character as real property. There are deficiencies in that reasoning: it overemphasizes the means of measurement; it presumes that the royalty interest does not exist until production is obtained; and it ignores that the right is to minerals, or proceeds of sale of minerals, that are to come from particular land, and the right is necessarily connected to that particular land.

Guaranty Trust v. Hetherington and others seem to suggest that the only kind of royalty that can be an interest in land is one that grants an undivided interest in the minerals in place, following ***Bensette v. Reece***. Along the same lines, some ask whether the royalty-holder has the right to enter and produce minerals if the owner of the property does not produce. In posing this requirement, they fail to consider how unlikely it is that an owner of mineral rights would wish to hamper his or her ownership by admitting the royalty owner to co-ownership or by allowing the royalty owner to conduct operations.

However one perceives the reasoning in these cases, it must be recognized that most of the decisions have held that royalties of different kinds, especially overriding royalties carved out of working interest, are not interests in land. In practical terms, a royalty-holder can attempt to secure itself against assignments or insolvencies affecting its property by using a trust a floating charge security, or a provision for a chain of direct covenants from successive assignees. The royalty-holder should also do what it can to give notice of its interest, especially through recording.

A royalty agreement may be drawn so as to include a covenant not to transfer the property unless the transferee agrees to assume the royalty and to confirm the assumption of the royalty by a contract with the royalty-holder. A purchaser with notice of the covenant but who is in breach of it may be bound by it, although a trustee in bankruptcy may not. For its part, a mineral owner will use whatever negotiating position it has to resist such restrictions on its freedom to deal with its property.

c. Alternatives

A more viable analysis is likely to come, it is suggested, from concentration on a more focused set of questions. The first is whether the royalty is carved out of an interest in land, that is, whether the grantor of the royalty himself or herself holds an interest in minerals that is an interest in land. Plainly, the grantor must hold such an interest, but it may be of different kinds: fee simple ownership, a Crown mining lease, a mining claim, or an option. 45[FN1]

The appellants in this case wish to equate a simple interest in a license to a proprietary interest in a lease. It is important therefore to determine the interests granted by the exploration licenses under the *Mineral Resources Act* 1975 S.N.S. c. 12. Section 2 of the *Act* contained the following definitions:

2 In this **Act** unless the context otherwise requires,

(e) "exploration license" means a license by which the holder thereof is granted the right to search and prospect for minerals on a designated area for a period of one year;

(h) "lease" means a mining lease by which the holder thereof is granted the right to mine on a designated area for a period of twenty years;

(p) "prospect" means to search for valuable mineral and includes any mode of working whereby soil or rock is disturbed, removed, washed or otherwise tested for the purpose of finding, identifying or determining the extent of any mineral therein;

Under sections 3 and 4 of the *Act* all mineral rights in the province subject to certain exceptions, were vested in the Crown. Sections 38 and 39 of the *Act* provided as follows:

38 A license shall constitute authority to search, prospect and mine all or specified minerals found in the area, claim, or tract for purposes of investigation, examination or test only.

39 A license shall be for a term of one year from the date thereof and may be renewed each year for four consecutive years if the holder thereof carries on mineral investigation and work as prescribed in this **Act**.

Sections 47 to 49 provided for the issuance of leases:

47 Subject to Section 83, a holder of any license may apply for and obtain a lease, including such areas as are contained within one or more claim not exceeding eighty in number according to the terms and subject to the conditions, as herein contained, upon proof that the following conditions have been complied with:

(a) that each of the said claims is in full force and effect;

(b) that the licensee has paid the prescribed rental; and

(c) that the licensee has deposited with the Registrar a return of survey of the lands to be taken under lease, duly executed by a land surveyor, and that the said return has been accepted by the Registrar.

48(1) A mining lease in the prescribed form shall be made in duplicate; one duplicate, to be known as the counterpart, shall be issued to the lessee, and the other shall be filed and registered in the office of the Registrar.

(2) A certificate of such registry, with the day and year thereof, shall be endorsed on the counterpart delivered to the lessee.

(3) A lease shall be executed by the lessee under seal, and on the part of the Crown by the Minister and under seal.

(4) A lease shall give authority to mine, quarry or extract all or specific minerals for commercial or industrial purposes.

49(1) A lease shall be for a terms of twenty years.

(2) A lessee, upon application to the Minister made within six months immediately preceding the expiration of any lease period, shall be entitled to a renewal thereof for a further period of twenty years from such expiration, providing the lessee

> is **bona fide** working the lease and has complied with the terms and conditions in the lease contained, within the true intent and meaning of this **Act**.

Section 59 dealt with the transfer of licenses as follows:

> 59(1) No licensee or lessee shall at any time during the term of the license or lease, assign, set over, transfer or otherwise part with such license or lease or any rights thereunder without the consent of the Minister, in writing, first had and obtained.
>
> (2) Where the Minister has refused to consent to or ratify a transfer for which application has been made in proper form and with the information required to be furnished, the Minister, if the applicant so requests in writing, shall hear representations to determine the right of the applicant to receive the consent or ratification.

Section 38 of the *Mineral Resources Act* 1990, S.N.S. c. 18 provides as follows:

> 38 Subject to Sections 39,40 and 101, the rights conferred by an exploration licence are, and are limited to, prospecting and searching for minerals, extracting minerals for test purposes and applying for a mining lease for all or a part of the area held under the exploration licence.

The license is for one year and may be renewed. Under s. 56 the holder of an exploration license is entitled to obtain a mining lease on fulfilling certain conditions. Section 85(1) of the *Act* provides as follows:

> 85(1) A licence shall not be transferred without the written consent of the Registrar.

The original licenses issued to Forgeron gave him the right "to search for and prospect" for the minerals in the specified areas for a period of twelve months. The Minister of Natural Resources did not consent to the transfer of the royalty interests to the appellants. In fact the appellants were advised that the Department did not recognize the transfer of partial interests in licenses.

The transfers of the licenses from Forgeron to Coxheath made no reference to the royalty interests. No authority has been cited to establish that a license issued in Nova Scotia conferred an interest in land. In *Re Milner's* appeal, 11 N.S.R. 522 the Court of Appeal decided that a license to search for minerals granted under c. 9, R.S. 4th Series, was assignable. Young, C.J. stated at p. 525:

> Conferred by statute, it is a possession or right, whether it be accounted an interest in lands or not, plainly distinguishable from the numerous classes of licenses and easements, whether of pleasure or otherwise, to be found in the books.

The rights conferred on Foregeron by the licenses issued under the *Mineral Resources Act*, 1975 are entirely dependent on the wording of the statute. In my view there is nothing in that, *Act* which indicates that the Legislature intended to confer a proprietary right in the lands or minerals covered by the license.

In the words of s. 38 of the *Act* the license was "authority to search, prospect and mine all or specified minerals in the area, claim

or tract for purposes of *investigation, examination or test only*". Under s. 47 a license holder may apply for and obtain a lease. That provision was not mandatory as opposed to s. 49. The language was changed by s. 56 1990 S.N.S., c. 18. It is not necessary in this case to decide whether a mining lease confers an interest in land. As Mr. Forgeron did not hold an interest in land under the licenses he could not confer such interests in assigning the royalty rights to the appellants. Counsel argued that the license was an option because it conferred a right to obtain a lease. No option was conferred by the licenses. The right to obtain a lease was purely statutory. The mining lease is the document which confers further rights on the licensee not the license.

The second issue is answered by the reasoning relating to the first issue. However, the appellants never obtained the Minister's consent to the transfer of the royalty interests under s. 59(1) of the 1975 *Act*. I see no difference in substance between that provision and the Regulation referred to in the *Keyes* decision, supra. In that case the majority held that failure to obtain the consent was fatal to the transfer. I would apply that reasoning in this case. With respect the appellants fail on the first two grounds of appeal.

The appellants also seek rectification of the agreement between Forgeron and Coxheath.

In my opinion it cannot be said that the wording of the 1986 agreement is such that it should be rectified to establish a NSR Royalty interest in land.

Rectification should not be granted lightly. See *Federal Business Development Bank v. Elcon Petroleum Maritime Ltd.* (1983), 58 N.S.R.(2d) at p. 259 and Friedman, *The Law of Contract in Canada*, 2nd ed. pp. 741 and 742. There is a heavy onus upon the party requesting rectification.

Here, the appellants desire to rewrite the terms of the original agreement which would in effect reserve for Forgeron an interest greater than that which he conveyed. He could not, and did not, convey an interest in the land.

In addition, and importantly, the appellants did not place this issue before the chambers judge. No evidence was produced specifically on point, no argument was made and there was no adjudication.

In consequence this issue should be dismissed.

In summary I would dismiss the appeal on all three issues.

I would award costs to the respondent, Nova Scotia Business Capital Corporation in the amount of $1500.00. The other named respondents did not participate on the appeal.

FN1 If the interest in the claim, option, or lease is not an interest in land (see Chapter 16), obviously there can be no possibility of a royalty from it being an interest in land.

END OF DOCUMENT

TAB 20

CED Mines and Minerals X.3 (Ontario)

Canadian Encyclopedic Digest
Mines and Minerals (Ontario)
X — Mining and Operating Agreements
3 — Royalties

X.3

See Canadian Abridgment: NAT.II.3.e.iv.A Natural resources — Mines and minerals — Ownership and acquisition of mineral rights — Mining lease — Rents and royalties — Interpretation of lease or agreement

§377 A "royalty" is a fixed proportion of the value of the production and is equivalent to rent for the leased area.[FN1]

§378 A royalty is not a property right, but is a contractual right in the nature of a right to take soil from the land. It is not enforceable against a transferee of the land and mineral rights in the absence of a contractual relationship between the latter and the person entitled to the royalty.[FN2]

§379 A royalty is not a tax, but a reservation out of the grant which a grantor of mining rights may make.[FN3]

§380 A lease of mining land providing for payment of rent, payable quarterly, in the form of a royalty for ore removed (with provision for minimum annual tonnage) and for payment of rent, leaves the lessee liable to pay rent on the basis of the minimum rent provided even though ore is not removed.[FN4]

§381 A covenant in an agreement to purchase mining property that the purchaser is to pay a royalty at a stipulated rate for ore removed, with a specified annual minimum ore production, leaves the purchaser liable to pay the royalty even if no ore is found.[FN5]

§382 An agreement to pay royalties on uranium mined from any subsequently-acquired claims adjacent to an original group of claims does not apply to claims purchased later that are not adjacent.[FN6]

§383 The reservation of a royalty from production under mineral leases by separate agreement is not enforceable against the assignee of the leases.[FN7]

§384 Every operator of a diamond mine must, for each fiscal year of the operator, pay to the Crown the amount of the royalty determined under the Act[FN8] in respect of the net value of the output of the diamond mine for the year that is

produced by the operator under the authority of a grant from the Crown.[FN9] An operator must pay such interest and penalties as are prescribed on late payments of royalties.[FN10]

§385 Every diamond mine operator must keep at an office in Ontario all records, books of account and other documents related to mining royalty returns and any other prescribed documents and information.[FN11] Further, the operator must allow the Minister access to any of these documents or information within such time as the Minister may specify in the request.[FN12] Every person engaged in the administration of this Act must preserve secrecy with respect to all information that comes to his or her knowledge in the course of his or her duties and must not communicate any of those matters to any other person except as may be required in connection with the administration and enforcement of this Act or for use in the development and evaluation of fiscal policy for the Crown.[FN13]

FN1. *Snyder v. Minister of National Revenue* (1939), [1939] S.C.R. 384 (S.C.C.); **see also** *Dawson v. Bell* (1945), [1945] O.R. 825 (Ont. C.A.).

FN2. *Fuller v. Howell* (1942), [1942] 1 D.L.R. 462 (Ont. H.C.); *Montreal Trust Co. of Canada v. Astl* (2001), 2001 CarswellAlta 1701 (Alta. C.A.) (mineral owners ordered to conduct necessary searches, prepare documents and make collapse application as to each royalty trust agreement in accordance with evidentiary requirements); **see also** *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (N.S. S.C.); affirmed (1994), 135 N.S.R. (2d) 259 (N.S. C.A.) (use of "royalty" not implicitly meaning interest in land or in nature of rent).

FN3. *R. v. Chappelle* (1903), [1904] A.C. 127 (Canada P.C.); **see also** *Alberta (Attorney General) v. Huggard Assets Ltd.* (1953), [1953] A.C. 420 (Alberta P.C.) (right of Crown to exact royalties after grant of mineral rights).

FN4. *Palmer v. Wallbridge* (1888), 15 S.C.R. 650 (S.C.C.).

FN5. *Dube v. Mann* (1912), 3 O.W.N. 1580 (Ont. H.C.); *Palmer v. Wallbridge* (1888), 15 S.C.R. 650 (S.C.C.).

FN6. *Stanward Corp. v. Denison Mines Ltd.* (1968), [1968] S.C.R. 441 (S.C.C.).

FN7. *Saskatchewan Minerals v. Keyes* (1971), [1972] S.C.R. 703 (S.C.C.).

FN8. Mining Act, R.S.O. 1990, c. M.14, s. 154.2 [en. 2007, c. 7, Sched. 22, s. 2] (rate of royalty).

FN9. Mining Act, R.S.O. 1990, c. M.14, s. 154.1 [en. 2007, c. 7, Sched. 22, s. 2].

FN10. Mining Act, R.S.O. 1990, c. M.14, s. 154.4 [en. 2007, c. 7, Sched. 22, s. 2].

FN11. Mining Act, R.S.O. 1990, c. M.14, s. 154.6(1) [en. 2007, c. 7, Sched. 22, s. 2].

FN12. Mining Act, R.S.O. 1990, c. M.14, s. 154.6(2) [en. 2007, c. 7, Sched. 22, s. 2].

FN13. Mining Act, R.S.O. 1990, c. M.14, s. 154.7 [en. 2007, c. 7, Sched. 22, s. 2].

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THIRD EYE CAPITAL CORPORATION
Applicant

-and-

RESSOURCES DIANOR INC. / DIANOR RESOURCES INC.
Respondent

Court File No. CV-15-11080-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THIRD EYE CAPITAL CORPORATION (ON MOTIONS OF RECEIVER AND LEADBETTER RETURNABLE SEPTEMBER 21, 2016)

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