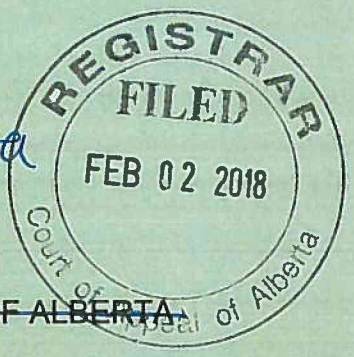
Clerks' Stamp:



Court of Appeal of Alberta

COURT OF APPEAL FILE NUMBER	1703-0288AC
COURT FILE NUMBER	1103 14112 and 1403 04885
COURT	~~COURT OF QUEEN'S BENCH OF ALBERTA~~
REGISTRY OFFICE	EDMONTON

Fast Track

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST ("Sawridge Trusts")

AND

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND NO. 19 August 15, 1986 (the "1986 Trust")

APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
STATUS ON APPEAL	Appellant
RESPONDENTS	ROLAND TWINN, EVERETT JUSTIN TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, AND MARGARET WARD, as Trustees for the 1985 Trust and 1986 Trust
STATUS ON APPEAL	Respondents
RESPONDENT	OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL	Respondent
DOCUMENT	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Mr. Justice R.P. Belzil
Dated the 13th day of October, 2017
Presently Not Entered

BOOK OF AUTHORITIES OF THE RESPONDENTS SAWRIDGE TRUSTEES AND FOUR SAWRIDGE TRUSTEES

For the Respondents Roland Twinn, Everett Justin Twinn, Catherine Twinn, Bertha L'hirondelle, And Margaret Ward, as Trustees for the 1985 Trust and 1986 Trust ("Sawridge Trustees")

Doris Bonora
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Telephone: 780-423-7188
Fax: 780-423-7276

For the Respondents Roland Twinn, Bertha L'hirondelle, Everett Justin Twin And Margaret Ward, as Trustees for the 1985 Trust and 1986 Trust ("Four Sawridge Trustees")

Kenneth B. Haluschak
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For the Respondent, Office of the Public Trustee of Alberta

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For the Appellant, Catherine Twinn, as Trustee for the 1985 Trust and the 1986 Trust

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Telephone: 780-482-9200
Fax: 780-482 -9100

Clerks' Stamp:

COURT OF APPEAL FILE NUMBER	1703-0288AC
COURT FILE NUMBER	1103 14112 and 1403 04885
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
REGISTRY OFFICE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST ("Sawridge Trusts") AND IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND NO. 19 August 15, 1986 (the "1986 Trust")
APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
STATUS ON APPEAL	Appellant
RESPONDENTS	ROLAND TWINN, EVERETT JUSTIN TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, AND MARGARET WARD, as Trustees for the 1985 Trust and 1986 Trust
STATUS ON APPEAL	Respondents
RESPONDENT	OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL	Respondent
DOCUMENT	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Mr. Justice R.P. Belzil
Dated the 13th day of October, 2017
Presently Not Entered

BOOK OF AUTHORITIES OF THE RESPONDENTS SAWRIDGE TRUSTEES AND FOUR SAWRIDGE TRUSTEES

For the Respondents Roland Twinn, Everett Justin Twinn, Catherine Twinn, Bertha L'hirondelle, And Margaret Ward, as Trustees for the 1985 Trust and 1986 Trust ("Sawridge Trustees")

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For the Respondents Roland Twinn, Bertha L'hirondelle, Everett Justin Twin And Margaret Ward, as Trustees for the 1985 Trust and 1986 Trust ("Four Sawridge Trustees")

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For the Respondent, Office of the Public Trustee of Alberta

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Fax: 780-471-7872

For the Appellant, Catherine Twinn, as Trustee for the 1985 Trust and the 1986 Trust

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TABLE OF AUTHORITIES

TAB 1

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

Between:

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon

Appellants
(Applicants)

- and -

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents
(Respondents)

- and -

Public Trustee of Alberta ("OPTG")

Respondent
(Respondent)

- and -

Catherine Twinn

Respondent
(Respondent)

- and -

Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley

Not Parties to the Appeal
(Respondents)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed on the 19th day of July, 2017
(2017 ABQB 377; Docket: 1103 14112)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

[2] In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

[3] The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination,

although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

[4] On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Sawridge #1).

The application to be added as parties (Sawridge #5)

[5] The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

[6] The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

[7] The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

[8] The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the

Trust and the assets held in it, and expand the issues beyond those identified during case management.

[9] With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

[10] With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

[11] The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

[12] All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

[13] Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP*

Inc, 2017 ABCA 95 at para 3, [2017] AJ No 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

[14] Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

[15] This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

[16] The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

[17] Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

[18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented

by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

[19] Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

[20] The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

[21] The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

[22] During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential

TAB 2

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1

JUDICIAL CENTRE OF EDMONTON
Clerk's Stamp
FILED
JUL 19 2017
Clerk of the Court

I hereby certify this to be a true copy of the original.

for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: July 5, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of Patrick Twinn, Aspen Saya Twinn. Melissa Megley, Shelby Twinn and Deborah A. Serafinchon in respect of being added as parties to the within action and seeking advance full indemnity costs; and Upon hearing from the counsel for The Office of the Public Trustee and Guardian, Sawridge Trustees, Catherine Twinn and Counsel for Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon by written brief and subsequent correspondence; and Upon the decision of The Honourable Mr. Justice D.R.G. Thomas dated July 5, 2017 ABQB 377;

IT IS HEREBY ORDERED THAT:

1. As no submissions were made on the accounting, the claims by Patrick Twinn and Shelby Twinn for an accounting from the Trustees are dismissed on a without prejudice basis.[1, 20]

2. The claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn and his wife Melissa Megley, have been abandoned and are dismissed. [21]

3. The claims by Patrick Twinn, Shelby Twinn and Deborah Serafinchon to be added as parties are dismissed [22]

4. Patrick Twinn and Shelby Twinn are recognized as Beneficiaries of the 1985 Trust by the Trustees and are hereby declared Beneficiaries of the 1985 Trust by the Court [32, 34 and 39]

5. Patrick Twinn and Shelby Twinn may have ongoing involvement in the litigation by transparent and civil communications with the Trustees and their legal counsel and through a positive dialogue to ensure that their status as beneficiaries is respected. [39]

6. Deborah Serafinchon may monitor the progress of this litigation and review the proposals which the Trustees may make in respect of the definition of 'beneficiary' under the 1985 Trust and provide comments to the Trustees and the Court [43];

7. Costs are awarded against Deborah Serafinchon in favor of the Sawridge Trustees on a party/ party basis [54]

8. Patrick Twinn and Shelby Twinn shall pay solicitor and own client indemnity costs of the Sawridge Trustees in responding to this application. [53]

9. The Public Trustee shall continue to act as litigation representative for the categories of minors the Court has identified as requiring representation, as specifically set out in

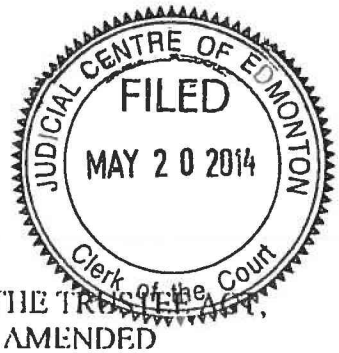
Sawridge #3, who have become adults during the course of the litigation. Said representation by the Public Trustee shall be subject to the existing indemnity and costs exemption orders [55]

Honourable Justice D.R.G. Thomas

Thomas J

TAB 3

	Clerk's stamp:
COURT FILE NUMBER	1403 04885
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT and THE SAWRIDGE TRUST ("Sawridge Trusts")

APPLICANTS	ROLAND TWINN, EVERETT JUSTIN TWIN WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the Sawridge Trusts
RESPONDENT	CATHERINE TWINN
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris Bonora Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V8 Telephone: (780) 423-7188 Fax: (780) 423-7276 File No: 551860-1-DCEB

Date on which Order Pronounced: May 16, 2014

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: K. G. Nielsen

UPON the application of the Trustees of the Sawridge Trusts; AND UPON being advised that direction was required to transfer the joint assets of the Sawridge Trusts; AND UPON being referred to the contents of the affidavits of Paul Bujold and Brian Heidecker AND UPON

hearing counsel for the Trustees of the Sawridge Trusts and counsel for Catherine Twinn, IT IS HEREBY ORDERED AND DECLARED as follows:

1. The assets of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust ("Sawridge Trusts") shall be transferred from the five previous trustees of the Sawridge Trusts being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Walter Felix Twin and Clara Midbo ("the previous trustees") to the new trustees being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Clara Midbo and Everett Justin Twin ("new trustees").

2. The administrator of the trusts, Paul Bujold, shall take any and all steps necessary and shall execute any and all documents necessary to transfer the assets from the previous trustees to the new trustees.

3. This order is made without prejudice to the right of Catherine Twinn to pursue an action to determine the eligibility of Everett Justin Twin to be appointed as a trustee of the Sawridge Band Inter Vivos Settlement.

D. Yungwirth

FCT Mr. Justice K. G. Nielsen

APPROVED AS TO FORM BY:

McLENNAN ROSS LLP
Per:

Karen Platten
Solicitors for Catherine Twinn

DENTONS CANADA LLP
Per:

Doris Bonora
Counsel for the Trustees

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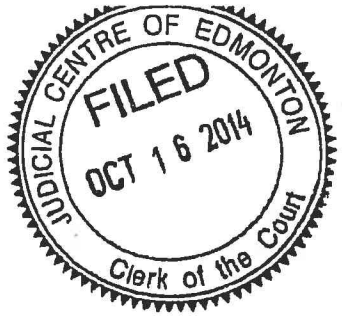
TAB 4



Clerk's stamp:

COURT FILE NUMBER 1403 04985

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT and THE SAWRIDGE TRUST ("Sawridge Trusts")

APPLICANTS ROLAND TWINN, BERTHA L'HIRONDELLE, and EVERETT JUSTIN TWIN, as Trustees for the Sawridge Trusts

RESPONDENT CATHERINE TWINN

DOCUMENT **ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Attention: Doris C.E. Bonora
Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V8

Telephone: (780) 423-7188
Fax: (780) 423-7276
File No: 551860-1-DCEB

I hereby certify this to be a true copy of the original.

for Clerk of the Court

Date on which Order Pronounced: October 1, 2014

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice L.R.A. Ackerl

UPON the application of the Trustees of the Sawridge Trusts; AND UPON being advised that direction was required to transfer the joint assets of the Sawridge Trusts, although no urgency currently exists; AND UPON being referred to the contents of the Affidavit of Paul Bujold and all Exhibits attached thereto; AND UPON hearing from counsel for the Trustees of the Sawridge

Trusts and counsel for Catherine Twinn, including that Catherine Twinn is willing to sign the Transfer of Assets as a separate document, IT IS HEREBY ORDERED AND DECLARED as follows:

1. Catherine Twinn is hereby directed to sign the amended document necessary to transfer the assets of the Sawridge Band Inter Vivos Settlement and the Sawridge Band Trust ("Sawridge Trusts") from the five previous trustees of the Sawridge Trusts being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Clara Midbo and Everett Justin Twinn ("the previous trustees") to the new trustees being Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret (Peggy) Ward ("new trustees") without signing the document which appoints Margaret (Peggy) Ward as a new trustee. The documents shall be signed by October 8, 2014.

2. The determination of costs of this application is reserved and may be heard with the application of Catherine Twinn for advice and direction which is adjourned sine die and shall be heard in Special Chambers in the action involving Catherine Twinn and the Trustees of the Sawridge Trusts being Action # 1403 04885.

"L.R.A. Ackerl"

Justice of the Court of Queen's Bench of Alberta

Consented to as to form and content:

McLennan Ross LLP
Lawyers for Catherine Twinn

TAB 5

2001 ABCA 216
Alberta Court of Appeal

Indian Residential Schools, Re

2001 CarswellAlta 1150, 2001 ABCA 216, [2001] A.W.L.D. 615, [2001] A.J. No. 1127, [2002] 1 W.W.R. 272, 108 A.C.W.S. (3d) 55, 12 C.P.C. (5th) 80, 204 D.L.R. (4th) 80, 253 W.A.C. 307, 286 A.R. 307, 96 Alta. L.R. (3d) 16

John Doe No. 1, Respondent (First Plaintiff) and W. Doe, Second Plaintiff (Not a Party to the Appeal) and C. Doe No. 1 and C. Doe No. 2, Third Plaintiffs (Not a Party to the Appeal) and Her Majesty the Queen in Right of Canada, First Defendant (Not a Party to the Appeal) and Les Missionaires de Marie Immaculé (Missionary Oblates of Mary Immaculate), Operating the Name Missionary Oblates of Mary Immaculate, Grandin Province, Second Defendant (Not a Party to the Appeal) and the Sisters of Charity of Providence of Western Canada, Third Defendant (Not a Party to the Appeal) and the Catholic Archdiocese of Grouard-McLennan, Appellant (Fourth Defendant) and the Roman Catholic Church, Fifth Defendant (Not a Party to the Appeal)

McClung, Berger, Wittmann JJ.A.

Heard: December 7, 2000
Judgment: August 28, 2001
Docket: Edmonton Appeal 0003-0134-AC

Proceedings: reversing 2000 CarswellAlta 41, 183 D.L.R. (4th) 552, 77 Alta. L.R. (3d) 62, 2000 ABQB 45, 258 A.R. 377, 44 C.P.C. (4th) 318 (Alta. Q.B.)

Counsel: *F.F. Slatter*, for Appellants, Catholic Archdiocese of Grouard-McLennan.
D.C. Goldie, *D.A. Cunningham*, for Respondent, John Doe #1.
L.M. Huculak, *S. Ayala*, for Respondent, Her Majesty the Queen in Right of Canada.
G.M. Vlavianos, for Intervenor, Roman Catholic Bishop of the Diocese of Calgary.
R.G. Baril, *Q.C.*, for Intervenor, Sisters of Charity of Providence of Western Canada.
P.A. Crisfield, for Intervenor, Synod of the Diocese of Calgary.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.7 Application to strike out party
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.i General principles
Headnote
Practice --- Parties — Application to strike out party
Multiple actions were filed in which it was alleged that plaintiffs suffered wrongful treatment in form of various types of abuse while students at residential schools — Actions were under common case management — Archdiocese was named as fourth defendant in one claim — Plaintiff in that claim attempted to effect service upon Roman Catholic Church as

fifth defendant — Archdiocese brought application to strike out church as party on ground that it was not entity capable of being sued — Case management judge found that question of whether church was capable of being sued was not clear, and that trial of issue was necessary to determine roles of various bodies — Application to strike was dismissed — Archdiocese appealed — Appeal allowed — Case management judge erred in exercise of her discretion under R. 38(3) of Alberta Rules of Court when she decided to defer determination of church's legal status to trial — Judge erred in law by mischaracterizing issue to be decided, by giving weight to irrelevant evidence, and by giving insufficient weight to uncontroverted evidence that church is not entity capable of being sued under Alberta law — Decision of judge did not meet test for reasonableness — Evidence before judge was sufficient for her to determine matter on motion to strike — Respondents to appeal, plaintiff and Crown failed to meet their onus of producing some evidence in rebuttal that church is entity capable of being sued, so as to at least warrant trial of issue — Based on record before her, judge should have struck out church from statement of claim — Alberta Rules of Court, Alta. Reg. 390/68, R. 38(3).

Table of Authorities

Cases considered:

Alberta Treasury Branches v. Ghermezian, 72 Alta. L.R. (3d) 164, [1999] 12 W.W.R. 296, 249 A.R. 240 (Alta. Q.B.) — considered

Canadian Engineering & Surveys (Yukon) Ltd. v. Banque nationale de Paris (Canada) (1996), 8 C.P.C. (4th) 190, 196 A.R. 1, 141 W.A.C. 1 (Alta. C.A.) — considered

Comeau v. Fundy Group Publications Ltd. (1981), 24 C.P.C. 251, 53 N.S.R. (2d) 493, 109 A.P.R. 493 (N.S. T.D.) — distinguished

Decock v. Alberta, 186 D.L.R. (4th) 265, 79 Alta. L.R. (3d) 11, [2000] 7 W.W.R. 219, 255 A.R. 234, 220 W.A.C. 234, 2000 ABCA 122 (Alta. C.A.) — followed

F. (B.) v. Society of Kabalarians of Canada, 1999 CarswellBC 2074 (B.C. S.C.) — referred to

Gienow Building Products Ltd. v. Tremco Inc., 78 Alta. L.R. (3d) 40, 42 C.P.C. (4th) 1, 186 D.L.R. (4th) 730, 255 A.R. 273, 220 W.A.C. 273, 2000 ABCA 105 (Alta. C.A.) — considered

Hal Commodities Cycles Management v. Kirsh (1993), 17 C.P.C. (3d) 320 (Ont. Gen. Div. [Commercial List]) — referred to

International Assn. of Science & Technology for Development v. Hamza, 28 Alta. L.R. (3d) 125, 34 C.P.C. (3d) 210, 122 D.L.R. (4th) 92, 162 A.R. 349, 83 W.A.C. 349, [1995] 6 W.W.R. 75 (Alta. C.A.) — distinguished

John Doe v. Bennett, 2000 CarswellNfld 201, 190 Nfld. & P.E.I.R. 277, 576 A.P.R. 277, 1 C.C.L.T. (3d) 261 (Nfld. T.D.) — referred to

Korte v. Deloitte, Haskins & Sells (1995), 36 Alta. L.R. (3d) 56 (Alta. C.A.) — considered

Madill v. Alexander Consulting Group Ltd. (1999), 20 C.C.P.B. 283, 237 A.R. 307, 197 W.A.C. 307, 71 Alta. L.R. (3d) 50, 176 D.L.R. (4th) 309, 41 C.P.C. (4th) 72 (Alta. C.A.) — referred to

National Hockey League v. Pepsi-Cola Canada Ltd., 70 B.C.L.R. (2d) 27, 92 D.L.R. (4th) 349, 42 C.P.R. (3d) 390, 5 B.L.R. (2d) 121, [1992] 6 W.W.R. 216 (B.C. S.C.) — distinguished

National Hockey League v. Pepsi-Cola Canada Ltd., 2 B.C.L.R. (3d) 3, (sub nom. *National Hockey League v. Pepsi-Cola Canada Ltd. (No. 2)*) 56 B.C.A.C. 1, (sub nom. *National Hockey League v. Pepsi-Cola Canada Ltd. (No. 2)*) 92 W.A.C. 1, 59 C.P.R. (3d) 216, 122 D.L.R. (4th) 412, [1995] 5 W.W.R. 402 (B.C. C.A.) — distinguished

Northland Bank v. Wettstein (1997), (sub nom. *Northland Bank (Liquidation), Re*) 200 A.R. 150, (sub nom. *Northland Bank (Liquidation), Re*) 146 W.A.C. 150 (Alta. C.A.) — considered

Regas Ltd. v. Plotkins, [1961] S.C.R. 566, 36 W.W.R. 481, 29 D.L.R. (2d) 282 (S.C.C.) — referred to

S. (J.R.) v. Glendinning, 2000 CarswellOnt 3555, 191 D.L.R. (4th) 750, 49 C.P.C. (4th) 360 (Ont. S.C.J.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 23 — referred to

R. 38(3) — considered

R. 129 — referred to

R. 200 — referred to

APPEAL by archdiocese from judgment reported at 2000 CarswellAlta 41, 183 D.L.R. (4th) 552, 77 Alta. L.R. (3d) 62, 2000 ABQB 45, 258 A.R. 377, 44 C.P.C. (4th) 318 (Alta. Q.B.), dismissing application by archdiocese to have defendant styled as "Roman Catholic Church" struck from statement of claim.

The Court:

Introduction

1 This is an appeal of an Order in respect of the Indian Residential School Claims, granted by the case management judge in chambers. The Order dismissed an application by the Appellant, the Catholic Archdiocese of Grouard-McLennan (the "Archdiocese"), to have the Fifth Defendant, styled "The Roman Catholic Church" (the "Church"), struck from the Statement of Claim on the ground that it is not a legal entity capable of being sued.

Facts

2 Several hundred outstanding actions, collectively known as the Indian Residential School Claims, have been filed in Alberta. The Statements of Claim generally allege that the Plaintiffs suffered wrongful treatment in the form of various types of abuse while they were students at the Indian Residential Schools. All of the actions are under common case management.

3 The Archdiocese is named as the Fourth Defendant in one of the Indian Residential School Claims, action no. 9903 03821. The Respondent John Doe No. 1 ("Doe"), a Plaintiff in the action, attempted to effect service upon the Church as the Fifth Defendant by forwarding a copy of the Statement of Claim to the Administrator of the Archdiocese, Reverend Arthé Guimond ("Guimond"). The Archdiocese then brought an application pursuant to Rule 38(3) of the *Alberta Rules of Court* (the "*ARC*"), seeking to strike out the Church on the ground that it is not a legal entity capable of being sued. In the alternative, the Archdiocese sought to have the service set aside pursuant to Rule 23 of the *ARC*, because Doe did not first obtain an Order for substitutional service. Doe cross-applied for an Order under Rule 23 stipulating that service upon the Administrator of the Archdiocese shall be deemed effective substituted service upon the Church. The applications were heard before the case management judge on January 6, 2000.

4 The evidence before the case management judge consisted of: an affidavit sworn in support of the application by Laurent J. Lamoureux ("Lamoureux"), the Financial Administrator of the Archdiocese; exhibits related to the affidavit; and, the transcript of Lamoureux's cross-examination on his affidavit.

Decision of the Case Management Judge

5 A written judgment with respect to the application was rendered by the case management judge on January 21, 2000, now cited as *Indian Residential Schools, Re* (2000), 77 Alta. L.R. (3d) 62 (Alta. Q.B.).

6 Based on the argument presented, the case management judge found the identification of both the Church's legal and ecclesiastical structures to be an extremely complex matter. Then, relying upon *International Assn. of Science & Technology for Development v. Hamza* (1995), 28 Alta. L.R. (3d) 125 (Alta. C.A.), and *F. (B.) v. Society of Kabalarians of Canada*, [1999] B.C.J. No. 2128 (B.C. S.C.) as authority, she stated at p. 71:

> [I]t may be inappropriate for the court to summarily determine the status of a party where the resolution of that issue requires the presentation of more evidence than may be afforded under a simple application to strike. In those instances either a trial of the issue or the action as a whole will be necessary to properly canvass the issue.

7 The case management judge applied this principle to the application before her and found the evidence to be insufficient to decide the question of whether the Church is an entity capable of being named and sued. She further

held that a trial of the issue would be premature at this stage of the proceedings, as the parties have not had the benefit of discoveries and document production. At para. [37] she stated: "Evidence which may be unearthed through those procedures may be crucial to a proper determination of the status and involvement of the Church in the residential schools, in the context of the evolving law of vicarious liability and fiduciary duty".

8 The case management judge noted that in arriving at her conclusions, she had considered *Alberta Treasury Branches v. Ghermezian* (1999), 72 Alta. L.R. (3d) 164 (Alta. Q.B.). In that case, Moore C.J. at pp. 170-71, cited *Madill v. Alexander Consulting Group Ltd.* (1999), 237 A.R. 307 (Alta. C.A.) as authority for the proposition that case management judges in chambers should determine any issues that can be resolved prior to trial which will aid in streamlining the proceedings. The case management judge found, however, that this principle was not relevant to the application before her, because it only applied in those cases where there is sufficient evidence before the Court upon which to make a decision.

9 For the foregoing reasons, the case management judge dismissed the application to strike out the Church as the Fifth Defendant. However, she noted that to leave the Fifth Defendant styled as the "Roman Catholic Church" would not assist Doe and the other Plaintiffs in the action, as there would be no identifiable person to be examined for discovery or to address document production. Reasoning that such evidence will be necessary for the Court to determine the proper parties to the action, she directed that the name of the Fifth Defendant be amended to read: "The Archbishop of the Catholic Archdiocese of Grouard-McLennan, as the representative of the Roman Catholic Church" (the "Archbishop").

10 Pursuant to her Reasons for Judgment, the case management judge granted an Order stipulating the following: 1) that the application to strike out the Fifth Defendant is dismissed; 2) that the name of the Fifth Defendant be amended as directed in the judgment; 3) that the application to set aside service is dismissed; 4) that service on Guimond as the current Administrator of the Archdiocese shall be deemed good and sufficient service on the Fifth Defendant; and, 5) that the Order shall have effect under the common case management regime.

Positions of the Parties

11 The Archdiocese asserts that the Church is not a suable entity in Alberta and that there was sufficient evidence before the case management judge to make that determination. On this basis, it submits that the question of the Church's legal status should be decided on the present record by this Court. The Archdiocese further submits that the case management judge erred by inadvertently focussing on the wrong issue in dismissing the application. It contends that she was unduly distracted by the question of the Church's involvement in running the schools, and consequently failed to properly consider the issue before her, i.e. whether the Church is an entity capable of being sued in Alberta.

12 The Archdiocese also challenges the appointment of the Archbishop as representative of the Church on the grounds that there was neither evidence before the case management judge to support the Church's existence in law, nor evidence that the Archbishop has any authority from the Church to act on its behalf. The Archdiocese further posits that such Order is incapable of effective performance.

13 The Respondents, Doe and Her Majesty The Queen in Right of Canada ("Canada"), submit that the case management judge did not err in the exercise of her discretion under s. 38(3) of the *ARC* when she deferred the issue of the Church's legal status to trial, rather than decide the question either on a motion to strike or by a trial of an issue. Further, the Respondents maintain that the case management judge exercised her discretion appropriately when she appointed the Archbishop as representative of the Church, given the complex questions of fact and law involved and the need for discovery to properly determine the issue before her.

14 Doe and Canada also submit that this Court must apply a high standard of deference to the decision of the case management judge, based on the following grounds: it is interlocutory in nature; it did not finally dispose of any matters in issue between the parties; it was made in the context of case management; and, the case management was in respect of a large number of claims involving complex and novel issues of fact and law.

15 It should be noted that there are also three Intervenors in this appeal: The Roman Catholic Bishop of the Diocese of Calgary (the "Diocese of Calgary"); The Sisters of Charity of Providence of Western Canada (the "Sisters"); and, The Synod of the Diocese of Calgary (the "Synod"). All of these Intervenors adopt the position of the Archdiocese.

Issues

16 The issues raised by this appeal are as follows:

(1) Whether the case management judge erred under Rule 38(3) of the *ARC* when she decided, based on the evidence before her, to defer the determination the Church's legal status to trial.

(2) Whether the case management judge erred when she directed that the name of the Fifth Defendant be amended to read: "The Archbishop of the Catholic Archdiocese of Grouard-McLennan, as the representative of the Roman Catholic Church".

Standard of Review

17 The standard of review applicable to an exercise of discretion by a chambers judge was articulated in *Decock v. Alberta* (2000), 186 D.L.R. (4th) 265 (Alta. C.A.), a recent decision of this Court. Russell J.A., with specific reference to discretionary decisions made under Rules 38(3) and 129 of the *ARC*, stated the standard at p. 272 in the following terms:

> In examining these Rules and the submissions on appeal, it is essential to bear in mind the standard of review for appeals from the exercise of the power to remove a party pursuant to Rule 38(3) or to strike a claim under Rule 129 (sometimes referred to as a "discretion"). The scope for review of such decisions is limited to a determination of whether: (i) the decision was unreasonable because no weight or insufficient weight was given to relevant considerations; or (ii) the chambers judge erred in law: *Paragon Controls Ltd. v. Valtek International*, [1998] A.J. No. 58 (QL) (C.A.), at para. 2 [summarized 76 A.C.W.S. (3d) 927]; *Blomme v. Herman* (1993), 145 A.R. 16 (C.A.) at 17-18; and *Russell Food Equipment (Calgary) Ltd. v. Valleyfield Investments Ltd.* (1962), 40 W.W.R. 292 (Alta. S.C.T.D.) at 293-95.

18 More generally, this Court in *Northland Bank v. Wettstein* (1997), 200 A.R. 150 (Alta. C.A.) at p. 152, quoted with approval in *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) by Roger P. Kerans at pp. 146-147:

> The general rule about appeals on interlocutory matters is that the reviewing court must review on the concurrence standard any clear issue of law that can be isolated, but, to the extent that the task of the first court was to balance many competing factors, review is for reasonableness.

19 Canada submits that case management judges dealing with complex litigation should be afforded even greater deference than that suggested by the above authorities. In support of this proposition, it cites the following cases: *Korte v. Deloitte, Haskins & Sells* (1995), 36 Alta. L.R. (3d) 56 (Alta. C.A.); *Canadian Engineering & Surveys (Yukon) Ltd. v. Banque nationale de Paris (Canada)* (1996), 196 A.R. 1 (Alta. C.A.); and, *Gienow Building Products Ltd. v. Tremco Inc.* (2000), 78 Alta. L.R. (3d) 40 (Alta. C.A.).

20 In *Korte*, the Court states at pp. 58-59 that case management judges in complex matters must be given some "elbow room" to resolve interlocutory issues, and that the Court of Appeal will only interfere with their judicial discretion in the "clearest of cases" of misuse.

21 In *Canadian Engineering & Surveys (Yukon) Ltd.*, the Court dismissed an appeal from a case management judge's refusal to grant an order for better discovery of documents. Kerans J.A., speaking for himself, opined at pp. 2-3 that the Court of Appeal should not interfere with such decisions made by case managers unless it can be shown that they are

"palpably wrong". Fruman J.A. for the majority in *Gienow Building Products Ltd. v. Tremco Inc.* (2000), 78 Alta. L.R. (3d) 40 (Alta. C.A.) at 53, agreed with Kerans J.A.'s view.

22 At first blush, the terminology used in cases such as *Korte* and *Canadian Engineering & Surveys (Yukon) Ltd.* may appear to denote greater deference than that afforded under the reasonableness standard. Sorting out the meaning of terms such as "clearest of cases" and "palpably wrong" can be a confusing task. However, reference to *Standards of Review Employed by Appellate Courts* can be helpful in this regard. There, the learned author observes in his introductory note at xi-xii:

> Review for "clear error", or its many synonyms, usually means, and should mean, review for unreasonableness, which means that the reviewer asks not whether the first decision was correct but rather whether it is one a well-informed person, acting responsibly, might select.

He further equates the term "palpable error" with that same standard, and at p. 43 provides a possible explanation for the variation in terms:

> The adoption of colourful adjectives like "palpable" and "overriding", perhaps can be explained by the fact that, to some, a decision is unreasonable if they disagree with it. That equation reduces the standard to one of correctness, and effectively erases it . . . Use of terms like "palpable" seem designed to discourage that sort of sliding from one standard to another".

23 Thus, the reasonableness standard has been described in the jurisprudence in a variety of different terms. Regardless of the variation in terminology found in the case law, the standard of review applicable to the exercise of discretion by a case management judge is no different than that for any discretionary decision made in chambers; that standard, simply put, is one of "reasonableness". Therefore, the standard as expressed in *Decock* is apposite with respect to this appeal.

Analysis

24 As previously noted, the case management judge exercised her discretion pursuant to Rule 38(3) of the *ARC*. It states as follows:

> 38(3) The Court may, either upon or without the application of any party and with or without terms order that the name of any party improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.

25 On its face, it is clear that Rule 38(3) grants the Court the jurisdiction to strike or to add parties upon its own motion or upon the application of a party to the action. However, any exercise of discretion in respect of that jurisdiction must be free of legal error and must be reasonable in light of all the relevant considerations. It is therefore necessary at this point to examine the law and considerations relevant to the case management judge's decision, in order to assess whether it was a reasonable exercise of her discretion.

26 The Archdiocese cited several authorities in support of the proposition that, for a party to sue or be sued, it must be a natural person, a corporation, or an entity granted status by statute. For example, they rely *inter alia* upon *Comeau v. Fundy Group Publications Ltd.* (1981), 24 C.P.C. 251 (N.S. T.D.) at 254, and *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 70 B.C.L.R. (2d) 27 (B.C. S.C.) at 50, aff'd (1995), 122 D.L.R. (4th) 412 (B.C. C.A.). Indeed, counsel for the Respondents conceded before the case management judge and this Court that the Church does not fall within any of the above three categories.

27 The Archdiocese submits that the Respondents' admission in conjunction with the above stated principle of law as to legal status was a sufficient basis upon which to strike the Church from the Statement of Claim. However, Doe and

Canada argue that the categories of juridical entities are not necessarily limited those three recognized in the authorities of the Archdiocese, and they support this assertion by citing *Hamza*, *supra*. This authority would appear to be crucial to the Respondents' case. Therefore, review of the decision in some detail is in order.

28 The defendant, Mrs. Hamza ("*Hamza*"), had sought an order striking out the statement of claim of the two plaintiffs, the International Association of Science and Technology for Development ("IASTD"), and the International Society for Mini & Micro Computers ("ISMM"), on the basis that they lacked the status to sue. Neither plaintiff was incorporated or registered as any form of society or trade union under any provincial or federal law, nor were they incorporated as societies in any other jurisdiction. Nevertheless, IASTD and ISMM claimed to be registered societies in Switzerland and recognized as legal entities under Swiss law. The chambers judge dismissed Hamza's application and she appealed.

29 The issue on appeal was whether an unincorporated foreign entity, recognized within its home jurisdiction as having the status to sue, should be accorded the same recognition in Alberta. Conrad J.A., for the Court, applied conflict of laws principles in addressing this question. She first determined, based on *Regas Ltd. v. Plotkins*, [1961] S.C.R. 566 (S.C.C.), and *Hal Commodities Cycles Management v. Kirsh* (1993), 17 C.P.C. (3d) 320 (Ont. Gen. Div. [Commercial List]), that the status to sue was a procedural issue. She then concluded that, because procedural matters are governed by the *lex fori*, the right of a foreign litigant to sue is properly determined by Alberta law.Moreover, Conrad J.A. stipulated that Alberta law includes Alberta's private international law rules with respect to foreign litigants.

30 After reviewing the relevant authorities, Conrad J.A. held at p. 139: "This court is entitled to know that its directions and judgments are enforceable against identifiable legal persons. If satisfied of that, by proof of foreign law, I am of the view the foreign entity with status to sue in its home jurisdiction should be allowed to sue in Alberta". On the basis of this principle, she concluded:

> [T]he status of IASTD and ISMM to sue in Alberta is, at the very least, a triable issue of law, subject to proof . . . The plaintiffs in this action might very well be accorded legal status to pursue their claim should they prove their existence as a legal person under Swiss law at trial . . . Thus, I agree with the Chambers judge that the statement of claim should not have been struck at this stage of the proceedings due to lack of status.

31 Doe and Canada argue that *Hamza* applies to the case at bar, in that, the Church may qualify as a foreign entity which is recognized as a juridical person in its home jurisdiction. They therefore submit that evidence as to the Church's home jurisdiction and its legal status within that jurisdiction is essential to the determination of the Church's status to be sued in Alberta. However, they maintain that such evidence would be best adduced at trial, with the benefit of examinations for discovery, the production of documents, and expert testimony. Moreover, Doe and Canada assert that the Archdiocese, as the party bringing the application to strike out the Church, bears the onus at this stage of the proceedings of proving that the Church is not a foreign entity capable of being sued in its home jurisdiction.

32 With all due respect, the Respondents are the ones who raise the possibility that the Church is a foreign entity having legal status in its home jurisdiction, and the onus falls on them to adduce *some* evidence in support of their theory so as to raise a triable issue of law. On the contrary, they have placed *no* evidence on the record in this regard, and as such, have failed to advance their position beyond the realm of pure conjecture.

33 Doe and Canada do not even go so far as to assert that the Church is in fact a foreign entity capable of being sued in its home jurisdiction. In oral argument before this Court, counsel for both Doe and Canada were each specifically asked if they were prepared to make such a claim and each declined to do so. In contrast, the plaintiffs in *Hamza* did go so far as to claim that they were in fact foreign entities and juridical persons in their home jurisdiction, and on that basis, *Hamza* is distinguished from the case at bar. Counsel for Canada conceded in oral argument before us that if *Hamza* were not applicable, it would be fatal to his client's case; we find that *Hamza* is not engaged on this record.

34 We further find that it was an error of law for the case management judge to defer to trial the issue of the Church's juridical status in the complete absence of any evidence on the record before her that the Church is an entity capable of being sued. Given this dearth of evidence, a trial of the issue would not have been warranted either.

35 As we have noted, the overriding preponderance of Canadian case law establishes that the Roman Catholic Church (or hierarchy), being an unincorporated religious association of its adherents, is not a legal entity at law. Not being a juridical personage, the Roman Catholic Church can only sue or be sued in Alberta if it is a person (which it obviously is not), or an entity that is otherwise recognized by statute. It is not. This is conceded by the plaintiff/respondent as well as by the case management judge, who acknowledged (Reasons for Judgment, par 10) that the Church does not fit within the recognized categories of legal persons.

36 Recent legal determinations are persuasive that the "Roman Catholic Church" as such, is not amenable to suit in the civil law process. They include the following cases: *S. (J.R.) v. Glendinning*, [2000] O.J. No. 2695 (Ont. S.C.J.); *John Doe v. Bennett*, [2000] N.J. No. 203 (Nfld. T.D.) (Wells C.J.); *Comeau v. Fundy Group Publications Ltd.*, *supra*; *National Hockey League v. Pepsi — Cola Canada Ltd.*, *supra*.

37 Since 1615, when the Franciscan Récollet Fathers (followed by the Jesuits) arrived in New France to undertake the workings of the Church - its teaching schools, seminaries, religious orders, conversions and baptisms - the Church has by careful design avoided all attempts to submit itself to secular legal disciplines, including incorporation by Royal Charter, legislatures, or statutory recognition beyond the ecclesiastical sense. In nations where there is an official state religion, the framework and administration of that religion may become a suable entity. The Church of England is offered as an example. In other instances, the civil definition of the reach of any religion seems to be habitually avoided by legislative authority throughout Canada and for four centuries.

38 Size does not dictate suability. Mr. Slatter pointed out that other important Canadian institutions do not enjoy the right to sue or exposure to suit as a defendant. He cited, by way of example, the Salvation Army, the Canadian Media, the Public Sector, and the Oil and Gas Industry, all of which are no more than entities loosely conjoined by a common interest. To this we might add Parliament and the Canadian Armed Forces. The Roman Catholic Church's various dioceses, and religious and teaching institutes that carry on under the aegis of the "Roman Catholic Church" may seek civil incorporation or recognition by statute for themselves. But in doing so, they do not suspend or redefine the ecclesiastical nature of the Roman Catholic Church, substituting a civil entity which would allow the Church to sue or be sued.

39 Nonetheless, the case management judge saw fit (*proprio motu*) to appoint the Archbishop of the Catholic Diocese of Grouard-McLennan as the representative of the "Roman Catholic Church" in her belief that his designation and his consequent discovery and production of documents would reveal probative information that "may be crucial to a proper determination of the status and involvement of the Church in the residential schools, in the context of the evolving law of vicarious liability and fiduciary duty". (Reasons for Judgment, par. 37.) This relief was not sought by counsel and its grant raises concerns as to what role the Archbishop of the Catholic Diocese of Grouard-McLennan could play under it.

40 The limits of the Archbishop's responsibility to answer questions on discovery or prepare an Affidavit of Records was not defined in scope or ability. Is he to be examined as an "employee", "officer", or "a person with some knowledge" of the matters in issue? (Rule 200.) His appointment does not define his duty either to inform himself, nor does it set the limits of his responsibility to answer. And if he has a duty to inform himself, from whom does the information source? Does he have power to produce documents in the possession of the Holy See? Must he search archives (if they exist) in the Vatican City? The obvious doubts raised by these questions demonstrate that the proposed process is fatally flawed.

41 The practice of the Alberta courts is clearly that a defendant is not to be made a party for the sole purpose of obtaining discovery. All the more reason not to create a party judicially for such a purpose. The Archbishop is not to be named solely for the purpose of discovery either.

42 Maintaining the order made by the case management judge is further complicated by the fact that when it issued, the Archbishop of the Diocese of Grouard-McLennan had died and his successor had not been named. This has caused counsel to note that if the disputed order stands a second non-existent entity (the Archbishop) has been appointed to represent the first non-existent entity "The Roman Catholic Church". In addition, The Synod, an intervenor, responds that the Diocese (here GrouardBMcLennan), an ecclesiastical corporation sole, recognized in law as such, should not have to respond to a claim against "The Roman Catholic Church", an entity unknown to law. The Diocese of GrouardBMcLennan has no authority to speak for the Church in the multitude of residential school actions and it does not know from whom to seek instructions. These concerns, which were not placed before the case management judge, seem relevant to us.

43 In fairness to the case management judge, her order was intended to be a resourceful attempt to assemble whatever evidence which could be "unearthed" on an important issue.

44 We view "The Roman Catholic Church" in Alberta law as no more than an ecclesiastical entity incapable of being sued. The issue before the case management judge was not whether "The Roman Catholic Church" might have been involved in the structure and operation of the residential schools and the sharing in any of the tortious excesses now alleged. It was whether, on the record before her, the respondents had succeeded in showing that the Roman Catholic Church was a suable legal entity in Alberta. It was not an issue to be deferred within the micawberish hope that time might reveal evidence that would be determinative. The "Roman Catholic Church" as well as the other named litigants were entitled to a ruling by the case management judge from the record as it stood. The respondents failed in their proof burden and the objection to the joining of "The Roman Catholic Church" should have prevailed.

45 The salient question of whether the Church is a suable entity is discrete from the irrelevant question of whether Doe has a cause of action against the Church. Rather than exclusively considering whether there was evidence that the Church was capable of being sued, the case management judge also considered whether there was evidence of the Church's involvement in running the schools and of its relationship to other bodies alleged to have operated the schools. Certainly, this latter type of evidence is typical of that which would be appropriately adduced at trial to establish the Church's liability, given it is a proper party to the action. However, the only question before the case management judge was whether the Church is capable of being a party at all; evidence going to liability is simply irrelevant to that question.

46 It is clear from the case management judge's Reasons that she gave weight to irrelevant evidence in deciding to defer, incrementally, the question of the Church's legal status to trial. She stated at paras. [33] *et. Seq.*:

> [33] I am satisfied from the evidence before me, in the form of the affidavit of Mr. Lamoureux, the transcript of his cross examination and the related exhibits, that the role of various bodies associated with the Roman Catholic Church, in the operation and/or organization of the residential schools, is anything but clear at this stage of the proceedings. Although the Applicant takes the position that, as the legally incorporated body of the Church, it is the proper party to be named in this action, the evidence demonstrates that there were other bodies such as "Indianescom" and the Vicariate Apostolic in 1911 who were involved in the management of the school. Additionally, at page 144 of the transcript of the cross-examination, Mr. Lamoureux testified as follows:
>
> > Q. Right. With respect to those six schools will you agree with me that although the Vatican City State and His Holiness the Pope were never involved directly or indirectly with the operation of those six schools but there certainly were other departments within the Roman Curia that oversaw what went on in those residential schools as far as you know and understand?
> >
> > A. I would agree to that.
>
> [34] In my view, the cross-examination makes it clear that various bodies within the Roman Catholic Church: the Pope; the Holy See; and the Curia, to name a few, have religious authority over various individuals within

> the Applicant organization and may have been involved, in some fashion, in the operation or supervision of the residential schools.
>
> [35] I am also satisfied by the argument presented that the identification of the ecclesiastical versus the legal structure of the Church is, factually and legally, an extremely complex matter.
>
> .....
>
> [37] In my view, to decide this issue at this time, either by application or a trial of the issue, would be premature. Whether the Church is an entity capable of being named and sued is not the type of issue that can be determined at this stage of the proceedings, where the parties have not had the benefit of discoveries and document production. Evidence which may be unearthed through those procedures may be crucial to a proper determination of the status and involvement of the Church in the residential schools, in the context of the evolving law of vicarious liability and fiduciary duty.

47 And at para. [40], in appointing the Archbishop as the representative of the Church, the case management judge reasons:

> [40] . . . This will afford an identifiable individual who can address document production, provide evidence and answer questions relating to issues such as the identity and involvement of Indianescom and the historical organization and involvement of the Church in the residential schools.

48 It is quite apparent from the above passages that the case management judge's consideration of irrelevant evidence as to the Church's involvement in the alleged tort influenced her decision to defer the question of its legal status to trial. This was an error of law. Although the record before her possibly disclosed some evidence that the Church had been involved with the residential schools, it contained absolutely no evidence that the Church is capable of being sued in Alberta. Quite to the contrary, the case management judge had before her uncontroverted evidence that the Church is not recognized as a juridical person under Alberta law; we find that on that basis she should have struck out the Church from the Statement of Claim.

49 In respect of this finding, we note a recent decision of the Ontario Superior Court, which was brought to our attention by the Intervenors the Diocese of Calgary and the Synod: *S. (J.R.) v. Glendinning* (2000), 191 D.L.R. (4th) 750 (Ont. S.C.J.). This case was decided subsequent to the lower court decision in the present case and is very similar on its facts.

50 In *Glendinning*, the plaintiff had brought an action in tort and for breach of fiduciary duty in respect of alleged sexual assaults by a Roman Catholic priest. The defendant diocese brought a motion to have the plaintiff's claim against the defendant Church dismissed on the ground that the Church was not a legal entity. The only evidence provided on the motion was the affidavit and cross-examination of Rev. Father Boll, a Roman Catholic priest and Canon lawyer.

51 The Court held, based on the same line of authorities relied upon by the Archdiocese in the case at bar, that the Church does not have the capacity to sue or be sued because it is not a natural person, a corporation, or a body which has been given that capacity by legislation. Ross J., before deciding the matter in favour of the applicant diocese, stated at p. 759:

> It is, I would suggest, apparent that it is the corporate entity which is empowered by its enabling legislation to manage the temporal affairs of the Church in the diocese and which has the legal capacity to sue and be sued in secular matters. In other words, the corporate diocese is a secular arm of the Church within such diocese or as Richard Boll phrases it in his affidavit, "the Diocese is the legal manifestation of the Church".

We note parenthetically that Ross J. considered the judgment presently under appeal, but nevertheless decided to strike out the Church on the diocese's motion, rather than to defer the question of the Church's legal status to trial.

52 Canada seeks to distinguish *Glendinning* on the basis that *Hamza* was not argued in that case and that the Court there did not consider the issue as to whether the Church is a foreign entity capable of being sued in its home jurisdiction. However, we find *Glendinning* to be analogous to the case at bar for the reason that, as in the present case, there was no evidence before the Chambers judge that the Church is a suable entity.

Conclusion

53 With respect to the first issue, we hold that the case management judge erred in the exercise of her discretion under Rule 38(3) of the *ARC* when she decided, based on the evidence before her, to defer the determination the Church's legal status to trial. She erred in law by mischaracterizing the issue to be decided, by giving weight to irrelevant evidence in reaching her decision, and by giving insufficient weight to uncontroverted evidence before her that the Church is not an entity capable of being sued under Alberta law. Thus, we find that the decision of case management judge does not meet the test for reasonableness as set out in *Decock*.

54 We further hold that the evidence before the case management judge was sufficient for her to determine the matter on the motion to strike. The Archdiocese had presented persuasive evidence that the Church is not recognized as a legal entity in Alberta. Conversely, the Respondents failed to meet their onus of producing some evidence in rebuttal that the Church is a suable entity, so as to at least warrant a trial of the issue. We therefore hold that, based on the record before her, the case management judge should have struck out the Church from the Statement of Claim.

55 It follows that adding the Archbishop of the Catholic Diocese of Grouard-McLennan as representative of the Roman Catholic Church was also an error in law, and so we order that the Fifth Defendant be struck from the Statement of Claim.

56 The appeal is allowed.

Appeal allowed.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

Counsel: Michael A. Feder, Tammy Shoranick, for Appellant
Darrell W. Roberts, Q.C., David Mitchell, for Respondent
Jonathan Eades, Micah Weintraub, for Intervener, Attorney General of British Columbia
David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

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

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration

award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court

dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

Held: The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique.

L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

Rothstein J. **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) When Is Contractual Interpretation a Question of Law?

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law.

See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc.* Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) The Role and Nature of the "Surrounding Circumstances"

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) Application to the Present Case

TAB 7

2002 SCC 33, 2002 CSC 33
Supreme Court of Canada

Housen v. Nikolaisen

2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 2002 CSC 33, [2002] 2 S.C.R. 235, [2002] 7 W.W.R. 1, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 112 A.C.W.S. (3d) 991, 211 D.L.R. (4th) 577, 219 Sask. R. 1, 272 W.A.C. 1, 286 N.R. 1, 30 M.P.L.R. (3d) 1, J.E. 2002-617, REJB 2002-29758

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

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

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

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

Counsel: *Gary D. Young, Q.C.*, *Denis I. Quon*, *M. Kim Anderson*, for Appellant
Michael Morris, *G.L. Gerrand, Q.C.*, for Respondent

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

Headnote

Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.

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

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

Droit municipal --- Responsabilité municipale — Négligence — Principes généraux

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

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

Held: The appeal was allowed.

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

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

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

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence

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

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

Arrêt: Le pourvoi a été accueilli.

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ». La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

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

Selon l'art. 192(3) de *The Rural Municipality Act, 1989*, le demandeur devait prouver que la municipalité connaissait ou devait connaître le mauvais état de la route pour qu'il soit décidé que celle-ci avait manqué à son obligation de diligence

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

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

APPEAL by plaintiff from judgment reported at 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), allowing appeal by municipality from finding of liability for negligence.

POURVOI du demandeur à l'encontre du jugement publié à 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), qui a accueilli le pourvoi de la municipalité à l'encontre de la conclusion l'ayant déclarée responsable vu sa négligence.

Iacobucci, Major JJ.:

I. Introduction

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an

appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.); *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.); *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60 (S.C.C.)). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

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

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

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

to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the *principal* rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on *all* conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

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

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

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3), to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, *supra*, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2 (S.C.C.), at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.)).

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

McLean v. McCannell, [1937] S.C.R. 341 (S.C.C.), at p. 343; see also *Dubé v. Labar*, [1986] 1 S.C.R. 649 (S.C.C.), at p. 662, and *Canadian National Railway v. Muller* (1933), [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.), at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

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

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

34 A good example of this subtle principle can be found in "*Rhone*" *(The) v.* "*Peter A.B. Widener*" *(The)*, [1993] 1 S.C.R. 497 (S.C.C.), at p. 515. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (p. 516). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of

the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. The Appropriate Standard of Review

38 We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule by which to determine another case where the facts are different ...

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. The Trial Judge Did Not Commit an Error of Law

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

> ... omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal ref'd [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an

TAB 8

2016 ABQB 553
Alberta Court of Queen's Bench

Twinn v. Twinn

2016 CarswellAlta 1919, 2016 ABQB 553, [2016] A.W.L.D. 4611, [2016] A.W.L.D. 4612, [2016] A.W.L.D. 4668, 24 E.T.R. (4th) 298, 271 A.C.W.S. (3d) 696

Catherine Twinn (Plaintiff) and Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker (Defendants)

Robert A. Graesser J.

Heard: May 24, 2016; June 21, 2016
Judgment: October 4, 2016
Docket: Edmonton 1503-08727

Counsel: Brian P. Kaliel, Q.C., Scott Sherlock, for Plaintiff
Nancy E. Cumming, Q.C., Joseph Kueber, Q.C., for Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward
Barbara J. Stratton, Q.C., for Defendant, Brian Heidecker

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

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Miscellaneous
Stay of arbitration — Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In 2011, respondents commenced action for declarations respecting definition of beneficiaries under trust — Applicant opposed position of respondents and that action remained unresolved — Applicant commenced action in 2014 challenging validity of appointment of two trustees — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as trustee — Applicant brought application to stay code of conduct proceedings pending outcome of other litigation — Application dismissed — There were serious issues to be tried in relation to removal of trustees — Those matters needed to be decided so that ongoing administration of trusts could continue — Applicant failed to demonstrate she would suffer irreparable harm if arbitration proceeded — Applicant did not say that she was unable to fund ongoing costs of various disputes — Applicant could continued to participate in lawsuits if she was removed as trustee — Applicant was also beneficiary of trust and had rights and remedies in that capacity — Balance of convenience did not favour granting stay.
Estates and trusts --- Trustees — Nature of trustee's office — Removal of trustee — Miscellaneous
Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In 2011, respondents commenced action for declarations respecting definition of beneficiaries under trust — Applicant opposed position of respondents and that action remained unresolved — Applicant commenced action in 2014 challenging validity of appointment of two trustees — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as trustee — Applicant brought application to stay code of conduct proceedings pending outcome of other litigation — Application dismissed — There were serious issues to be tried in relation to removal of trustees — Those matters needed to be decided so that ongoing administration of trusts could continue — Applicant failed to demonstrate she would suffer irreparable

harm if arbitration proceeded — Applicant did not say that she was unable to fund ongoing costs of various disputes — Applicant could continued to participate in lawsuits if she was removed as trustee — Applicant was also beneficiary of trust and had rights and remedies in that capacity — Balance of convenience did not favour granting stay.
Alternative dispute resolution --- Practice and procedure — Costs — Miscellaneous
Entitlement — Parties were trustees of inter vivos settlement established in 1985 and 1986 — Parties were bound by 2009 code of conduct — In February 2015 respondents complained about applicant's conduct in her role as trustee — Code of conduct arbitration process was commenced under the terms of code of conduct — Applicant also brought code of conduct proceedings against respondents — Respondents failed to proceed with original code of conduct proceedings but were preparing new proceedings to remove applicant as trustee — Respondents agreed that all trustees would be fully indemnified from trusts for their future reasonable legal costs of participation in code of conduct process — Hearing was held to determine costs of arbitration proceedings to date — Costs awarded to applicant to date of application — It was manifestly unfair that respondents were reimbursed for code of conduct proceedings, which they had abandoned, while applicant incurred legal costs to oppose proceedings — Applicant was granted her costs of code of conduct proceedings and for her action, up to date of application.

APPLICATION by applicant for stay of arbitration proceedings pending outcome of other litigation.

***Robert A. Graesser J.*:**

Introduction

1 Catherine Twinn is a trustee of two Sawridge Band trusts. She seeks a stay of arbitration/mediation proceedings commenced against her by the other trustees of the trusts. She also seeks remedies concerning the costs of the arbitration/mediation proceedings to date. As an alternative to the stay she seeks, Ms. Twinn asks the Court to impose terms on the conduct of the arbitration/mediation proceedings.

Background

2 Catherine Twinn, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward are the trustees of the 1985 Sawridge Band Inter Vivos Settlement and the 1986 Sawridge Band Inter Vivos Settlement. Brian Heidecker is the Chair of the boards of trustees but is not himself a trustee.

3 There is extensive litigation between Catherine Twinn and the Respondents. In 2011, the trustees commenced actions seeking declarations as to the definition of beneficiaries under the terms of each trust. Ms. Twinn is adverse to the positions taken by the other trustees. In 2014, Ms. Twinn commenced an action challenging the validity of the appointment of two of the Respondent trustees.

4 The beneficiary actions are proceeding slowly. The validity of appointment action is apparently in its early stages. A special chambers application has been set for November, 2016 to determine whether Ms. Twinn is entitled to be indemnified for her costs in the beneficiary actions. Her position is that since the trusts are paying the costs of the other trustees (who are apparently in agreement as to how those actions should be resolved), the trusts should be paying her costs as she argues a different position. This cost application appears to be a preliminary step in the beneficiary actions before the merits will be addressed.

5 The trustees are bound by a Code of Conduct for trustees, signed by all of them on January 12, 2009. The Code of Conduct provides for a dispute resolution process in the event of complaints about a trustee's conduct.

6 In February, 2015 the Respondent Trustees complained about Ms. Twinn's conduct in her role as trustee. A Code of Conduct mediation/arbitration process was commenced under the terms of the Code of Conduct.

7 Although there were discussions between the two sides concerning the appointment of a mediator/arbitrator, Ms. Twinn commenced this action in June, 2015 to stay any mediation/arbitration proceedings against her, pending the

79 I leave that issue to be resolved in the first instances by the parties in their discussions, and next by the arbitrator. Ultimately, non-arbitrable issues may have to proceed through the litigation process, but again that would not appear to result in an overlap of issues.

80 The Applicant is a party to the Code of Conduct. She agreed to the arbitration provisions contained in it. It provides an expedient manner of resolving conduct issues. The Applicant has not satisfied me that the balance of convenience favours staying the arbitration proceedings under the Code of Conduct.

81 As for arguments that the arbitration proceedings will be expensive and will deplete the funds available to the beneficiaries, the size of the trusts and the importance of the issues in the various lawsuits outweigh concerns over the costs of arbitration proceedings over who should be trustees of the trusts.

Section 6(c) of the Arbitration Act

82 It should be obvious from my conclusions on the issues of irreparable harm and balance of inconvenience that the Applicant has failed to establish that the arbitration proceedings under the Code of Conduct would be manifestly unfair to her, or would provide unequal treatment to her. The only element of unequal treatment is the issue of payment of legal expenses, and this concern has been overcome by the Respondent trustees' agreement to reimburse the Applicant's legal costs on the same basis as theirs will be reimbursed to them.

Conclusion

83 The Applicant's application to stay the Code of Conduct proceedings is dismissed. The Code of Conduct proceedings should proceed in accordance with the provisions of the Code of Conduct, subject to the terms offered by the Respondent trustees, namely that:

> a. The complaints of all Trustees will be heard by the same mediator/arbitrator at the Code of Conduct Process. All Trustees may amend their complaints to include additional complaints, within one month prior to the commencement of the Code of Conduct Process.
>
> b. The Applicant will submit names of two potential mediators/arbitrators to the Respondent Trustees within two weeks of the entry of this Order. If one of the nominees is acceptable to the Respondent Trustees, then they will notify the Applicant. The Respondent Trustees will submit names of two potential mediators/arbitrators to the Applicant within two weeks of receipt of the Applicant's nominees. The Applicant will notify the Respondent Trustees if any of the Respondent Trustees' nominees are acceptable within two weeks of receipt of the names of the nominees. If no agreement is reached, the parties will submit the four names of the nominee mediators/arbitrators to Mr. Justice Graesser in a joint letter, with Mr. Justice Graesser to choose the mediator/arbitrator.
>
> c. Any Trustees removed at the Code of Conduct Process will continue to have the right to fully participate in Queen's Bench Actions 1103 14112 and 1403 04885 in the same manner as if they were still a Trustee.
>
> d. All Trustees will be fully indemnified from the Trusts for their future reasonable legal costs of participation in the Code of Conduct Process on a solicitor and client basis. Their Bills of Costs may be submitted on a monthly or other periodic basis to the Arbitrator for approval. The Bills of Costs may be redacted to exclude privileged references. The Mediator/Arbitrator's decision will be final.

84 I do not have jurisdiction to order that the Applicant's disqualification proceedings against two of the trustees be dealt with by arbitration. That appears to be what both sides want, and I encourage them to agree to the terms necessary to include that dispute in the arbitration. That appears efficient and economic.

85 To the extent that trustee qualifications (as raised in the Applicant's disqualification claim) are not agreed to become the subject of Code of Conduct proceedings, they must remain in the Applicant's lawsuit.

86 If the issues raised by the Applicant are agreed be included in Code of Conduct proceedings, Ms. Twinn should amend her complaint against the Respondent trustees accordingly.

87 No manifest unfairness or unequal treatment of the Applicant by reason of the arbitration proceedings have been made out.

88 With respect to the costs of these proceedings to date, I see a difference between Code of Conduct proceedings themselves and litigation to stop or stay the Code of Conduct proceedings. It is manifestly unfair that the Respondent trustees have been reimbursed their legal fees for commencing Code of Conduct proceedings and then abandoning them when the Applicant objected and was required to commence this action to stop them, without the Applicant being reimbursed her costs in opposing the Code of Conduct proceedings. These are costs relevant to this action, and not strictly within the scope of the Code of Conduct proceedings.

89 I conclude that the Applicant should have her legal costs reimbursed for steps taken in the abandoned Code of Conduct proceedings, as well as in this action, to the point of the application before me in December, 2015.

90 I awarded no one costs of the December, 2015 application, finding that the application was an abuse of process. The Applicant has been unsuccessful in this application, but for the concessions made by the Respondent trustees. I do not award her any costs of this application. However, because the Respondent trustees are being reimbursed their legal expenses by the trusts, I do not consider it appropriate that the Applicant be required to reimburse the trusts for any costs expended in opposing this application.

91 If the parties cannot agree on the quantum of the costs I have ordered, they may contact me to discuss a process to resolve any dispute.

92 The above conditions address the Applicant's procedural concerns as to legal costs, hearing the competing complaints at the same time and by the same arbitrator, and as to a fair process for the selection and appointment of the arbitrator.

93 As for amendment of existing complaints and adding additional allegations, the trusts are ongoing entities, and I expect that issues may arise from time to time. The proper place to determine these issues is under the Code of Conduct. For the purposes of the presently contemplated proceedings, it seems to me that the parties should agree on a date by which all amendments will be put forward. If they cannot agree on a date, I will set a date if the arbitrator has not yet been appointed. If the arbitrator has been appointed, procedural issues and deadlines for the arbitration will be in his or her jurisdiction and not mine, subject to the provisions of s 6 of the *Arbitration Act*.

Application dismissed.

End of Document

TAB 9

Clerk's stamp:	DEC 14 2016
COURT FILE NUMBER	1503 08727
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
PLAINTIFF (APPLICANT)	CATHERINE TWINN
DEFENDANTS (RESPONDENTS)	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, MARGARET WARD and BRIAN HEIDECKER
DOCUMENT	ORDER
PARTY FILING THIS DOCUMENT	THE DEFENDANTS (RESPONDENTS), ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN and MARGARET WARD
ADDRESS FOR SERVICE OF LAWYER OF RECORD	BRYAN & COMPANY LLP 2600 Manulife Place 10180 – 101 Street Edmonton, AB T5J 3Y2
LAWYER IN CHARGE	NANCY E. CUMMING, Q.C. Phone: 780.423.5730 File No. 29793-2/NEC

I hereby certify this to be a true copy of the original.

for Clerk of the Court

DATE ON WHICH ORDER PRONOUNCED:	October 4, 2016
NAME OF MASTER WHO MADE THIS ORDER:	Mr. Justice Robert A. Graesser
LOCATION OF HEARING:	Edmonton, Alberta

UPON the Application of the Plaintiff (Applicant); AND UPON having read the Affidavit sworn by Catherine Twinn on June 19, 2015 and filed on June 22, 2015, the Affidavit sworn and filed by Catherine Twinn on December 4, 2015 and the Affidavit sworn by Catherine Twinn on May 6, 2016 and filed on May 9, 2016; AND UPON it appearing that the Plaintiff (Applicant), Catherine Twinn (the "Plaintiff") and the Defendants (Respondents), Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward (the "Defendant Trustees") are the Trustees (collectively, the "Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 and The Sawridge Trust dated August 15, 1986 (the "Trusts") and that the Defendant (Respondent), Brian Heidecker is the Chair of the boards of the Trustees, but not a trustee; AND UPON hearing representations from counsel for the Plaintiff and counsel for the Defendant Trustees, the Defendant (Respondent), Brian Heidecker having taken no position in the current Application:

IT IS HEREBY ORDERED THAT:

1. The Plaintiff's Application to stay the Code of Conduct proceedings is dismissed.

2. The Code of Conduct proceedings should proceed in accordance with the provisions of the Code of Conduct, subject to the following:

   (a) The complaints of all Trustees will be heard by the same mediator/arbitrator at the Code of Conduct process. All Trustees may amend their complaints to include additional complaints, in accordance with paragraph 7 of this Order.

   (b) The Plaintiff will submit names of two potential mediators/arbitrators to the Defendant Trustees within two weeks of the entry of this Order. If one of the nominees is acceptable to the Defendant Trustees, then they will notify the Plaintiff. The Defendant Trustees will submit names of two potential mediators/arbitrators to the Plaintiff within two weeks of receipt of the Plaintiff's nominees. The Plaintiff will notify the Defendant Trustees if any of the Defendant Trustees' nominees are acceptable within two weeks of receipt of the names of the nominees. If no agreement is reached, the parties will submit the four names of the nominee mediators/arbitrators to Mr. Justice Robert A. Graesser in a joint letter, with Mr. Justice Robert A. Graesser to choose the mediator/arbitrator.

   (c) Any Trustees removed at the Code of Conduct process will continue to have the right to fully participate in Queen's Bench Actions 1103 14112 and 1403 04885 in the same manner as if they were still a Trustee.

   (d) All Trustees will be fully indemnified from the Trusts for their future reasonable legal costs of participation in the Code of Conduct process on a solicitor and client basis. Their Bills of Costs may be submitted on a monthly or other periodic basis to the mediator/arbitrator for approval. The Bills of Costs may be redacted to exclude privileged references. The mediator/arbitrator's decision will be final.

3. The Plaintiff will be reimbursed from the Trusts for her legal costs for steps taken in the abandoned Code of Conduct proceedings, as well as in this Action, to the point of the Court Application heard on December 16, 2015.

4. No costs shall be awarded to either the Plaintiff or the Defendant Trustees for this Application.

5. If the Plaintiff and Defendant Trustees cannot agree on the quantum of the costs ordered herein, either party may apply to Mr. Justice Robert A. Graesser to seek directions to resolve any dispute. Mr. Justice Robert A. Graesser may make such further directions in this regard as he may think fit.

6. The Plaintiff and the Defendant Trustees may agree to amend the issues which may be dealt with by arbitration to include issues raised by the Plaintiff in Action No. 1403 04885, including the Plaintiff's disqualification proceedings against two of the Defendant Trustees in this action. To the extent that the issues raised by the Plaintiff in Action No. 1403 04885 are not subsumed in the Code of Conduct process, the Plaintiff may pursue these proceedings in Action No. 1403 04885.

7. The Plaintiff and the Defendant Trustees will co-operate on agreeing upon a date by which all amendments to the Code of Conduct complaints will be put forward. If the parties cannot agree upon a date, a date will be set by Mr. Justice Robert A. Graesser in the event that a mediator/arbitrator has not yet been appointed. If the mediator/arbitrator has been appointed, procedural issues and deadlines for the arbitration will be in his or her jurisdiction, subject to the provisions of Section 6 of the *Arbitration Act*.

"R.A. Graesser"

The Honourable Mr. Justice Robert A. Graesser

APPROVED AS BEING THE ORDER MADE BY:

MILLER THOMSON LLP

Per: _____

Brian P. Kalfel, Q.C., solicitors for the Plaintiff (Applicant), Catherine Twinn

TAB 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: Skypower CL 1 LP v. Ontario (Minister of Energy) | 2012 ONSC 4979, 2012 CarswellOnt 11834, 355 D.L.R. (4th) 168, 298 O.A.C. 204, 220 A.C.W.S. (3d) 346, [2012] O.J. No. 4458 | (Ont. Div. Ct., Sep 10, 2012)

2010 SCC 4
Supreme Court of Canada

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)

2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, [2010] 1 S.C.R. 69, [2010] 3 W.W.R. 387, [2010] B.C.W.L.D. 1106, [2010] B.C.W.L.D. 1107, [2010] B.C.W.L.D. 1108, [2010] B.C.W.L.D. 1109, [2010] S.C.J. No. 4, 100 B.C.L.R. (4th) 201, 185 A.C.W.S. (3d) 81, 281 B.C.A.C. 245, 315 D.L.R. (4th) 385, 397 N.R. 331, 475 W.A.C. 245, 65 B.L.R. (4th) 1, 86 C.L.R. (3d) 163, J.E. 2010-321

Tercon Contractors Ltd. (Appellant) and Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways (Respondent) and Attorney General of Ontario (Intervener)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: March 23, 2009
Judgment: February 12, 2010
Docket: 32460

Proceedings: reversing *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2007), 73 B.C.L.R. (4th) 201, 414 W.A.C. 103, 249 B.C.A.C. 103, 66 C.L.R. (3d) 1, 2007 BCCA 592, 2007 CarswellBC 2880, [2008] 2 W.W.R. 410, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647 (B.C. C.A.); affirming *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2006), 2006 BCSC 499, 2006 CarswellBC 730, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, 53 B.C.L.R. (4th) 138 (B.C. S.C.)

Counsel: Chris R. Armstrong, Brian G. McLean, William S. McLean, Marie-France Major for Appellant
J. Edward Gouge, Q.C., Jonathan Eades, Kate Hamm for Respondent
Malliha Wilson, Lucy McSweeney for Intervener, Attorney General of Ontario

Subject: Contracts
Headnote
Construction law --- Contracts — Breach of terms of contract — Exclusion of liability
In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and

business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Construction law --- Contracts — Breach of terms of contract — Breach by owner — General principles

In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Construction law --- Contracts — Building contracts — Execution of formal contract — Tendering process — Process and procedure

In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Droit de la construction --- Contrats — Violation des conditions du contrat — Exonération de responsabilité

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce,

d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Droit de la construction --- Contrats — Violation des conditions du contrat — Violation par le propriétaire — Principes généraux

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Droit de la construction --- Contrats — Contrats de construction — Exécution d'un contrat solennel — Processus d'appel d'offres — Procédure

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

In the tendering process for the construction of a 25-km highway, the Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd., among others. The contract was awarded in the name of B Ltd., notwithstanding that B Ltd. and E Co., an ineligible proponent, planned to perform the work as a joint venture.

T Ltd. brought an action against the Ministry for damages for failure to reject the first ranked proposal from B Ltd., allegedly contrary to the request for proposals. The action was allowed and T Ltd. was awarded damages. The trial judge found that the Ministry breached "contract A" by accepting a bid that was incapable of acceptance, because of non-compliance, and breached duty of fairness owed to T Ltd. by approving a non-compliant bid as the successful bidder. The trial judge further found that the exclusion from liability clause in contract A did not apply to the fundamental breaches that occurred. The Ministry successfully appealed. In the appeal it was determined that the trial judge erred in interpreting the exclusion clause and in refusing to give effect to it. T Ltd. appealed.

Held: The appeal was allowed.

Per Cromwell J. (LeBel, Deschamps, Fish, Charron JJ. concurring): The issues were whether the successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred. The trial judge reached the right result on both issues. The foundation of the tender contract was that only six, pre-selected bidders would be permitted to participate in the bidding. The Ministry not only breached the express and implied terms of contract, it did so in a way that was an affront to the integrity and business efficacy of the tendering process. The exclusion clause did not protect the Ministry from T Ltd.'s damage claim from the Ministry's dealings with an ineligible bidder, let alone from its breach of the implied duty of fairness to bidders.

Per Binnie J. (dissenting) (McLachlin C.J.C., Abella, Rothstein JJ. concurring): The important legal issue raised by this appeal was whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. T Ltd. pointed to public interest and the transparency and integrity of the government tendering process, but such a concern, while important, did not render unenforceable the terms of the contract T Ltd. agreed to. T Ltd. was a large and sophisticated corporation, and the Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. There was no reason why the clause should not have been enforced.

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres. Le contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise.

T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres. Le recours a été accueilli et T Ltd. a été indemnisé. La juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme. De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites. Le ministère a interjeté appel avec succès. En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet. T Ltd. a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Cromwell, J. (LeBel, Deschamps, Fish, Charron, JJ., souscrivant à son opinion) : Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit. La juge de première instance a eu raison sur les deux questions. Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres. Le ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres. La clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Binnie, J. (dissident) (McLachlin, J.C.C., Abella, Rothstein, JJ., souscrivant à son opinion) : Le présent pourvoi soulevait une question de droit importante, celle de savoir si un tribunal peut refuser à la partie coupable d'inexécution — et dans l'affirmative, à quelles conditions — le bénéfice d'une clause d'exonération de la responsabilité à laquelle a consenti l'autre partie alors qu'elle n'était frappée d'aucune inaptitude. T Ltd. a invoqué l'intérêt public lié à la transparence et à l'intégrité du processus gouvernemental d'appel d'offres, mais, même s'il s'agissait d'une condition importante, son inobservation

n'a pas rendu inapplicable les clauses du contrat auxquelles T Ltd. avait consenti. T Ltd. était une grande entreprise dotée d'une vaste expérience, et le ministère, même s'il n'a pas respecté ses obligations contractuelles, bénéficiait de la clause de non-recours. Il n'y avait donc pas de raison de ne pas faire respecter celle-ci.

APPEAL by plaintiff from judgment reported at *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2007), 73 B.C.L.R. (4th) 201, 414 W.A.C. 103, 249 B.C.A.C. 103, 66 C.L.R. (3d) 1, 2007 BCCA 592, 2007 CarswellBC 2880, [2008] 2 W.W.R. 410, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647 (B.C. C.A.).

POURVOI du demandeur à l'encontre d'un jugement publié à *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2007), 73 B.C.L.R. (4th) 201, 414 W.A.C. 103, 249 B.C.A.C. 103, 66 C.L.R. (3d) 1, 2007 BCCA 592, 2007 CarswellBC 2880, [2008] 2 W.W.R. 410, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647 (B.C. C.A.).

***Cromwell J.*:**

I. Introduction

1 The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

2 The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

3 The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (2006 BCSC 499, 53 B.C.L.R (4th) 138 (B.C. S.C.), at para. 150). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

4 The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201 (B.C. C.A.)). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

5 On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

6 In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering]

What has given rise to some concern is not the reference to "public policy", whose role in the enforcement of contracts has never been doubted, but to the more general ideas of "unfair" and "unreasonable", which seemingly confer on courts a very broad after-the-fact discretion.

114 The Court's subsequent observations in *Domtar Inc. v. Abb Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 (S.C.C.), should be seen in that light. *Domtar* was a products liability case arising under the civil law of Quebec, but the Court observed with respect to the common law:

> Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to "fundamental breach", it notably repudiated any judicial discretion to depart from the terms of a valid contact upon vague notions of "equity or reasonableness". It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

115 I agree with Professor Waddams when he writes:

> [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

116 While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Millar, Re* (1937), [1938] S.C.R. 1 (S.C.C.), at p. 4)

See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

117 As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

118 There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous

magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

119 A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650 (Alta. C.A.). The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243). What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

120 Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

121 The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

122 The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

123 If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

IV. Application to the Facts of this Case

124 I proceed to deal with the issues in the sequence mentioned above.

A. Did the Ministry Breach Contract A?

125 The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138 (B.C. S.C.), at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

126 The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a

TAB 11

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 3 — Preparing Written Argument and Scheduling Oral Argument of Appeals [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 1 — Factums [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.25

s 14.25 Contents of factums

Currency

14.25Contents of factums

14.25(1) A factum must include the following:

(a) Table of Contents, including page numbers;

(b) Part 1 — Facts: in the appellant's factum, a statement of facts (including, if desired, a concise introductory statement of the legal issues raised), and in the respondent's factum, its position on the facts as stated by the appellant, and any other facts considered relevant;

(c) Part 2 — Grounds of Appeal: in the appellant's factum, a concise statement of the grounds for appeal, and in the respondent's factum, its position in regards to the stated grounds, and any other points that may properly be put in issue;

(d) Part 3 — Standard of Review: a statement on the relevant standard of review;

(e) Part 4 — Argument: a discussion addressing the questions of law or fact raised by the appeal;

(f) Part 5 — Relief Sought: a statement of the relief sought, including any special direction with respect to costs;

(g) the estimated time required for the oral argument, within the limits set out in rule 14.32(4);

(h) Table of Authorities: a list of the legal authorities referred to in the factum, that meets the requirements of rule 14.31(a);

(i) an Appendix containing extracts from any statute, enactment or rule necessary for the disposition of the appeal, unless they are reproduced elsewhere in the materials to be filed.

14.25(2) Where a cross appeal has been filed, the respondent's factum must consist of 2 sections, each of 5 parts as required by subrule (1), entitled "factum on the appeal" and "factum on the cross appeal", prepared in accordance with subrule (1) with any appropriate modifications.

14.25(3) An intervenor's factum must be prepared in the same form as a respondent's factum, with any appropriate modifications.

14.25(4) A case management officer may vary the format or filing of, or dispense with the preparation of, a factum.

Amendment History
Alta. Reg. 41/2014, s. 4

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 3 — Preparing Written Argument and Scheduling Oral Argument of Appeals [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 2 — Extracts of Key Evidence [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.27

s 14.27 Filing Extracts of Key Evidence

Currency

14.27Filing Extracts of Key Evidence

14.27(1) Where needed to resolve the issues in the appeal, each party to an appeal must file Extracts of Key Evidence that meet the requirements of rule 14.29,

(a) containing extracts of the transcripts, exhibits and other material on the record needed to resolve the issues in the appeal,

(b) excluding any evidence, exhibits and other materials unlikely to be needed, and

(c) not containing any comment, argument, trial briefs, legal authorities or new evidence.

14.27(2) If any document required by rule 14.18 is not available at the time of preparation of the Appeal Record, a copy must be included in the Extracts of Key Evidence or appended to the factum.

14.27(3) A party preparing Extracts of Key Evidence must file with the Registrar, when or before filing that party's factum, 5 copies of the Extracts of Key Evidence, and must file and serve one additional copy on every other party to the appeal.

Amendment History
Alta. Reg. 41/2014, s. 4; 85/2016, s. 1(9)

Currency
Alberta Current to Gazette Vol. 113:23 (December 15, 2017)

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 7 — General Rules for Appeals [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 6 — Sanctions [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.90

s 14.90 Sanctions

Currency

14.90Sanctions

14.90(1) In addition to the sanctions set out in Part 10, Division 4,

(a) unless otherwise ordered, a party is not entitled to assess costs or recover disbursements in respect of a procedural step in which the party has

(i) failed to comply with a deadline set out in this Part,

(ii) filed a document that fails to comply in a substantial respect with the requirements of these rules, or

(iii) filed a document that is carelessly or inadequately prepared or that contains illegible material or text;

(b) in the case of any non-compliance with a rule or a direction or order, a single appeal judge or a panel of the Court of Appeal may strike from the record any document, including a notice of appeal or cross appeal, or provide directions for the management of the appeal.

14.90(2) Where an appeal has been struck by operation of these rules or the provisions of any order or because of the failure of any party to appear when required, or has been deemed to have been struck or abandoned, the respondent is entitled to a costs award for having responded to the appeal.

14.90(3) A single appeal judge may order the interim release of the appellant pending the appeal of any order for the imprisonment or other restraint of the liberty of the appellant arising from a civil sanction imposed by the court appealed from.

Amendment History
Alta. Reg. 41/2014, s. 4

Currency
Alberta Current to Gazette Vol. 113:23 (December 15, 2017)