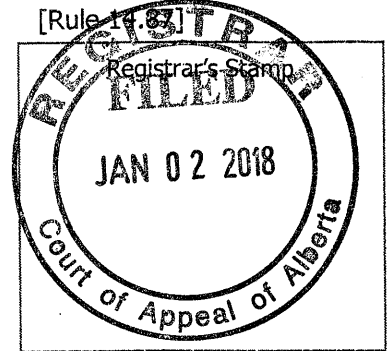


Fast Track

COURT OF APPEAL OF ALBERTA

Form AP-5

[Rule 14.83]



COURT OF APPEAL FILE
NUMBER:

1703-0288AC

TRIAL COURT FILE NUMBER:

1103 14112 and 1403 04885

REGISTRY OFFICE:

Edmonton

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

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")

IN THE MATTER OF THE SAWRIDGE
TRUST CREATED BY CHIEF WALTER
PATRICK TWINN OF THE SAWRIDGE
INDIAN BAND, NO. 19 ON 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 the 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

BOOK OF AUTHORITIES OF THE APPELLANT
Volume 1 of 1

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

**David D. Risling and Crista Osualdini
McLennan Ross LLP**

#600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

E-mail: drisling@mross.com
cosualdini@mross.com

Telephone: (780) 482-9200

Fax: (780) 482-9100

For the Respondents, Roland Twinn, Catherine Twinn, Everett Justin Twinn, Bertha L'Hirondelle and Margaret Ward, As Trustees for the 1985 and 1986 Trusts

**Doris Bonora
Dentons Canada LLP**

2900 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 3V5

E-mail: doris.bonora@dentons.com

Telephone: (780) 423-7188

Fax: (780) 423-7276

For the Respondents, Roland Twinn, Everett Justin Twinn, Bertha L'Hirondelle and Margaret Ward, As Trustees for the 1985 and 1986 Trust

**Nancy Cumming
Bryan & Company LLP**

2600 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 3Y2

E-mail: necumming@bryanco.com

Telephone: (780) 423-5730

Fax: (780) 428-6324

For the Respondent, Public Trustee of Alberta

**Janet L. Hutchison
Hutchison Law**

#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8H 2A3

E-mail: jhutchison@jhlaw.ca

Telephone: (780) 417-7871

Fax: (780) 417-7872

COURT OF APPEAL OF ALBERTA

Form AP-5

[Rule 14.87]

Registrar's Stamp

COURT OF APPEAL FILE
NUMBER: 1703-0288AC

TRIAL COURT FILE NUMBER: 1103 14112 and 1403 04885

REGISTRY OFFICE: Edmonton

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

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")

IN THE MATTER OF THE SAWRIDGE
TRUST CREATED BY CHIEF WALTER
PATRICK TWINN OF THE SAWRIDGE
INDIAN BAND, NO. 19 ON 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 the 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

BOOK OF AUTHORITIES OF THE APPELLANT
Volume 1 of 1

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

**David D. Risling and Crista Osualdini
McLennan Ross LLP**

#600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4
E-mail: drisling@mross.com
cosualdini@mross.com
Telephone: (780) 482-9200
Fax: (780) 482-9100

For the Respondents, Roland Twinn, Catherine Twinn, Everett Justin Twinn, Bertha L'Hirondelle and Margaret Ward, As Trustees for the 1985 and 1986 Trusts

**Doris Bonora
Dentons Canada LLP**

2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5
E-mail: doris.bonora@dentons.com
Telephone: (780) 423-7188
Fax: (780) 423-7276

For the Respondents, Roland Twinn, Everett Justin Twinn, Bertha L'Hirondelle and Margaret Ward, As Trustees for the 1985 and 1986 Trust

**Nancy Cumming
Bryan & Company LLP**

2600 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3Y2
E-mail: necumming@bryanco.com
Telephone: (780) 423-5730
Fax: (780) 428-6324

For the Respondent, Public Trustee of Alberta

**Janet L. Hutchison
Hutchison Law**

#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8H 2A3
E-mail: jhutchison@jhlaw.ca
Telephone: (780) 417-7871
Fax: (780) 417-7872

Table of Authorities

<i>Twinn v. Twinn</i> , 2017 ABCA 419	TAB 1
Letter to The Honourable Mr. Justice D.R.G. Thomas from Edward Molstad, dated September 18, 2017	TAB 2
<i>Creston Moly Corp. v. Sattva Capital Corp.</i> , 2014 SCC 53.....	TAB 3
<i>Housen v. Nikolaisen</i> , 2002 SCC 33.....	TAB 4
Chapter 18 – Duties Underlying The Office of Trustee, B. Delegation Between Trustees.....	TAB 5
Waters' Law of Trusts in Canada, 4 th ed by Donovan WB Waters, Mark R. Gillen & Lionel D. Smith	TAB 6
<i>Geffen v. Goodman Estate</i> , [1991] 2 SCR 353	TAB 7
<i>The Canada Trust Company v. Russel Browne et al</i> , ONSC 4400.....	TAB 8
Waters' Law of Trusts in Canada, 3 rd ed by Donovan WM Waters, Mark R. Gillen & Lionel D. Smith	TAB 9
<i>Trustee Act</i> , RSA 2000, c T-8, s. 25	TAB 10

Tab 1

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

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

2017 ABCA 419 (CanLII)

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 Sarafinchon 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: *Bröcker 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

beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

[23] The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was “to deter dissipation of trust property by meritless litigation activities by trust beneficiaries”: see para 53.

[24] Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for “frills and extras” authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v Silvera*, 2010 ABQB 224 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

[25] Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party’s litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684 at para 25; *Brown v Silvera* at paras 29-35; aff’d 2011 ABCA 109. The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and “own client” costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

[26] In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

I have taken a “costs neutral” approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the

Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299 (Sawridge #4) at para 30.

[27] The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

[28] In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Appeal heard on November 1, 2017

Memorandum filed at Edmonton, Alberta
this 12th day of December, 2017

Paperny J.A.

Veldhuis J.A.

Martin J.A.

Appearances:

N.L. Golding, Q.C.
for the Appellants

D.C. Bonora and A. Loparco
for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha
L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust

J.L. Hutchison
for the Respondent The Office of the Public Guardian and Trustee

D.D. Risling
for the Respondent Catherine Twinn

Tab 2



PARLEE McLAWS^{LLP}
BARRISTERS & SOLICITORS | PATENT & TRADEMARK AGENTS

September 18, 2017

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-2/EHM

*Delivered by Hand and
Via email to denise.sutton@albertacourts.ca*

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, Alberta T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

Dear Mr. Justice Thomas:

**Re: Sawridge Band Inter Vivos Settlement (1985 Trust)
Court of Queen's Bench Action No: 1103.14112**

We reply to your letter of September 13, 2017 on behalf of the Sawridge First Nation (SFN).

There are a number of matters that are continuing in this action including the following:

- Ms. Catherine Twinn's application for indemnification for legal fees and disbursements in this action and in Action No. 1403.04885 from the 1985 Sawridge Trust (1985 Trust) scheduled to be heard in Chambers on October 13, 2017. We are advised that the claim for indemnification relates to past legal fees and disbursements in the approximate amount of \$855,000.00 plus future legal fees and disbursements. (SFN is not a party to this application).
- We are advised that Patrick Twinn, Shelby Twinn and Deborah Serafinchou have appealed Sawridge #5. (SFN is not a party to this application or appeal).
- Maurice Felix Stoney has filed a Notice of Appeal in relation to Sawridge #6 (SFN is a party intervenor in relation to this matter).

Chief and Council of SFN (Chief and Council) are concerned that the legal costs that have been paid by the 1985 Trust to date and the future legal costs in relation to these proceedings and related proceedings will substantially impair the ability of the 1985 Trust to provide benefits to the beneficiaries who are members of SFN. As a result, Chief and Council have instructed our offices to review the evidence and the Record in this matter and to consult with them in relation to an application to dissolve the 1985 Trust on grounds that it fails as being discriminatory and contrary to public policy and other grounds.

Should the 1985 Trust be dissolved, it is the intention of Chief and Council to settle a new trust which would be for the benefit of SFN members today and future generations of SFN members as it is the position of Chief and Council of the SFN that this was the intended purpose of the 1985 Trust when it was settled.

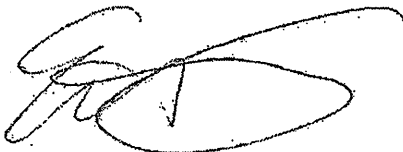
We would anticipate being in a position to advise the parties and the Court as to whether SFN will be proceeding with this application/action by approximately mid-October, 2017.

Should the SFN proceed with this application/action, it is our view that Your Lordship would be the person best suited to hear this matter; however, this would be subject to SFN advancing an application within this action and your agreement and availability.

As a result, we would request that we be given notice of the in person Case Management Meeting which is to be scheduled in order that we might attend and advise the Court and the parties of our position at that time.

Yours truly,

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.
EHM/tmb

- cc: Doris Bonora, Dentons Canada LLP
Via email: doris.bonora@dentons.co
- cc: Janet Hutchison, Hutchison Law
Via email: jhutchison@jhlhlaw.ca
- cc: Karen Platten, Q.C., McLennan Ross
Via email: kplatten@mross.com

Tab 3

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 devaient 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 devaient 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.

Table of Authorities

Cases considered by Rothstein J.:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.)*) 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*) [2011] 3 S.C.R. 654, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner*) 519 A.R. 1, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner*) 539 W.A.C. 1 (S.C.C.) — referred to
C.J.A., Local 579 v. Bradco Construction Ltd. (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — referred to
Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered
Canadian Western Bank v. Alberta (2007), [2007] 1 L.R. 1-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — referred to
Costco Wholesale Canada Ltd. v. R. (2012), 2012 CarswellNat 5331, [2012] G.S.T.C. 44, 2012 CarswellNat 1650, 2012 FCA 160, 2012 G.T.C. 1036, (sub nom. *Minister of National Revenue v. Costco Wholesale Canada Ltd.*) 431 N.R. 78, 2012 CAF 160 (F.C.A.) — referred to

Cusson v. Quan (2009), 397 N.R. 94, 314 D.L.R. (4th) 55, 2009 SCC 62, 2009 CarswellOnt 7958, 2009 CarswellOnt 7959, 70 C.C.L.T. (3d) 1, 102 O.R. (3d) 480 (note), (sub nom. *Quan v. Cusson*) [2009] 3 S.C.R. 712, 258 O.A.C. 378 (S.C.C.) — followed

Domtar Inc. v. Belkin Inc. (1989), 39 B.C.L.R. (2d) 257, 62 D.L.R. (4th) 530, [1990] 2 W.W.R. 242, 1989 CarswellBC 163 (B.C. C.A.) — considered

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2010), 483 W.A.C. 112, 25 Alta. L.R. (5th) 221, 2010 CarswellAlta 746, 2010 ABCA 126, 477 A.R. 112 (Alta. C.A.) — referred to

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

Enns v. Hansey (2013), 2013 CarswellMan 129, 2013 MBCA 23 (Man. C.A.) — referred to

Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (2003), 10 R.P.R. (4th) 1, 173 Man. R. (2d) 300, 293 W.A.C. 300, 34 C.P.C. (5th) 21, 2003 CarswellMan 229, 2003 MBCA 71, [2003] 9 W.W.R. 385 (Man. C.A.) — referred to

Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc. (1997), 49 B.C.L.R. (3d) 317, 101 B.C.A.C. 62, 164 W.A.C. 62, 1997 CarswellBC 2836 (B.C. C.A.) — referred to

Gutierrez v. Tropic International Ltd. (2002), 2002 CarswellOnt 2599, 162 O.A.C. 247, 63 O.R. (3d) 63, 33 B.L.R. (3d) 18 (Ont. C.A.) — referred to

Hayes Forest Services Ltd. v. Weyerhaeuser Co. (2008), 2008 CarswellBC 121, 79 B.C.L.R. (4th) 17, 250 B.C.A.C. 286, 416 W.A.C. 286, 2008 BCCA 31, 289 D.L.R. (4th) 230, [2008] 7 W.W.R. 74, 42 B.L.R. (4th) 1 (B.C. C.A.) — referred to

Homex Realty & Development Co. v. Wyoming (Village) (1980), 1980 CarswellOnt 508, 13 M.P.L.R. 234, 116 D.L.R. (3d) 1, 33 N.R. 475, [1980] 2 S.C.R. 1011, 1980 CarswellOnt 650 (S.C.C.) — considered

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

Immeubles Port Louis Ltée c. Lafontaine (Village) (1991), 38 Q.A.C. 253, 5 M.P.L.R. (2d) 1, 78 D.L.R. (4th) 175, [1991] 1 S.C.R. 326, 121 N.R. 323, 1991 CarswellQue 44, 1991 CarswellQue 100 (S.C.C.) — referred to

Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada (2006), 80 O.R. (3d) 557 (note), 348 N.R. 307, 211 O.A.C. 363, 2006 CarswellOnt 3265, 2006 CarswellOnt 3266, 2006 SCC 21, 36 C.C.L.I. (4th) 161, 267 D.L.R. (4th) 1, [2006] I.L.R. I-4512, [2006] 1 S.C.R. 744, [2006] R.R.A. 523 (S.C.C.) — referred to

Jiro Enterprises Ltd. v. Spencer (2008), 2008 ABCA 87, 2008 CarswellAlta 322 (Alta. C.A.) — referred to

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

MiningWatch Canada v. Canada (Minister of Fisheries & Oceans) (2010), 397 N.R. 232, [2010] 1 S.C.R. 6, 315 D.L.R. (4th) 434, 99 Admin. L.R. (4th) 1, 2010 CarswellNat 55, 2010 CarswellNat 56, 2010 SCC 2, 47 C.E.L.R. (3d) 159 (S.C.C.) — referred to

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

New Brunswick (Board of Management) v. Dumsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dumsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, 2008 CSC 9, (sub nom. *Dumsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dumsmuir v. New*

Brunswick) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd. (2013), 2013 BCCA 95, 2013 CarswellBC 603, 333 B.C.A.C. 310, 571 W.A.C. 310 (B.C. C.A.) — referred to

Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd. (2013), 2013 CarswellBC 2667, 2013 CarswellBC 2668, [2013] 3 S.C.R. viii (note) (S.C.C.) — referred to

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

Prenn v. Simmonds (1971), [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381 (U.K. H.L.) — referred to

QK Investments Inc. v. Crocus Investment Fund (2008), 290 D.L.R. (4th) 84, 419 W.A.C. 176, 225 Man. R. (2d) 176, 2008 MBCA 21, 2008 CarswellMan 65, 39 C.B.R. (5th) 167, [2008] 7 W.W.R. 59 (Man. C.A.) — referred to

Quick Auto Lease Inc. v. Nordin (2014), 2014 CarswellMan 122, 2014 MBCA 32, 303 Man. R. (2d) 262, 600 W.A.C. 262 (Man. C.A.) — referred to

R. c. Bellusci (2012), (sub nom. *R. v. Bellusci*) 265 C.R.R. (2d) 77, 293 C.C.C. (3d) 565, 2012 SCC 44, 2012 CarswellQue 7206, 2012 CarswellQue 7207, [2012] 2 S.C.R. 509, 94 C.R. (6th) 221, 348 D.L.R. (4th) 569, (sub nom. *R. v. Bellusci*) 433 N.R. 135 (S.C.C.) — referred to

R. v. Bjelland (2009), 194 C.R.R. (2d) 148, 2009 CarswellAlta 1110, 2009 CarswellAlta 1111, 2009 SCC 38, 67 C.R. (6th) 201, 460 A.R. 230, 462 W.A.C. 230, [2009] 2 S.C.R. 651, 391 N.R. 202, 246 C.C.C. (3d) 129, 10 Alta. L.R. (5th) 1, 309 D.L.R. (4th) 257, [2009] 10 W.W.R. 387 (S.C.C.) — referred to

R. v. Fedossenko (2013), 2013 ABCA 164, 2013 CarswellAlta 600 (Alta. C.A.) — referred to

R. v. Hubley (2009), 2009 PECA 21, 2009 CarswellPEI 51, 289 Nfld. & P.E.I.R. 174, 890 A.P.R. 174 (P.E.I. C.A.) — referred to

R. v. Regan (2002), [2002] 1 S.C.R. 297, 2002 CarswellNS 61, 2002 CarswellNS 62, 2002 SCC 12, 282 N.R. 1, 91 C.R.R. (2d) 51, 49 C.R. (5th) 1, 201 N.S.R. (2d) 63, 629 A.P.R. 63, 161 C.C.C. (3d) 97, 209 D.L.R. (4th) 41 (S.C.C.) — referred to

R. v. Will (2013), 2013 SKCA 4, 2013 CarswellSask 18, 405 Sask. R. 270, 563 W.A.C. 270 (Sask. C.A. [In Chambers]) — referred to

Reardon Smith Line v. Hansen-Tangen (1976), [1976] 1 W.L.R. 989, [1976] 3 All E.R. 570 (U.K. H.L.) — referred to
Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology (2000), 2000 CarswellBC 1850, 2000 BCCA 496, (sub nom. *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*) 192 D.L.R. (4th) 122, [2000] 10 W.W.R. 256, 8 B.L.R. (3d) 21, 80 B.C.L.R. (3d) 266, 142 B.C.A.C. 129, 233 W.A.C. 129 (B.C. C.A.) — followed

Tamil Co-operative Homes Inc. v. Arulappah (2000), 49 O.R. (3d) 566, 192 D.L.R. (4th) 177, 36 R.P.R. (3d) 58, 48 C.P.C. (4th) 15, 162 O.A.C. 356, 2000 CarswellOnt 2718 (Ont. C.A.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 397 N.R. 331, [2010] 1 S.C.R. 69, 281 B.C.A.C. 245, 475 W.A.C. 245, 315 D.L.R. (4th) 385, 2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, [2010] 3 W.W.R. 387, 100 B.C.L.R. (4th) 201 (S.C.C.) — referred to

Thorner v. Major (2009), [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.) — referred to

WCI Waste Conversion Inc. v. ADI International Inc. (2011), 962 A.P.R. 1, 309 Nfld. & P.E.I.R. 1, 2011 CarswellPEI 34, 2011 PECA 14 (P.E.I. C.A.) — referred to

269893 Alberta Ltd. v. Otter Bay Developments Ltd. (2009), 76 R.P.R. (4th) 66, 449 W.A.C. 98, 266 B.C.A.C. 98, 2009 CarswellBC 190, 2009 BCCA 37 (B.C. C.A.) — referred to

Statutes considered:

Administrative Tribunals Act, S.B.C. 2004, c. 45

Generally — referred to

s. 58 — considered

s. 59 — considered

Arbitration Act, R.S.B.C. 1996, c. 55

Generally — referred to

s. 31 — considered

s. 31(1) — considered

s. 31(2) — considered

s. 31(2)(a) — considered

s. 31(2)(b) — considered

s. 31(2)(c) — considered

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Authorities considered:

Brown, Donald J.M. and John M. Evans, with the assistance of Christine E. Deacon, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (looseleaf)

Dyzenhaus, David, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997)

Hall, Geoff R., *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2012)

Lewison, Kim, *The Interpretation of Contracts*, 5th ed. (London: Sweet & Maxwell, 2011 & Supp. 2013)

McCamus, John D., *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)

Words and phrases considered:

Contractual interpretation

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.

fee paid in shares

There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both [the respondent and the appellant] would have been aware of this as sophisticated business parties.

surrounding circumstances

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 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 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.

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 . . . , 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" 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.

Termes et locutions cités:

circonstances

Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (...). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (...). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (...).

La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (...), c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances, pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (...). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

honoraires sous forme d'actions

Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et [l'intimée et l'appelante], des parties avisées, en auraient eu connaissance.

interprétation contractuelle

L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

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 findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US\$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US\$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US\$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was \$0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US\$1.5 million).

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 (*Prem 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

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US \$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

Tab 4

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. Gerrard, 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 étaient 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 prévienne les accidents qui peuvent avoir lieu à cause des conditions de la route et non à cause de l'état du chauffeur. Le pourvoi devrait être rejeté.

Table of Authorities

Cases considered by Iacobucci, Major JJ.:

Anderson v. Bessemer (City) (1985), 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 53 U.S.L.W. 4314, 1 Fed. R. Serv. 3d 1 (U.S. N.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369, [1996] S.C.J. No. 116 (S.C.C.) — followed

Canadian National Railway v. Muller (1933), 41 C.R.C. 329, [1934] 1 D.L.R. 768 (S.C.C.) — referred to

Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd., [1981] 1 S.C.R. 504, 56 C.P.R. (2d) 145, 35 N.R. 390, 122 D.L.R. (3d) 203, 1981 CarswellNat 582F (S.C.C.) — referred to

Cork v. Kirby MacLean Ltd., [1952] 2 All E.R. 402 (Eng. C.A.) — followed

Dubé v. Labar, 36 C.C.L.T. 105, [1986] 3 W.W.R. 750, 68 N.R. 91, 42 M.V.R. 1, [1986] 1 S.C.R. 649, 2 B.C.L.R. (2d) 273, 1 Y.R. 81, 27 D.L.R. (4th) 653, 1986 CarswellYukon 4, 1986 CarswellYukon 13 (S.C.C.) — referred to

Galaske v. O'Donnell, [1994] 5 W.W.R. 1, [1994] 1 S.C.R. 670, 112 D.L.R. (4th) 109, 43 B.C.A.C. 37, 69 W.A.C. 37, 166 N.R. 5, 89 B.C.L.R. (2d) 273, 21 C.C.L.T. (2d) 1, 2 M.V.R. (3d) 1, 1994 CarswellBC 152, 1994 CarswellBC 1238, [1994] S.C.J. No. 28 (S.C.C.) — followed

Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — followed

Gottardo Properties (Dome) Inc. v. Toronto (City), 1998 CarswellOnt 3004, (sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9*) 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.) — followed

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.) — referred to

Horsley v. MacLaren, [1969] 2 O.R. 137, (sub nom. *Matthews v. MacLaren*) 4 D.L.R. (3d) 557 (Ont. H.C.) — referred to

Ingles v. Tutkaluk Construction Ltd., 183 D.L.R. (4th) 193, 2000 SCC 12, 2000 CarswellOnt 447, 2000 CarswellOnt 448, 46 O.R. (3d) 736 (headnote only), 8 M.P.L.R. (3d) 1, 49 C.C.L.T. (2d) 1, 251 N.R. 63, 1 C.L.R. (3d) 1, 130 O.A.C. 201, [2000] 1 S.C.R. 298, [2000] S.C.J. No. 13 (S.C.C.) — referred to

Jaegli Enterprises Ltd. v. Ankenman, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — followed

McLean v. McCannell, [1937] S.C.R. 341, [1937] 2 D.L.R. 639, 1937 CarswellOnt 105 (S.C.C.) — considered

Palsky v. Humphrey, [1964] S.C.R. 580, 48 W.W.R. 38, 45 D.L.R. (2d) 655, 1964 CarswellAlta 36 (S.C.C.) — referred to

Partridge v. Langenburg (Rural Municipality), [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — followed

"*Rhone*" (*The*) v. "*Peter A.B. Widener*" (*The*), 148 N.R. 349, [1993] 1 S.C.R. 497, 101 D.L.R. (4th) 188, 1993 CarswellNat 1376, [1993] 1 Lloyd's Rep. 600, 1993 CarswellNat 1888 (S.C.C.) — considered

Ryan v. Victoria (City), 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

Schwartz v. R., 17 C.C.E.L. (2d) 141, (sub nom. *Minister of National Revenue v. Schwartz*) 193 N.R. 241, (sub nom. *Schwartz v. Canada*) 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, (sub nom. *Schwartz v. Canada*) [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — followed

St-Jean c. Mercier, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

Stein v. "Kathy K" (The) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — followed

Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein*) 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein*) 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein*) 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein*) [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — followed

Underwood v. Ocean City Realty Ltd., 12 B.C.L.R. (2d) 199, 1987 CarswellBC 69 (B.C. C.A.) — followed

Van de Perre v. Edwards, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, (sub nom. *P. (K.V.) v. E. (T.)*) 275 N.R. 52, (sub nom. *K.V.P. v. T.E.*) 156 B.C.A.C. 161, (sub nom. *K.V.P. v. T.E.*) 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — followed

Woods Manufacturing Co. v. R., [1951] S.C.R. 504, 67 C.R.T.C. 87, [1951] 2 D.L.R. 465, 1951 CarswellNat 272 (S.C.C.) — considered

Cases considered by Bastarache J.:

Bose Corp. v. Consumers Union of U.S. Inc. (1984), 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, 38 Fed. R. Serv. 3d 1421, 10 Media L. Rep. 1625 (U.S. Mass.) — considered

Brown v. British Columbia (Minister of Transportation & Highways), [1994] 4 W.W.R. 194, 20 Admin. L.R. (2d) 1, 89 B.C.L.R. (2d) 1, 19 C.C.L.T. (2d) 268, [1994] 1 S.C.R. 420, 42 B.C.A.C. 1, 67 W.A.C. 1, 2 M.V.R. (3d) 43, 164 N.R. 161, 112 D.L.R. (4th) 1, 1994 CarswellBC 128, 1994 CarswellBC 1236, [1994] S.C.J. No. 20 (S.C.C.) — considered

Canada v. Pharmaceutical Society (Nova Scotia), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353, [1992] S.C.J. No. 67 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368 (Eng.), 1997 CarswellNat 369 (Fr.), 1997 CarswellNat 368, 1997 CarswellNat 369, [1996] S.C.J. No. 116 (S.C.C.) — considered

Diebel Estate v. Pinto Creek (Rural Municipality) No. 75, (sub nom. *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)*) 149 Sask. R. 68, 1996 CarswellSask 584 (Sask. Q.B.) — considered

Fafard v. Quebec (City), 55 S.C.R. 615, 39 D.L.R. 717, 1917 CarswellQue 8 (S.C.C.) — considered

Galbiati v. Regina (City) (1971), [1972] 2 W.W.R. 40, 1971 CarswellSask 93 (Sask. Q.B.) — considered

Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — considered

Jaegli Enterprises Ltd. v. Ankenman (1978), 95 D.L.R. (3d) 82, 1981 CarswellBC 726 (B.C. S.C.) — referred to

Jaegli Enterprises Ltd. v. Ankenman, 21 B.C.L.R. 155, (sub nom. *Taylor v. Ankenman*) 112 D.L.R. (3d) 297, 1980 CarswellBC 137 (B.C. C.A.) — referred to

Jaegli Enterprises Ltd. v. Ankenman, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — considered

Jennings v. Cronsberry, (sub nom. *R. v. Jennings*) [1966] S.C.R. 532, 57 D.L.R. (2d) 644, 1966 CarswellOnt 61 (S.C.C.) — considered

Just v. British Columbia, 1 C.C.L.T. (2d) 1, [1989] 2 S.C.R. 1228, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140, 1989 CarswellBC 234, 1989 CarswellBC 719, [1989] S.C.J. No. 121 (S.C.C.) — considered

Kolesar v. Jeffries (1977), (sub nom. *Joseph Brant Memorial Hospital v. Koziol*) [1978] 1 S.C.R. 491, 2 C.C.L.T. 170, (sub nom. *Kolesar v. Joseph Brant Memorial Hospital*) 15 N.R. 302, 77 D.L.R. (3d) 161, 1977 CarswellOnt 448, 1977 CarswellOnt 465 (S.C.C.) — considered

Levey v. Rodgers (Rural Municipality), [1921] 3 W.W.R. 764, 15 Sask. L.R. 31, 63 D.L.R. 452, 1921 CarswellSask 185 (Sask. C.A.) — referred to

Moge v. Moge (1992), [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, [1993] R.D.F. 168, 1992 CarswellMan 143 (Eng.), 1992 CarswellMan 222 (Fr.), [1992] S.C.J. No. 107 (S.C.C.) — considered

Nelson v. Waverley (Rural Municipality No. 44), 65 Sask. R. 260, 1988 CarswellSask 140 (Sask. Q.B.) — considered

Nielsen v. Kamloops (City), [1984] 5 W.W.R. 1, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 66 B.C.L.R. 273, 1984 CarswellBC 476, 1984 CarswellBC 821 (S.C.C.) — considered

Parkland No. 31 (County) v. Stetar (1974), [1975] 1 W.W.R. 441, [1975] 2 S.C.R. 884, 3 N.R. 311, 50 D.L.R. (3d) 376, 1974 CarswellAlta 131, 1974 CarswellAlta 196 (S.C.C.) — referred to

Partridge v. Langenburg (Rural Municipality), [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — considered

Ryan v. Victoria (City), 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

Schwartz v. R., 17 C.C.E.L. (2d) 141, (sub nom. *Minister of National Revenue v. Schwartz*) 193 N.R. 241, (sub nom. *Schwartz v. Canada*) 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, (sub nom. *Schwartz v. Canada*) [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — considered

Shupe v. Pleasantdale (Rural Municipality), [1932] 1 W.W.R. 627, 1932 CarswellSask 25 (Sask. C.A.) — considered

St-Jean c. Mercier, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

Stein v. "Kathy K" (The) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — considered

Swinamer v. Nova Scotia (Attorney General), 19 C.C.L.T. (2d) 233, 20 Admin. L.R. (2d) 39, 112 D.L.R. (4th) 18, 129 N.S.R. (2d) 321, 362 A.P.R. 321, [1994] 1 S.C.R. 445, 2 M.V.R. (3d) 80, 163 N.R. 291, 1994 CarswellNS 3, 1994 CarswellNS 433 (S.C.C.) — referred to

Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein*) 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein*) 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein*) 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein*) [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — considered

Toronto (City) Board of Education v. O.S.S.T.F., District 15, 25 C.C.E.L. (2d) 153, 144 D.L.R. (4th) 385, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15*) 98 O.A.C. 241, [1997] 1 S.C.R. 487, 44 Admin. L.R. (2d) 1, 97 C.L.L.C. 220-018, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15*) 208 N.R. 245, 1997 CarswellOnt 244, 1997 CarswellOnt 245, [1997] L.V.I. 2831-1, [1997] S.C.J. No. 27 (S.C.C.) — considered

Van de Perre v. Edwards, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, (sub nom. *P. (K.V.) v. E. (T.)*) 275 N.R. 52, (sub nom. *K.V.P. v. T.E.*) 156 B.C.A.C. 161, (sub nom. *K.V.P. v. T.E.*) 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — considered

Williams v. North Battleford (Town) (1911), 16 W.L.R. 301, 4 Sask. L.R. 75 (Sask. C.A.) — considered

Statutes considered by Iacobucci, Major JJ.:

Highway Traffic Act, S.S. 1986, c. H-3.1

Generally — referred to

Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

Generally — considered

s. 192 — considered

s. 192(3) — considered

Statutes considered by Bastarache J.:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Highway Traffic Act, S.S. 1986, c. H-3.1

Generally — referred to

s. 33(1) — considered

s. 33(2) — considered

s. 44(1) — considered

Highway Traffic Act, R.S.O. 1960, c. 172

Generally — referred to

Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

Generally — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

Words and phrases considered

PALPABLE

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

The common element in each of these definitions is that palpable is plainly seen.

Termes et locutions cités

MANIFESTE

Qu'est-ce qu'une erreur manifeste? *Le Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « ... Qui est tout à fait évident, qui ne peut-être contesté dans sa nature ou son existence. [...] *erreur manifeste* ». *Le Grand Robert de la langue française* (2^e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évident [...] Qui est clairement, évidemment tel [...] *Erreur, injustice manifeste* ». Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « ... Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* ».

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ».

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

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

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

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

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

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

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

A. The Appropriate Standard of Review

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

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

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

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

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

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

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

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge, supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

41 The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people

Tab 5

Common business practice today puts much more emphasis upon specialization and delegation than was the case one hundred years ago, perhaps in response to the considerably increased sophistication of business and commerce. As a result, the old rule of *delegatus non potest delegare* seems, in effect, to have given way to a new rule which permits delegation subject to the requirement that a fiduciary make the policy decisions himself, and subject also to legislative intervention as concerns investment decisions. If this is so, the current problem is not so much which types of agent expertise the trustee may properly hire, but which items of trust business require the trustee's personal attention and decision.

The scope of delegation justified under modern business practice also throws into relief the need for utter clarity in the law as to the responsibility of a trustee for the agents he employs. As we will see, that clarity does not always exist in Canada.²³

B. Delegation Between Trustees

Trustees must act together.²⁴ "Nothing is better settled than that where there are several trustees all must act," said MacLennan J.A. in *Gibb v. McMahon*.²⁵ Executors, though for many purposes they have the powers and duties of trustees, may act individually and bind the deceased's estate if the assets being dealt with are pure personalty and the executor in question is acting within the scope of his duties, but when the asset is realty, executors also, like trustees, must act jointly.²⁶ This means that trustees, and sometimes executors, must act jointly or the act is invalid and the trust or estate is not bound.²⁷

Whether a trustee may authorize his co-trustees to act on his behalf depends on the nature of the task involved. The principle is that a trustee may only delegate to his co-trustee in cases where a third party agent could have been employed. Certainly a trustee cannot leave the trust duties to his co-trustees with the explanation that he does not want to be bothered. The proper course for such a trustee is to retire, but, if he chooses not to retire, he remains liable where his personal participation as a

cannot delegate that duty – merely administrative functions can be delegated. See *Ahmad v. College of Physicians & Surgeons (British Columbia)* (1970), 18 D.L.R. (3d) 197, [1971] 2 W.W.R. 60 (B.C. C.A.).

²³ A thorough investigation of the whole question can be found in B.C. Law Institute, *Statutory Powers of Delegation by Trustees*, Report No. 11 (2000).

²⁴ The common law of Canada, as of England, also requires that they be unanimous in their decisions, unless the settlor or testator provides to the contrary (although in England trustees of charitable trusts can act by majority: *Re Whiteley*, [1910] 1 Ch. 600 (Eng. Ch. D.)). Where there is such a provision, it normally permits a majority decision to bind all the trustees. The Quebec *Civil Code* requires only majority decisions, unless the instrument provides otherwise (see C.C.Q., arts. 1278, 1332).

²⁵ (1905), 9 O.L.R. 522 (Ont. C.A.), affirmed (1906), 37 S.C.R. 362 (S.C.C.) at 525 [O.L.R.].

²⁶ *Willcocks v. MacLennan*, [1946] O.W.N. 490 (Ont. C.A.).

²⁷ But see *Theodore I Sherman v. Minister of National Revenue* (1976), 76 D.T.C. 1170 (T.R.B.): the Board has an inherent jurisdiction to hear the appeal launched in the name of less than the full number of trustees, though all had agreed to appeal. Unanimous agreement to appeal to the Board was not therefore necessary. For the purposes of the *Income Tax Act*, the trust "is considered to be a legal entity" (at 1172), and the trustee who brought the action in this case was acting as an agent for the trust.

trustee is called for and loss results of his co-trustees.²⁸ No express or s the trustee liable only for his own would be personally at fault in leav he escape liability on the grounds t who settles property on trust cease: transfer to trustees or the declaratio a trustee in the ordinary manner for

In British Columbia,³¹ Manitoba to be absent from the province ma this case, however, the delegating t mitted by his chosen delegate.

C. Delegation of Ministerial

1. Background to the Legislati

It was clear by the beginning o have to handle tasks which require conduct of his own affairs would e real estate valuers, in addition to became ever more diverse in kind a the trustee could not be expected to person would do. Indeed, unless a few would be capable of undertakin trust affairs must suffer. As a cons nineteenth century that a trustee mi

²⁸ In *Dover v. Denne* (1902), 3 O.L.R. 664 (other than a term of the trust requiring o to his co-trustee, relieves the trustee fro were excused from liability on the grou can exonerate a trustee. See *infra*, Part II

²⁹ In *Mitchell v. Richey* (1865), 12 Gr. 88 trustee was not liable if he accepted the would receive all rents and profits and a concern with the matter. The co-trustee had in mind, however, only the misapp trustee as an agent for collection purpose has himself done no wrong, and who was under such circumstances for the miscon regarded as wrongly decided.

³⁰ *Ibid.*, at 90-91, per Spragge V.C., disagr

³¹ *Trustee Act*, R.S.B.C. 1996, c. 464, s. 14

³² *Trustee Act*, C.C.S.M., c. T160, s. 36.

³³ *Trustees Act*, R.S.N.B. 1973, c. T-15, s.

Tab 6

IV. TRUST AND CONTRACT 66

A. Trusts of Choses in Action 68

1. Situation One: Promisee of Another's Promise to Benefit a Third Party as Trustee for that Third Party 68
 - (a) Evidence of Intention to Create an Express Trust 69
 - (b) The Ability of A and B to Vary the Terms of the Arrangement 73
 - (c) Policy and Possible Reform 75
 - (d) Promisee as Constructive Trustee 75
 - (e) Performance Bonds, and Labour and Materials Payment Bonds 77
2. Situation Two: Person Promising to Act as Trustee for Third Party on Receipt of Property 80
3. Situation 3: Trustee as Assignee of Contractual Rights 83

B. Burdening Assignee of Property Which is Subject to Contractual Rights 83

V. TRUST AND BAILMENT 86

VI. TRUST AND DEBT 90

VII. TRUSTS AND POWERS 97

A. The Various Types of Trusts and Powers 97

B. Evidence of a Power, and of a Power Followed by a Trust 102

C. Certainty of Objects: Trust, Trust Powers, and Mere Powers 105

VIII. TRUST AND EQUITABLE CHARGE 108

IX. TRUST, CONDITIONAL GIFT, AND PERSONAL OBLIGATION 111

Several types of legal relationships share common features with the trust relationship while being distinct in other ways. Comparing trusts to these other concepts yields not only a better appreciation of trust relationships, but an understanding of the important practical consequences the characterization of a relationship, as trust or otherwise, can have.

I. TRUST AND FIDUCIARY RELATIONSHIP

A. Trustees as Fiduciaries

The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers, or performing the duties of, his office. His duty is one of selfless service. And the object of describing a man as a resulting or constructive trustee is to emphasize that he is a person who is under the express trustee's fiduciary obligation to hold property, of which he is technically the owner, for the benefit of another.

It was in Equity that the notion of the fiduciary was first conceived, and it originated to explain the position of one who at law held title and had all the appearance of full enjoyment, but who nevertheless because of Equity's intervention had no right of personal enjoyment. Here was a man who had the capacity to bring

every proprietary and possessory action available at law, but who was personally liable to another for all he did; a man whose rights were only those of administration and disposition, and whose liability to another resulted in his holding even those rights on behalf of the other. At law such a man would have been an agent, a mere conduit for the creation of rights and duties between his principal (the trust beneficiary) and the third party (for instance, those selling to and buying from the trust), but it did not work out that way. As we have seen, Equity could not deny the doctrines of the common law, and at law the trustee was title holder and possessor. The only way around that obstacle was for Equity to impose obligations upon this person with title and possession, and the nature and scope of these obligations were spelt out in the concept of fiduciary relationship. The trustee was a fiduciary of his rights and powers; he not only exercised those rights and powers on behalf of the beneficiary, he owed to the beneficiary the utmost duty of loyalty.

The fiduciary's obligations have been defined in a number of ways by the courts and commentators,¹ but essentially it means the duty to account to another, who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee. Nothing may be done which is not directed solely towards the best interests of the trust beneficiary or beneficiaries. The ramifications of this character of the office of trustee are many. The prime outcome is that the trustee may not occupy, or permit himself to be in a position, where the duties of his office and his personal interests may conflict.² As far as Equity is concerned, his office is so selfless that he is not entitled to remuneration for his services, though no objection will be taken to the settlor or testator extending to the trustee a remuneration, either unsolicited or as the result of agreement.³ He must perform his duties personally – the principle of delegation is not recognized by Equity; though, if the nature of his trust duties, given the nature of the trust property and the terms of the trust, are such that in the ordinary course of affairs businessmen would employ agents, that freedom will be extended to him.⁴ But he may be liable for the agent's wrongdoing. Similarly, he is not entitled to shrug off the wrongful actions of a co-trustee on the basis that he knew nothing of what the other was doing; as a fiduciary he is responsible for all acts of trusteeship, and he therefore carries a several, as well as a joint, liability for all that is done in the name of the trust or through the exercise of the office of trustee.⁵

Over the years it has been necessary to relax somewhat this high and rigorous standard of selfless behaviour and ultimate responsibility. It has been recognized by legislatures that for Equity to impose such standards in a modern business setting is self-defeating. No one would accept the office, particularly professionals who, since the second half of the nineteenth century, have come to be in the eyes of many settlors and testators the obvious persons for trusteeship appointment. In common

¹ See *infra*, "Constructive Trusts", chapter 11, Part II B; Donovan W.M. Waters, *The Constructive Trust* (1964) at 68-69, and 341-43; P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 1-56.

² *Infra*, chapter 18, Part II.

³ *Infra*, chapter 22, Part II.

⁴ *Infra*, chapter 18, Part I.

⁵ *Infra*, chapter 25, Part III.

still be found that the settlor was relying on the particular attributes of the original trustee, and then the same non-delegability results. But, as Garrow J.A. said in *Kennedy v. Kennedy*,⁵ such reliance must be expressed by the settlor in clear and apt language. It was in *Robinson v. Long*⁶ that the test was given probably the clearest expression; referring to the position of the particular trustee, Barry J. said, "where a man employs another, relying upon his peculiar aptitude for the work entrusted to him, it is not competent to that person to delegate the trust to another."⁷

What kinds of duty or power are likely to be held to be non-delegable? This is where the real difficulty arises, because the authorities do not suggest a readily recognizable distinction. For example, one might think that trustees cannot delegate dispositive powers, but can delegate administrative powers.⁸ A dispositive power or discretion is the authority to a trustee to distribute trust property to a beneficiary or among beneficiaries as he thinks best. The trustee may have to carry out certain purposes of the settlor in exercising his discretion, as when he has a power of maintenance or a power of paying capital sums by way of advancement of the beneficiary. He may be restricted in any distribution he makes to a certain beneficiary or certain beneficiaries who constitute either a class of persons or named persons. Today in the form of a discretionary trust a power of appointment is frequently conferred upon a trustee or trustees in the capacity of fiduciary or fiduciaries.⁹ In all these instances, the dispositive discretion seems essentially the kind of power, or duty to distribute, which the trustee must himself personally exercise. Yet section 35(1) of the Manitoba *Trustee Act* expressly permits the trustee to appoint an agent "to transact any business or do any act required to be transacted or done in the execution of the trust." Does this cover dispositive discretions? The case authorities may suggest that this would be the kind of thing the trustee must do himself, but one cannot be dogmatic on the subject.¹⁰

The administrative power or discretion might seem essentially delegable. This is the power to deal with the property in the course of management. Trustees need to be able to sell, mortgage, lease, insure, invest, compound liabilities, and consent as shareholders to company reorganizations; indeed, to act in relation to third parties as if they (trustees) are absolute owners. Most of these tasks call for professional

⁵ (1913), 28 O.L.R. 1, 11 D.L.R. 328 (Ont. C.A.). The decision was affirmed (1913), [1914] A.C. 215, 13 D.L.R. 707 (Ontario P.C.).

⁶ 50 N.B.R. 467, [1923] 3 D.L.R. 918 (N.B. C.A.).

⁷ *Ibid.*, at 472-73 [N.B.R.]. But see *Re Curry* (1973), [1974] 1 W.W.R. 574, 41 D.L.R. (3d) 478 (B.C. S.C.): an executor (or trustee) who is a solicitor may employ another solicitor to do the estate work, even though the executor is qualified to do the work. See further remuneration of trustees, *infra*, chapter 22, Part II.

⁸ See, for example, the *Trustee Act*, 2000 (Eng.), s. 11. This distinction is recommended by the B.C. Law Institute in its report, *A Modern Trustee Act for British Columbia*, 2004. See subs. 7(1) and (2) of the draft *Trustee Act*. These subsections were modelled on s. 5 of the Ontario Law Reform Commission's draft *Trustee Act*, in its *Report on the Law of Trusts*, 1984.

⁹ The discretionary trust in favour of and among a group or class of beneficiaries, i.e., potential distributees, whether a trust power or a mere power, offers significant flexibility to the property owner, especially as to taxation, in planning the disposition of his or her estate.

¹⁰ In the other Canadian common law jurisdictions there will be no statutory defence to the charge that the trustee should have made any such decision himself.

skill, and these are the areas where one would expect to find the agent conducting trust business if the trustee himself does not possess that skill. Yet the authorities do not support the contention that these tasks can always be delegated.

The rule which emerges from the authorities seems to be this: whenever the power, discretion, or duty assigned to the trustee requires that a policy decision be made, the trustee must make it himself. A policy decision is one which, if dispositive, determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved.

Four cases may be cited to demonstrate this rule. In *Re Partanen*,¹¹ the testator left property to trustees on trust to use the fund to establish such scholarships and other funded schemes for the benefit of students in mining and agriculture as the trustees in their uncontrolled discretion should decide. No doubt because they did not feel competent to make decisions concerning the most effective way of financially assisting such students, the trustees proposed to hand over the fund to a university, taking from the university in question a covenant that it would make an appropriate decision. Both Rose C.J.H.C. at first instance, and the Ontario Court of Appeal, condemned this proposal. The trustees were not exercising their discretion; they were not making any decision as to what scholarships or funds were desirable. They were simply handing over their discretion and decision-making duty to the university authorities. If they wished to declare themselves incompetent, what the trustees should have done, said Rose C.J.H.C., was ask the court to relieve them of the trusteeship. The Court of Appeal on the other hand required the trustees to come forward with a new scheme. Clearly the trustees should have taken advice from competent persons or institutions engaged in mining and agricultural education, and in the light of that advice, which might come to very explicit conclusions, make their decision. They would then set up the scholarship or fund scheme, possibly conveying the fund to the chosen institution or institutions for this purpose.

*McLellan Properties Ltd. v. Roberge*¹² concerned a power of sale. Y, the executor and trustee, held realty and personalty on trust to the use of X during his life, and after X's death to call in, sell and convert the estate into money. X, the father of the executor and trustee, was the attorney to the estate, and in that capacity he purported to enter into a contract to sell part of the realty to a third party. Assuming that he had made a contract offer which the third party was willing to accept, one question which arose was whether X was in a position to act in such a way on behalf of the trust. The Ontario Court of Appeal thought not. The exercise of the power of sale required the trustee's personal act, involving both his judgment and his discretion. It was therefore not possible for the trustee to delegate this power by way of the conferment upon another of a power of attorney, and, since the Court found that the sale transaction was decided upon and carried forward by X, it was held that X's action was null and void.

The Supreme Court took a different view of the facts, concluding that the trustee knew and approved of the offer before the acceptance. Estey J. considered that the

¹¹ [1944] O.W.N. 130, [1944] 2 D.L.R. 473 (Ont. C.A.) (a dispositive discretion).

¹² [1947] S.C.R. 561, [1947] 4 D.L.R. 641 (S.C.C.), reversing [1946] O.R. 379, [1946] 2 D.L.R. 728 (Ont. C.A.) (an administrative power).
§

in *Worrall v. Harford*² summarized the position, and this case has been a leading authority in both England and Canada.³ "It is in the nature of the office of trustee", said Lord Eldon, "whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust. This is implied in every such deed." Early in the nineteenth century the right of the trustee to be indemnified in this way was made statutory, and the same statutory right was conferred upon trustees in Ontario in 1865.⁴ Since then it has become a standard provision in every provincial and territorial jurisdiction in Canada.⁵ But, as Master Hodgins pointed out in *Hughes v. Rees*,⁶ the statute did not add anything; it merely does what a court of equity would do without any such directions.

The idea is essentially one of reimbursement. The trustees discharge costs, expenses and liabilities, and then seek to recover them from the trust property. They are not required to make payments initially out of their own pockets, though the notion of indemnification would suggest this and trustees do find occasions when the best interests of the trust lead them to make payments before funds are readily available from the trust. Before the statutory provisions were enacted, trustees often made such payments. The statutory enactments have now made it clear that the trustee is entitled to be reimbursed when the payments have been made on behalf of the trust out of the trustee's own funds, or to "pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trust or powers."⁷ In practice, trustees do make payments for expenses from the trust property, and this has always been regarded as perfectly proper; it will be only in the exceptional situations where they will employ their own funds, and subsequently seek reimbursement.⁸

The trustee's expenses are normally drawn from the capital of the trust property, since this is a neutral source of repayment which will affect all the beneficiaries' interests, but both income and capital are subject to the liability to meet expenses,⁹ and it will be seen that the statutory provision is careful to refer to "trust property" as the source of the indemnification.

² (1802), 8 Ves. Jun. 4, 32 E.R. 250 (Eng. Ex. Ch.) at 8 [Ves. Jun.].

³ See, e.g., *Smith v. Beal* (1894), 25 O.R. 368 (Ont. C.A.); *Burn v. Gifford* (1879), 8 P.R. 44; *Callie v. R.* (1991), 40 E.T.R. 276 (Fed. T.D.). On the general principle of entitlement to indemnification, see also, e.g., *Thompson v. Lamport*, [1945] S.C.R. 343 (S.C.C.); *Basran v. Basran* (1981), 123 D.L.R. (3d) 508 (B.C. S.C.); *Johnson Estate v. Forbes*, 2007 CarswellMan 511, 37 E.T.R. (3d) 60 (Man. Q.B.); and *Re Reinisch Estate*, 2011 MBQB 200, 2011 CarswellMan 457 (Man. Master).

⁴ *An Act to amend the Law of Property and Trusts in Upper Canada*, c. 28, s. 32.

⁵ R.S.A. 2000, c. T-8, s. 25; R.S.B.C. 1996, c. 464, s. 95; C.C.S.M., c. T160, s. 78; R.S.N.B. 1973, c. T-15, s. 13(2); R.S.N.L. 1990, c. T-10, s. 29; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.S. 1989, c. 479, s. 29; S.S. 2009, c. T-23.01, s. 43; R.S.O. 1990, c. T.23, s. 23.1; R.S.Y. 2002, c. 223, s. 8. P.E.I. appears to rely upon the inherent jurisdiction.

⁶ (1884), 10 P.R. 301 (Ont. Master) at 305, reversed on other grounds (1885), 9 O.R. 198 (Ont. H.C.).

⁷ E.g., *Trustee Act*, R.S.B.C. 1996, c. 464, s. 95.

⁸ E.g., *Hewson v. Smith* (1870), 17 Gr. 407 (Ont. Ch.).

⁹ *Stott v. Milne* (1884), 25 Ch. D. 710 (Eng. C.A.). See also *Re Forbes Estate* (1997), 17 E.T.R. (2d) 177 (Man. Q.B.), involving the interpretation of a particular clause and whether the indemnification should come out of income or capital. See also, *supra*, chapter 19, Part III C 1 "Responsibility as Between Successive Beneficiaries for Financial Burdens Imposed upon the Trust Property".

In effect, therefore, it is the beneficiaries who are paying for the expenses incurred by the trustees, and it is of crucial importance to them that some brake or check shall be imposed upon trustees in the expenses which can be "passed on" to the trust. The brake supplied is that the trustees can only recover or be allowed those expenses which are "properly incurred" which is equivalent to saying "not improperly incurred".¹⁰ This restriction was part of the equitable principle of indemnification, and it is implicit in the application of the statutory provisions. The check upon trustees is that their claim for indemnification is made at the time of the passing of their accounts by the court; if they incurred any expenses improperly, reimbursement for those items will be disallowed, and any payment direct from the trust property made the subject of an order for reinstatement. Improperly incurred expenses therefore fall upon the trustee personally, and to this extent the trustee always incurs expenses at risk. Consequently, it is now the trustee who will be concerned as to what expenses may be incurred.

There is a considerable volume of case authority on what may be regarded as "not improperly incurred" expenses, but essentially they are all determinations of fact in the circumstances of each particular case. In allowing or refusing claims made by trustees, the test is whether the expense incurred arose out of an act within the scope of the trusteeship duties and powers, whether in the circumstances it was reasonable, and whether it was something that his duty as the trustee required him to do. The scope of trusteeship is usefully illustrated by the circumstances in *Fultz v. McNeil*.¹¹ The promoters of a company to exploit coal rights in a certain area were anxious to persuade licence holders in the area to surrender their licences to the company in return for bonds and stock in the company. The defendant acquired these licences from the licencees on trust, agreeing to remit bonds and stocks to them in return for the transfer of the licences to the company. At this point a loan became urgently needed if certain options were not to lapse; and the defendant was compelled to borrow on the terms that, in addition to interest, bonds and stocks of the company would be surrendered to the lender. The defendant deducted this quantum of bonds and stocks from those which he had obtained for remittance to the former licensees, and, having proportionately divided this burden among the licensees, he claimed it as a proper expense. The Supreme Court decided against him on the grounds that the loan was needed in connection with the flotation of the company. It was an expense the promoters had to bear. It had nothing to do with the trustee's task to hold the licences until suitable terms had been made with the company and then to

¹⁰ *Re Beddoe*, [1893] 1 Ch. 547 (Eng. Ch. Div.), followed on this point in *Re Dingman* (1915), 35 O.L.R. 51 (Ont. C.A.). See also, e.g., *Kozicki Estate v. Kozicki Farms Ltd.* (2004), [2004] S.J. No. 218, 2004 CarswellSask 235 (Sask. Q.B.); and *Re Kaptyn Estate*, 2011 CarswellOnt 302, 64 E.T.R. (3d) 269 (Ont. S.C.J.). On the passing of accounts, the onus is on the trustee to establish that expenses for which indemnification is sought were properly incurred – see *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C. C.A.); and *Re Overbo Estate* (2003), 322 A.R. 368, 49 E.T.R. (2d) 272 (Alta. Surr. Ct.).

¹¹ (1906), 38 S.C.R. 198 (S.C.C.). See also *Saunders v. Wright* (1994), [1994] N.S.J. No. 412, 1994 CarswellNS 638 (N.S. C.A.) in which the court refused the trustee indemnification for meals, travel and solicitor's expenses incurred in pursuing a beneficiary of the trust for claims that were not part of the administration of the trust, but arose out of a contractual relationship with the beneficiary.

Tab 7

Ted M. Geffen, Sam E. Geffen and William A. Geffen *Appellants*

v.

Stacy Randall Goodman, Executor of the Estate of Tzina Burnette Goodman (otherwise known as Zinna Burnette Goodman), and the said Stacy Randall Goodman *Respondents*

INDEXED AS: GEFFEN v. GOODMAN ESTATE

File No.: 21613.

1990: October 10; 1991: June 27.

Present: Wilson, La Forest, Sopinka, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Trusts and trustees — Undue influence — Woman placing property in trust — Step to create trust initiated by settlor's brothers — Settlor suffering mental problem and at times dependant on brothers — Trust directing how property to be disposed of on settlor's death — Settlor bequeathing property other than as provided by trust — Whether presumption of undue influence applicable.

Costs — Trustees — Action started to defend against allegation of fraud on part of trustees — Action successful — Whether trustees entitled to costs out of the trust property.

The deceased, a woman with a history of mental problems, inherited the family home from her mother as well as a life interest in the residue of her mother's estate which was to pass on her death to her children. Her brothers were given cash bequests. An earlier will had given the deceased a life estate and directed that on the mother's death the estate was to be divided among all the mother's grandchildren. The brothers sought legal advice as to whether the later will was valid and arranged a meeting between the lawyer, their sister and themselves to canvass the options. One of their concerns was that their sister would sell the house and they would ultimately be financially responsible for her care. The meeting disbanded with no agreement being reached and the sister from then on had only casual contact with

Ted M. Geffen, Sam E. Geffen et William A. Geffen *Appelants*

c.

Stacy Randall Goodman, exécuteur testamentaire de Tzina Burnette Goodman (par ailleurs connue sous le nom de Zinna Burnette Goodman), et ledit Stacy Randall Goodman *Intimés*

RÉPERTORIÉ: GEFFEN c. SUCCESSION GOODMAN

c N° du greffe: 21613.

1990: 10 octobre; 1991: 27 juin.

Présents: Les juges Wilson, La Forest, Sopinka, Cory et McLachlin.

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

Fiducies et fiduciaires — Abus d'influence — Bien mis en fiducie par une femme — Dispositions pour créer la fiducie prises à l'origine par les frères de la disposante — Disposante souffrant de problèmes mentaux et parfois à la charge de ses frères — Fiducie indiquant comment disposer du bien au décès de la disposante — La disposante a légué son bien d'une manière différente de celle prévue dans la fiducie — La présomption d'abus d'influence est-elle applicable?

Dépens — Fiduciaires — Action intentée pour répondre à une allégation de fraude de la part des fiduciaires — Réussite de l'action — Les fiduciaires ont-ils droit au paiement de dépens à même la masse?

La défunte, une femme ayant eu des antécédents psychiatriques a obtenu, par héritage de sa mère, la maison familiale ainsi qu'un droit de tenure viager sur le reliquat de la succession de sa mère qui, à son décès, devait être transmis à ses enfants. Ses frères ont reçu des legs en argent. Un testament antérieur donnait à la défunte un droit de tenure viager et exprimait la volonté qu'au décès de la mère le patrimoine soit partagé entre tous les petits-enfants de la mère. Les frères ont demandé un avis juridique sur la validité du second testament et ont préparé une rencontre entre l'avocat, leur sœur et eux-mêmes pour examiner les choix qui s'offraient. Un de leurs sujets d'inquiétude était que leur sœur vende la maison et qu'elle leur soit finalement à charge financièrement. La rencontre a pris fin sans qu'on parvienne à

her brothers. She continued to seek the lawyer's advice, however, and a trust deed was executed. The house was conveyed to trustees on terms that the deceased retained a life interest in it and that on her request the trustees would consider a sale of the property so long as the sale was in her best interests. The trust deed further provided that upon her death the trust property would be divided equally among the surviving grandchildren of the deceased's mother. The deceased's will left her entire estate to her own children.

This appeal concerns the validity of the trust agreement. It was found to be valid at trial but invalid on appeal because of the operation of the presumption of undue influence. Costs were denied. At issue here was (1) whether the presumption of undue influence was properly applied by the Court of Appeal; and, (2) whether the trustees were entitled to costs out of the trust property.

Held: The appeal should be allowed.

Per Wilson and Cory JJ.: Neither the result nor process focused approach to the doctrine of undue influence fully captures its true purport because the doctrine applies to such a wide variety of transactions from pure gifts to classic contracts. In the case of gifts, the process leading up to the gifting should be subject to judicial scrutiny because there is something completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity. With respect to contractual relations, however, it has long been the view of the courts that the sanctity of bargains should be protected unless they are patently unfair. Something more than a tainted process, e.g., detrimental reliance, must be shown.

"Influence" refers to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. There is nothing *per se* reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

un accord et, par la suite, la sœur n'est entrée en contact avec ses frères qu'à l'occasion. Elle a cependant continué de demander des avis juridiques et a signé un acte de fiducie. La maison a été transférée aux fiduciaires à la condition que la défunte conserve un droit de tenure viager sur la maison et que, à sa demande, les fiduciaires étudient la possibilité de la vendre si la vente était avantageuse pour elle. L'acte de fiducie stipulait en outre qu'à son décès le bien en fiducie serait partagé également entre les petits-enfants survivants de la mère de la défunte. Le testament de la défunte léguait tous ses biens à ses enfants.

Le pourvoi concerne la validité du contrat de fiducie. Il a été jugé valide en première instance mais invalide en appel en raison de l'application de la présomption d'abus d'influence. Les dépens n'ont pas été adjugés. Il s'agit en l'espèce de savoir (1) si la Cour d'appel a appliqué correctement la présomption d'abus d'influence; et (2) si les fiduciaires ont droit au paiement des dépens à même la masse.

Arrêt: Le pourvoi est accueilli.

Les juges Wilson et Cory: Ni la façon d'aborder la théorie de l'abus d'influence, axée sur le résultat, ni celle axée sur le processus ne font ressortir parfaitement son véritable objectif parce que la théorie s'applique à une grande diversité d'opérations, allant des simples donations aux contrats classiques. Dans le cas des donations, le processus qui aboutit au don doit être assujéti à l'examen judiciaire, parce que la sanction judiciaire de la générosité forcée ou obtenue frauduleusement revêt un aspect répugnant. En ce qui a trait aux relations contractuelles, toutefois, les tribunaux ont décidé depuis longtemps qu'il y avait lieu de protéger l'inviolabilité des marchés sauf s'ils étaient manifestement abusifs. Il faut établir quelque chose de plus qu'un processus vicié, par exemple, la confiance préjudiciable.

«Influence» veut dire la capacité d'une personne de dominer la volonté d'une autre, que ce soit par manipulation, par contrainte ou par pur, mais subtil, abus d'autorité. Dominer la volonté d'autrui signifie simplement exercer sur lui ou elle une influence persuasive. La capacité d'exercer pareille influence peut découler d'un rapport de confiance, mais elle peut aussi résulter d'autres relations. Il n'y a rien de répréhensible en soi à ce que des personnes ayant des rapports de confiance exercent une influence sur leurs bénéficiaires, voire commettent un abus d'influence à leur endroit. Tout dépend de leur mobile et de l'objectif qu'elles cherchent à réaliser par ce moyen.

The requirement of "manifest disadvantage", while perhaps appropriate in a purely commercial setting, limits the doctrine of undue influence too much. In the case of gifts or bequests, it makes no sense to insist that the donor or testator prove that their generosity placed them at a disadvantage.

The inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption as well as other relationships of dependency which defy easy categorization.

Given the requisite type of relationship to support the presumption, the inquiry must next involve an examination of the nature of the transaction. When dealing with commercial transactions a plaintiff must show in addition to the required relationship between the parties that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. This added requirement is justified when dealing with commercial transactions because a court of equity, even while tempering the harshness of the common law, must accord some degree of deference to the principle of freedom of contract and the inviolability of bargains. Moreover, it can be assumed in the vast majority of commercial transactions that parties act in pursuance of their own self-interest. The mere fact, therefore, that the plaintiff seems to be giving more than he is getting is insufficient to trigger the presumption.

By way of contrast, in situations where consideration is not an issue, e.g., gifts and bequests, it is quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. The court is concerned that such acts of beneficence not be tainted and it is enough that the presence of a dominant relationship be established.

Once the plaintiff has established that the circumstances triggering the presumption, the onus moves to the defendant to rebut it.

A review of the circumstances between the deceased and her brothers at the relevant time disclosed a potential for the brothers to exercise a persuasive influence on their sister. The trust instrument was more akin to a gift or bequest than a commercial transaction and the existence of the required relationship without more was sufficient to trigger the presumption. It therefore had to be

Bien qu'elle puisse convenir dans un contexte purement commercial, l'exigence du «désavantage manifeste» restreint trop la théorie de l'abus d'influence. Dans le cas des donations ou des legs, il n'est pas du tout logique d'insister pour que le donateur ou le testateur prouve que sa générosité l'a désavantagé.

L'examen devrait d'abord porter sur les rapports entre les parties. La première question qu'il faut trancher dans chaque cas est de savoir si la relation elle-même comporte intrinsèquement une possibilité de domination. Ce critère vise les rapports qui sont déjà reconnus, en *equity*, comme donnant lieu à la présomption, ainsi que d'autres rapports de dépendance qu'on ne saurait facilement ranger dans une catégorie.

Une fois établi le type de relation requis pour justifier la présomption, il faut ensuite examiner la nature de l'opération. S'il s'agit d'opérations commerciales, le demandeur doit démontrer, outre l'existence des rapports requis entre les parties, le caractère inéquitable du contrat, en ce sens qu'il a été désavantagé injustement ou que le défendeur a été avantagé injustement. Cette exigence supplémentaire est justifiée en matière commerciale, car une cour d'*equity*, même lorsqu'elle tempère la rigueur de la common law, doit respecter dans une certaine mesure le principe de la liberté de contracter et de l'inviolabilité des marchés. De surcroît, on peut présumer, dans la très grande majorité des opérations commerciales, que les parties agissent dans leur propre intérêt. Par conséquent, le simple fait que le demandeur semble donner plus que ce qu'il reçoit est insuffisant pour faire jouer la présomption.

Par contre, dans les cas où une contrepartie n'est pas en cause, par exemple, dans le cas des donations et des legs, il est tout à fait inopportun d'obliger le demandeur à prouver que le résultat constitue un désavantage ou un avantage injuste. Le souci de la cour est que ces libéralités ne soient pas entachées d'un vice et il suffit d'établir la présence d'une relation de domination.

Une fois que le demandeur a établi que les circonstances donnent lieu à l'application de la présomption, il incombe dès lors au défendeur de la réfuter.

L'examen de la situation de la défunte et de ses frères à l'époque pertinente révèle que ces derniers pouvaient exercer une influence persuasive sur leur sœur. L'acte de fiducie participe davantage d'une donation ou d'un legs que d'une opération commerciale et l'existence de la relation requise sans plus est suffisante pour faire jouer la présomption. Il reste donc à déterminer si la

determined whether the presumption had been rebutted. A meticulous examination of the facts was necessary to make that determination.

The solicitor/client privilege belongs to the client alone. Confidential communications between them can only be divulged in certain circumscribed situations. The client may choose to disclose the contents of those communications and thereby waive the privilege or may authorize the solicitor to reveal them. The courts have assumed the role of ensuring that without the client's express consent a solicitor may not testify. An exception has developed, however, to permit a solicitor to give evidence in wills cases.

The considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force here. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in that the purpose of allowing the evidence to be admitted is to ascertain her true intentions. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing the inquiry on who those heirs or successors properly are.

Appellate review should be limited to those instances where a manifest error has been made. Here there was no indication either from the reasons for judgment or from the record that the trial judge misapprehended the evidence or otherwise erred in the process of making his findings of fact. Accordingly, the Court of Appeal erred in overturning such findings.

Appellants successfully rebutted the presumption of undue influence given that there was very little contact between the brothers and the deceased at the relevant time, that the deceased was not in fact relying on her brothers to advise her, and that the prime motivation of the brothers was to advance their sister's welfare. It is also relevant that the deceased received some independent legal advice and that the agreement ultimately concluded was in accord with her wishes. In other situations the fact that the brothers took a leading rôle in the initial meeting with the lawyer might militate against a finding of independent advice.

The solicitor's advice was flawed in that he unfortunately did not inquire into the deceased's financial situation in any depth and did not ensure that she fully understood the agreement. The potentially adverse

présomption a été réfutée. Pour ce faire, il faut procéder à un examen méticuleux des faits.

Le secret professionnel de l'avocat est établi au bénéfice du client seulement. Les communications confidentielles entre l'avocat et son client ne peuvent être divulguées que dans certains cas précis. Le client peut choisir de divulguer le contenu de ses communications et renoncer ainsi au secret professionnel, ou il peut autoriser son avocat à en divulguer le contenu. Les tribunaux ont pris sur eux de s'assurer qu'un avocat ne témoigne pas sans le consentement exprès de son client. Une exception a toutefois été prévue afin de permettre à l'avocat de témoigner en matière testamentaire.

Les considérations qui justifient l'admissibilité des communications entre l'avocat et son client en matière de testament s'appliquent avec la même force en l'espèce. Le principe général qui justifie la protection de ces communications est respecté. Les intérêts de la cliente maintenant décédée sont servis, en ce sens que l'admission du témoignage a pour but d'établir ses intentions véritables. Et en faisant porter l'examen sur l'identité des héritiers ou ayants droit légitimes de la défunte, l'on respecte le principe qui veut que l'on étende le privilège à ses héritiers ou ayants droit.

L'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. En l'espèce, rien n'indique, dans les motifs de jugement ou dans le dossier, que le juge de première instance a mal compris la preuve ou qu'il a par ailleurs commis une erreur quelconque en faisant ses constatations de fait. Par conséquent, la Cour d'appel a commis une erreur en infirmant ces constatations.

Les appelants ont réussi à réfuter la présomption d'abus d'influence étant donné qu'il y avait eu très peu de contacts entre la défunte et ses frères à l'époque pertinente, que la défunte ne se fiait pas, en réalité, à ses frères pour la conseiller et que le principal mobile des frères était de veiller au bien-être de leur sœur. Il est aussi utile de souligner que la défunte a consulté un conseiller juridique séparément et que le contrat passé concordait avec ses volontés. Dans d'autres situations, le fait que les frères ont joué un rôle de premier plan lors de la première rencontre avec l'avocat pourrait empêcher de conclure qu'elle a reçu les conseils d'une personne indépendante.

L'avis juridique était incomplet car l'avocat n'a pas demandé de précisions sur la situation financière de la défunte et ne s'est pas assuré qu'elle comprenait bien le contrat. Les conséquences néfastes que pouvait entraîner

1991 CanLII 69 (SCC)

consequences of not having an asset which she could liquidate if necessary were offset by two important considerations. First, it was her express, and perhaps her primary, objective to put the sale of the house beyond her reach so that she could be assured of always having a home of her own. Second, it was also her wish that all her mother's grandchildren share equally in the estate. Given that the terms of the trust instrument reflected her wishes in those two fundamental respects, any imperfection in the legal advice obtained was not fatal to the appellants' case.

Trustees are entitled to be indemnified for all costs, including legal costs reasonably incurred. The trustees in this action acted reasonably. They were initially accused of having perpetrated a fraud against the deceased — an allegation that did not win the approval of any of the courts that have heard the matter — and were obliged to defend the action. The co-existing interest of trustee and beneficiary is not a valid basis for denying costs. The fact that the brothers were acting in the interests of their children, nephews and nieces did not cast doubt upon the propriety of their actions.

Respondents had a tenable case. It was appropriate that they simply bear their own costs and not have to bear the appellants' costs as well.

Per La Forest and McLachlin JJ.: A presumption of undue influence will arise only when the parties are in a relationship of "influence", where one person is in a position to dominate the will of another. The requirement of manifest disadvantage does not make sense in the context of this case, where the challenged transaction concerns a gift. A gift is by its nature inherently disadvantageous, at least in a material sense, so the requirement is superfluous. It becomes unnecessary to discuss the issue of manifest disadvantage further on the facts of this case.

A showing of undue disadvantage or benefit may be appropriate before a presumption of undue influence will be applied to a commercial transaction. Since the effect of the presumption is to shift the burden of proof to the defendant, it may not be unreasonable to require some showing of undue disadvantage or benefit in a commercial transaction before the presumption will arise. It is a substantially different question, however, whether undue influence itself must always involve undue disadvantage or benefit. It was unnecessary here to choose between opposing positions as to whether

le fait de ne pas avoir de bien qu'elle pourrait réaliser au besoin sont contrebalancées par deux facteurs importants. Premièrement, son objectif exprès, et peut-être son premier objectif, était de mettre hors de sa portée la vente de la maison de sorte qu'elle soit assurée de toujours posséder un toit. Deuxièmement, elle voulait aussi que l'héritage soit partagé également par tous les petits-enfants de sa mère. Étant donné que les conditions de l'acte de fiducie traduisent ses volontés sous ces deux aspects fondamentaux, aucune imperfection de l'avis juridique n'est fatale pour la cause des appelants.

Les fiduciaires ont le droit de se faire rembourser tous les frais, dont les honoraires d'avocat, qu'ils ont engagés raisonnablement. Les fiduciaires ont agi de façon raisonnable dans cette action. Ils ont d'abord été accusés d'avoir commis une fraude au détriment de la défunte, allégation que n'a retenue aucune cour saisie de l'affaire, et ils ont dû répondre à l'action. Les intérêts coexistants du fiduciaire et du bénéficiaire ne constituent pas un motif valable pour refuser de leur accorder des dépens. Le fait que les frères agissaient dans l'intérêt de leurs enfants, neveux et nièces ne met pas en doute la justesse de leurs actions.

Les intimés avaient une thèse défendable. Il est opportun qu'ils assument simplement leurs propres frais, mais non pas également ceux des appelants.

Les juges La Forest et McLachlin: La présomption d'abus d'influence ne prend naissance que lorsqu'il existe entre les parties des relations dans lesquelles une «influence» est exercée, lorsqu'une personne est en mesure de dominer la volonté d'une autre personne. L'exigence d'un désavantage manifeste n'est pas du tout logique dans le contexte de cette affaire, où l'opération contestée est une donation. Un don est intrinsèquement désavantageux, tout au moins au plan matériel, de sorte que l'exigence est superflue. Il est inutile de discuter plus longuement de la question du désavantage manifeste vu les faits de l'espèce.

Il peut être indiqué d'exiger la preuve d'un désavantage ou d'un avantage injuste avant d'appliquer la présomption d'abus d'influence à une opération commerciale. Étant donné que cette présomption a pour effet de déplacer le fardeau de la preuve en l'imposant au défendeur, il peut ne pas être déraisonnable d'exiger quelque preuve de désavantage ou d'avantage injuste résultant d'une opération commerciale avant que la présomption entre en jeu. Toutefois, la question de savoir si l'abus d'influence lui-même doit toujours supposer un avantage ou désavantage injuste est une question très diffé-

manifest disadvantage should be a required element of undue influence in a commercial transaction.

The relevant question here was whether the relationship of Mrs. Goodman to her brothers was such that they had the ability to dominate her. Mrs. Goodman's relationship with her brothers was not a close one and the trial judge found that it was such that the three brothers had no influence on their sister at all. She did not rely upon her brothers for assistance even during the troubled time following her mother's death and there could accordingly be no presumption of undue influence at that time. The facts were even stronger as they related to the subsequent period. The trust agreement was not entered into until several months after her mother's death and then only after numerous independent consultations with her solicitor and periods of independent thought by her when contact between herself and her three brothers no longer existed.

Per Sopinka J.: The trial judge made a positive finding of fact, supported by the evidence, that there was no undue influence exerted in this case. The operation of any presumption is therefore immaterial as it is not necessary to decide whether something already found not to exist should be presumed.

Text writers and courts are divided on whether presumptions affect only the evidential burden or both the evidential burden and legal burden. An evidential burden casts on the burdened party the obligation of going forward with some evidence while the legal burden is applied against the burdened party if the evidence, after being weighed, fails to persuade. Given the positive finding of fact made by the trial judge it is not necessary to resolve which view of presumptions is correct, as on either view, the presumption of undue influence played no role in this case.

Cases Cited

By Wilson J.

Considered: *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757; **disapproved:** *Goldsworthy v. Brickell*, [1987] 2 W.L.R. 133; **referred to:** *Ellis v. Barker* (1871), 7 Ch. App. 104; *Wright v. Carter*, [1903] 1 Ch. 27; *Mitchell v. Homfray* (1881), 8 Q.B.D. 587; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380; *Hylton v. Hyl-*

rente. Il n'était pas nécessaire de choisir entre deux positions opposées sur la question de savoir si le désavantage manifeste doit être un élément requis de l'abus d'influence dans une opération commerciale.

^a Il fallait se demander si les rapports entre M^{me} Goodman et ses frères étaient de nature à leur permettre de la dominer. Les rapports que M^{me} Goodman avait avec ses frères n'étaient pas étroits et le juge de première instance a conclu que les trois frères n'exerçaient aucune influence sur leur sœur. Elle ne comptait pas sur l'aide de ses frères même au cours de la période difficile suivant immédiatement la mort de leur mère. Il ne pouvait y avoir aucune présomption d'abus d'influence à ce moment-là. Les faits sont encore plus solides en ce qui concerne la période qui a suivi. Le contrat de fiducie n'a été signé que plusieurs mois après le décès de la mère et n'a été conclu qu'à la suite de nombreuses consultations indépendantes avec son avocat, et après qu'elle y ait réfléchi librement, quand les contacts entre elle et ses trois frères avaient cessé.

^e Le juge Sopinka: Le juge de première instance, s'appuyant sur la preuve, a conclu qu'il n'y avait pas abus d'influence en l'espèce. L'existence d'une présomption est donc sans importance et il n'est pas nécessaire de se demander si ce qui a été déterminé ne pas exister devrait être présumé.

^h Les commentateurs ainsi que les tribunaux ont des opinions divergentes quant à savoir si les présomptions ont une incidence sur le fardeau de présentation seulement ou à la fois sur le fardeau de présentation et le fardeau ultime. Un fardeau de présentation impose à la partie qui en est chargée l'obligation d'avancer des éléments de preuve, tandis que le fardeau ultime est imposé à la partie qui en est chargée si la preuve, une fois appréciée, ne réussit pas à convaincre. Étant donné la conclusion positive du juge de première instance sur les faits, il est inutile de décider lequel de ces points de vue est exact, car la présomption d'abus d'influence ne joue aucun rôle en l'espèce.

Jurisprudence

Citée par le juge Wilson

Arrêts examinés: *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757; **arrêt critiqué:** *Goldsworthy v. Brickell*, [1987] 2 W.L.R. 133; **arrêts mentionnés:** *Ellis v. Barker* (1871), 7 Ch. App. 104; *Wright v. Carter*, [1903] 1 Ch. 27; *Mitchell v. Homfray* (1881), 8 Q.B.D. 587; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380;

ton (1754), 2 Ves. Sen. 547, 28 E.R. 349; *In re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289; *Zamet v. Hyman*, [1961] 3 All E.R. 933; *Midland Bank plc v. Shephard*, [1988] 3 All E.R. 17; *Simpson v. Simpson*, [1989] Fam. L. 20; *Bank of Credit & Commerce International S.A. v. Aboody*, [1989] 2 W.L.R. 759; *Re Brocklehurst*, [1978] 1 All E.R. 767; *Huguenin v. Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526; *Csada v. Csada*, [1985] 2 W.W.R. 265; *Johnson v. Buttress* (1936), 56 C.L.R. 113; *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Bell v. Smith*, [1968] S.C.R. 664; *Bullivant v. Attorney-General for Victoria*, [1901] A.C. 196; *Stewart v. Walker* (1903), 6 O.L.R. 495; *Langworthy v. McVicar* (1913), 25 O.W.R. 297; *Re Ott*, [1972] 2 O.R. 5; *Ares v. Venner*, [1970] S.C.R. 608; *R. v. Khan*, [1990] 2 S.C.R. 531; *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Harper v. The Queen*, [1982] 1 S.C.R. 2; *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Métivier v. Cadorette*, [1977] 1 S.C.R. 371; *Re Dingman* (1915), 35 O.L.R. 51; *Re Dallaway*, [1982] 3 All E.R. 118.

By La Forest J.

Referred to: *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686.

By Sopinka J.

Referred to: *S v. S*, [1972] A.C. 24; *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602; *Powell v. Cockburn*, [1977] 2 S.C.R. 218; *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Blyth v. Blyth*, [1966] A.C. 643; *Hornal v. Neuberger Products Ltd.*, [1957] 1 Q.B. 247; *New York Life Insurance Co. v. Schlitt*, [1945] S.C.R. 289.

Authors Cited

Andrews, Neil. "Undue Influence and Contracts of Loan", [1985] *Cambridge L.J.* 192.
 "Bank securities allegedly obtained by undue influence", [1985] *J. Bus. L.* 191.
 15 C.E.D. (West. 3rd) Title 67, Fraud and Misrepresentation.
 Cope, Malcolm. *Duress, Undue Influence and Unconscientious Bargains*. North Ryde, N.S.W.: Law Book Co., 1985.

Hylton v. Hylton (1754), 2 Ves. Sen. 547, 28 E.R. 349; *In re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289; *Zamet v. Hyman*, [1961] 3 All E.R. 933; *Midland Bank plc v. Shephard*, [1988] 3 All E.R. 17; *Simpson v. Simpson*, [1989] Fam. L. 20; *Bank of Credit & Commerce International S.A. v. Aboody*, [1989] 2 W.L.R. 759; *Re Brocklehurst*, [1978] 1 All E.R. 767; *Huguenin v. Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526; *Csada v. Csada*, [1985] 2 W.W.R. 265; *Johnson v. Buttress* (1936), 56 C.L.R. 113; *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618; *Solosky v. La Reine*, [1980] 1 R.C.S. 821; *Bell v. Smith*, [1968] R.C.S. 664; *Bullivant v. Attorney-General for Victoria*, [1901] A.C. 196; *Stewart v. Walker* (1903), 6 O.L.R. 495; *Langworthy v. McVicar* (1913), 25 O.W.R. 297; *Re Ott*, [1972] 2 O.R. 5; *Ares v. Venner*, [1970] R.C.S. 608; *R. v. Khan*, [1990] 2 R.C.S. 531; *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; *Lensen v. Lensen*, [1987] 2 R.C.S. 672; *Harper v. La Reine*, [1982] 1 R.C.S. 2; *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 R.C.S. 78; *Métivier v. Cadorette*, [1977] 1 R.C.S. 371; *Re Dingman* (1915), 35 O.L.R. 51; *Re Dallaway*, [1982] 3 All E.R. 118.

Citée par le juge La Forest

Arrêt mentionné: *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686.

Citée par le juge Sopinka

Arrêts mentionnés: *S v. S*, [1972] A.C. 24; *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] R.C.S. 602; *Powell v. Cockburn*, [1977] 2 R.C.S. 218; *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Blyth v. Blyth*, [1966] A.C. 643; *Hornal v. Neuberger Products Ltd.*, [1957] 1 Q.B. 247; *New York Life Insurance Co. v. Schlitt*, [1945] R.C.S. 289.

Doctrine citée

Andrews, Neil. «Undue Influence and Contracts of Loan», [1985] *Cambridge L.J.* 192.
 «Bank securities allegedly obtained by undue influence», [1985] *J. Bus. L.* 191.
 15 C.E.D. (West. 3rd) Title 67, Fraud and Misrepresentation.
 Cope, Malcolm. *Duress, Undue Influence and Unconscientious Bargains*. North Ryde, N.S.W.: Law Book Co., 1985.

Cope, Malcolm. "Undue Influence and Alleged Manifestly Disadvantageous Transactions: National Westminster Bank plc v. Morgan" (1986), 60 *A.L.J.* 87.

Dale, Brenda. "Undue Influence and Manifest Disadvantage" (1988), 52 *Conv. & Prop. Law.* 441.

Dale, Brenda. "Undue Influence: Recent Developments" (1989), 53 *Conv. & Prop. Law.* 63.

Dixon, M. J. "The Limits of Undue Influence Explained", [1989] *Cambridge L.J.* 359.

Halsbury's Laws of England, vol. 18, 4th ed. London: Butterworths, 1977.

Ogilvie, M. H. "Undue Influence in the House of Lords" (1986), 11 *Can. Bus. L.J.* 503.

Phipson, Sidney Lovell. *Phipson on Evidence*, 13th ed. By John Huxley Buzzard, Richard May and M. N. Howard. London: Sweet & Maxwell, 1982.

Reed, Charles P. "Comment" (1984), 18 *Law Teacher* 132.

Reed, Charles P. "Commentary" (1985), 19 *Law Teacher* 106.

Snell, Edmund Henry Turner. *Snell's Principles of Equity*, 28th ed. By P. V. Baker and P. St. J. Langan. London: Sweet & Maxwell, 1982.

Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*. Toronto: Butterworths, 1974.

Taylor, R. D. "Commentary" (1985), 19 *Law Teacher* 105.

Tiplady, David. "The Limits of Undue Influence" (1985), 48 *Mod. L. Rev.* 579.

Wigmore, John Henry. *Wigmore on Evidence*, vol. 8, 3rd ed. Boston: Little, Brown & Co., 1940.

APPEAL from a judgment of the Alberta Court of Appeal (1989), 68 Alta. L.R. (2d) 289, [1989] 6 W.W.R. 625, allowing an appeal from a judgment of Hutchinson J. (1987), 52 Alta. L.R. (2d) 210, [1987] 4 W.W.R. 730. Appeal allowed.

J. D. Bruce McDonald, for the appellants.

R. H. Barron, Q.C., and *P. A. Ferner, Q.C.*, for the respondents.

The judgment of Wilson and Cory JJ. was delivered by

WILSON J.—The respondent, Stacy Randall Goodman, as executor of his mother's estate and on his own behalf, commenced an action claiming that he and his siblings were entitled to certain property left to his mother, Tzina Goodman, by his grandmother,

Cope, Malcolm. «Undue Influence and Alleged Manifestly Disadvantageous Transactions: National Westminster Bank plc v. Morgan» (1986), 60 *A.L.J.* 87.

^a Dale, Brenda. «Undue Influence and Manifest Disadvantage» (1988), 52 *Conv. & Prop. Law.* 441.

Dale, Brenda. «Undue Influence: Recent Developments» (1989), 53 *Conv. & Prop. Law.* 63.

Dixon, M. J. «The Limits of Undue Influence Explained», [1989] *Cambridge L.J.* 359.

^b *Halsbury's Laws of England*, vol. 18, 4th ed. London: Butterworths, 1977.

Ogilvie, M. H. «Undue Influence in the House of Lords» (1986), 11 *Can. Bus. L.J.* 503.

^c Phipson, Sidney Lovell. *Phipson on Evidence*, 13th ed. By John Huxley Buzzard, Richard May and M. N. Howard. London: Sweet & Maxwell, 1982.

Reed, Charles P. «Comment» (1984), 18 *Law Teacher* 132.

Reed, Charles P. «Commentary» (1985), 19 *Law Teacher* 106.

Snell, Edmund Henry Turner. *Snell's Principles of Equity*, 28th ed. By P. V. Baker and P. St. J. Langan. London: Sweet & Maxwell, 1982.

Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*. Toronto: Butterworths, 1974.

^e Taylor, R. D. «Commentary» (1985), 19 *Law Teacher* 105.

Tiplady, David. «The Limits of Undue Influence» (1985), 48 *Mod. L. Rev.* 579.

^f Wigmore, John Henry. *Wigmore on Evidence*, vol. 8, 3rd ed. Boston: Little, Brown & Co., 1940.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1989), 68 Alta. L.R. (2d) 289, [1989] 6 W.W.R. 625, qui a accueilli un appel d'un jugement du juge Hutchinson (1987), 52 Alta. L.R. (2d) 210, [1987] 4 W.W.R. 730. Pourvoi accueilli.

J. D. Bruce McDonald, pour les appelants.

^h *R. H. Barron, c.r.*, et *P. A. Ferner, c.r.*, pour les intimés.

ⁱ Version française du jugement des juges Wilson et Cory rendu par

LE JUGE WILSON—L'intimé, Stacy Randall Goodman, a, en sa qualité d'exécuteur testamentaire de sa mère et en son propre nom, intenté une action dans laquelle il soutient que ses enfants et lui ont droit à un bien-fonds légué à sa mère, Tzina Goodman, par sa

1991 CanLII 69 (SCC)

Annie Sanofsky. The appellants, Sam, William and Ted Geffen are the brothers and nephew of Stacy's mother. They are the trustees of a certain trust agreement in which Stacy's mother is named as the settlor and under which the trust property is to be distributed amongst all of Annie Sanofsky's grandchildren. This appeal concerns the validity of the trust agreement.

1. The Facts

Annie Sanofsky had four children, Sam, Ted, Jack and Tzina. Sam and Ted Geffen are both successful businessmen currently living in the United States. Their brother Jack is an insurance underwriter who lives in Edmonton. Their sister Tzina, (Mrs. Goodman) now deceased, had a less than trouble-free life. She first came under the care of a psychiatrist while a teenager. Psychiatric intervention became a common feature of her existence. She was hospitalized many times over the years and was eventually diagnosed as suffering from bipolar affective disorder, formerly known as manic depressive disorder, and immature personality. Tzina's illness caused strain in her family relationships. Her disorder tended to drive people away from her. Although she married and had children she did not have much contact with her children after her separation from her husband. Her contact with them was purely casual.

In 1968, with the help of her son Jack, Annie Sanofsky executed a will providing for a life estate to her daughter Tzina and directing that on Tzina's death her estate should be distributed to all of her (Annie's) grandchildren. At the time of their mother's death the four children were surprised to learn that a new will had been executed in 1975 which superseded the 1968 will. Under the new will Annie Sanofsky left the property which had been her home outright to her daughter Tzina, provided bequests of \$1000 each to her sons, and directed that the residue of her estate be held in trust for Tzina during her lifetime and pass on Tzina's death to her (Tzina's) children.

The three Geffen brothers, not surprisingly, were unhappy with the way in which their mother had disposed of her estate. They thought it unfair that their children had been cut out of the will. Their sister

grand-mère, Annie Sanofsky. Les appelants, Sam, William et Ted Geffen sont, respectivement, les frères et le neveu de la mère de Stacy. Ils sont les fiduciaires d'un contrat de fiducie dans lequel la mère de Stacy est désignée comme la disposante et en vertu duquel le bien en fiducie doit être partagé entre tous les petits-enfants d'Annie Sanofsky. Ce pourvoi concerne la validité du contrat de fiducie.

^b 1. Les faits

Annie Sanofsky a eu quatre enfants, Sam, Ted, Jack et Tzina. Sam et Ted Geffen sont des hommes d'affaires prospères qui vivent aux États-Unis. Leur frère Jack est un courtier d'assurances qui vit à Edmonton. Leur sœur Tzina (M^{me} Goodman), qui est maintenant décédée, a eu sa part de difficultés dans la vie. D'abord soignée par un psychiatre à l'adolescence, elle a fini par avoir besoin de soins psychiatriques pendant toute sa vie. Elle a été hospitalisée à maintes reprises au fil des ans; le diagnostic établi à son égard fait état d'un trouble affectif bipolaire, que l'on appelait auparavant psychose maniaco-dépressive, et de personnalité immature. À cause de sa maladie, ses rapports avec sa famille se sont tendus; les gens ont eu tendance à l'éviter. Elle s'est certes mariée et a eu des enfants, mais elle a été peu souvent en contact avec ses enfants après sa séparation d'avec son mari. Ils ne se voyaient qu'à l'occasion.

En 1968, avec l'aide de son fils Jack, Annie Sanofsky a signé un testament accordant à sa fille Tzina un droit de tenure viager et disposant qu'au décès de Tzina, son patrimoine soit partagé entre tous ses petits-enfants (ceux d'Annie). Lors du décès de leur mère, les quatre enfants ont été étonnés d'apprendre qu'un nouveau testament, annulant celui de 1968, avait été signé en 1975. Aux termes du second testament, Annie Sanofsky léguait sans réserve à sa fille Tzina la propriété où elle avait vécu, laissait 1 000\$ à chacun de ses fils et disposait que le reliquat de sa succession soit détenu en fiducie pour le bénéfice de Tzina pendant sa vie et, au décès de Tzina, transmis aux enfants de cette dernière.

Comme on pouvait s'y attendre, les trois frères Geffen n'ont pas été heureux des dispositions testamentaires de leur mère. Ils ont estimé injuste que leurs enfants aient été exclus du testament. Leur sœur

1991 CanLII 69 (SCC)

agreed. They were especially concerned, however, with their mother's decision to bequeath her home in Calgary outright to their sister. Tzina had a history of mental illness and they feared that her disability would interfere with her capacity to act responsibly in relation to the property she had inherited. They were particularly concerned that Tzina might divest herself of the assets she needed for her own support. If this happened they might be called upon to contribute to her support. They, along with their sister, decided to seek legal advice as to whether or not the second will was valid.

They retained the services of Mr. Pearce, a Calgary lawyer, and explained the situation to him. Jack Geffen acted as spokesman for the family. The options open to Tzina were canvassed. It was suggested that the house be transferred by Tzina to her brothers' children. A disagreement ensued between Tzina and her brother Jack. She did not like the idea of transferring title to the house immediately, leaving herself with only a life interest in it. Mr. Pearce suggested that she take some time to think things over. The meeting disbanded, the brothers paid for the consultation and all concerned returned to their respective homes.

Mrs. Goodman thereafter had only casual contact with her brothers but continued to seek the advice of counsel and communicated with Mr. Pearce on several occasions. As a result of these consultations it was suggested to Mrs. Goodman that the Calgary residence be put into a trust for her for life with her brothers as trustees but that she would retain the right to dispose of the property by will. This suggestion was vehemently rejected by Jack but accepted by Ted and Sam Geffen. Jack indicated that he would have nothing further to do with the trust and it was agreed that Ted's son, William, would replace him as a trustee.

Mr. Pearce then went ahead and prepared the trust deed. The trust property was conveyed to the trustees on terms that Mrs. Goodman retained a life interest in the Calgary residence and that on her request the trustees would consider a sale of the property so long as the sale was in Mrs. Goodman's best interests. The trust deed further provided that upon

s'est dite du même avis. Toutefois, ils s'inquiétaient surtout de la décision de leur mère de léguer, sans réserve, sa maison de Calgary à leur sœur. Tzina souffrait de troubles mentaux et ils craignaient que sa maladie ne la rende incapable d'agir de façon responsable en ce qui a trait à la propriété dont elle avait hérité. La possibilité que Tzina se défasse des biens dont dépendait sa subsistance était pour eux un sujet d'inquiétude particulier. Dans cette éventualité, ils pourraient être appelés à lui apporter un soutien financier. Avec leur sœur, ils ont décidé de demander une opinion juridique sur la validité du second testament.

Ils ont retenu les services de M^e Pearce, un avocat de Calgary, et lui ont exposé le cas. Jack Geffen a été le porte-parole de la famille. Les choix qui s'offraient à Tzina ont été examinés soigneusement. L'on a proposé que Tzina transfère la maison aux enfants de ses frères. Un désaccord a surgi entre Tzina et son frère Jack. Elle n'a pas aimé l'idée de céder le titre de propriété de la maison immédiatement et de ne conserver qu'un droit de tenure viager sur celle-ci. M^e Pearce lui a suggéré d'y réfléchir quelque temps. Ils se sont séparés, les frères ont payé la consultation et tous les intéressés ont regagné leurs domiciles respectifs.

Par la suite, M^{me} Goodman n'est entrée en contact avec ses frères qu'à l'occasion, mais elle a continué de demander des avis juridiques et a communiqué avec M^e Pearce à maintes reprises. Par suite de ces consultations, il a été suggéré à M^{me} Goodman de mettre la maison de Calgary en fiducie à son bénéfice pendant sa vie, ses frères étant désignés fiduciaires, mais de retenir le droit de l'aliéner par testament. Jack a rejeté catégoriquement cette suggestion, mais Ted et Sam Geffen l'ont acceptée. Jack a dit qu'il n'aurait plus rien à voir avec la fiducie et il a été convenu que le fils de Ted, William, le remplacerait comme fiduciaire.

M^e Pearce a donc rédigé l'acte de fiducie. Le bien en fiducie a été transféré aux fiduciaires aux conditions suivantes: M^{me} Goodman conserverait un droit de tenure viager sur la maison de Calgary et, à sa demande, les fiduciaires étudieraient la possibilité de la vendre si la vente était avantageuse pour M^{me} Goodman. L'acte de fiducie stipulait en outre

Mrs. Goodman's death the trust property would be divided equally among her surviving children, nephews and nieces, i.e., all Annie Sanofsky's grandchildren.

After the deed was executed Mrs. Goodman was apparently not too sure of the effect of what she had done. She attempted twice to put the property on the market. Her attempts were thwarted by Mr. Pearce. Mrs. Goodman died in May of 1984, leaving a last will and testament in which she left her entire estate to her children.

2. The Courts Below

Alberta Court of Queen's Bench (1987), 52 Alta. L.R. (2d) 210 (per Hutchinson J.)

At trial the plaintiffs submitted that the trust agreement was entered into by Mrs. Goodman as a result of the undue influence of the defendants and Jack Geffen. Hutchinson J. first dealt with the admissibility of Mr. Pearce's evidence and in particular the argument that it should not have been received since it was privileged. Having concluded that Mr. Pearce's testimony was properly admitted the trial judge turned to its import. He said at pp. 220-21:

I accept Mr. Pearce's testimony that during his initial dealings with Mrs. Goodman during the period of his initial interview up to at least 7th February 1980 Mrs. Goodman fully understood the nature and effect of the arrangements evidenced by the trust agreement. I am satisfied that Mrs. Goodman was the initiator of the instructions to Mr. Pearce, following periods of independent thought by her, to draw the trust agreement in accordance with his suggestion that this would be an alternate method of holding the Calgary residential property so as to ensure that she had a place to live during her lifetime and that she intended to include all of the ultimate beneficiaries of the trust named therein, including her own children.

Based on the testimony of the solicitor as well as the other witnesses, Hutchinson J. found on the evidence that the Geffen brothers did not in fact influence their sister into signing the trust agreement. In doing so he placed particular emphasis on the fact that the agreement in substance reflected the true

qu'au décès de M^{me} Goodman, le bien en fiducie serait partagé également entre ses enfants, neveux et nièces survivants, c'est-à-dire tous les petits-enfants d'Annie Sanofsky.

Après que l'acte eut été signé, M^{me} Goodman n'était apparemment pas tout à fait certaine des conséquences de ce qu'elle avait fait. Elle a tenté à deux reprises de mettre en vente la propriété. M^e Pearce a fait avorter ces tentatives. M^{me} Goodman est décédée en mai 1984; dans son testament, elle léguait tous ses biens à ses enfants.

2. Les tribunaux d'instance inférieure

Cour du Banc de la Reine de l'Alberta (1987), 52 Alta. L.R. (2d) 210 (le juge Hutchinson)

Au procès, les demandeurs ont soutenu que l'acte de fiducie avait été signé par M^{me} Goodman par suite de l'abus d'influence des défendeurs et de Jack Geffen. Le juge Hutchinson a d'abord examiné l'admissibilité du témoignage de M^e Pearce, et, en particulier, l'argument selon lequel ce témoignage n'aurait pas dû être reçu parce qu'il était privilégié. Après avoir conclu que le témoignage de M^e Pearce était recevable, le juge de première instance s'est penché sur sa portée. Il dit, aux pp. 220 et 221:

[TRADUCTION] J'accepte le témoignage de M^e Pearce selon lequel, au cours de ses premières discussions avec M^{me} Goodman, dans le cadre de sa première rencontre avec elle jusqu'au 7 février 1980 au moins, M^{me} Goodman comprenait très bien la nature et l'effet des dispositions consignées dans l'acte de fiducie. Je suis convaincu, d'une part, que M^{me} Goodman, après y avoir bien réfléchi de son côté, est à l'origine des instructions données à M^e Pearce de rédiger l'acte de fiducie en conformité avec la suggestion de ce dernier, que ce serait là une autre manière de détenir la résidence de Calgary, propre à lui garantir un toit jusqu'à la fin de ses jours, et, d'autre part, qu'elle avait l'intention d'inclure tous les bénéficiaires ultimes de la fiducie qui y sont nommés, dont ses propres enfants.

Se fondant sur le témoignage de l'avocat et ceux d'autres témoins, le juge Hutchinson a conclu qu'en fait, d'après la preuve, les frères Geffen n'avaient pas influencé la décision de leur sœur de signer l'acte de fiducie. Ce faisant, il a insisté particulièrement sur le fait que l'acte de fiducie traduisait pour l'essentiel les

wishes of the settlor. Alternatively, Hutchinson J. found that any presumption of undue influence was rebutted by the fact that Mrs. Goodman consulted Mr. Pearce independently and after her brothers had left Calgary. The trial judge concluded at pp. 228-29:

If anything, the evidence which I have heard and which was read in by counsel for the plaintiff persuades me that the relationship between Mrs. Goodman and her three brothers was such that they had no influence on their sister at all Apart from the brief interval of time when they were together as a result of their mother's last illness and death, there was hardly any contact between the three brothers and Mrs. Goodman. She did not rely on them for assistance and they were only concerned that their mother's estate be available for her maintenance without the need on their part to assume any personal responsibility for their sister's care.

Alberta Court of Appeal (1989), 68 Alta. L.R. (2d) 289

Stevenson J.A. (Stratton J.A. concurring)

On appeal the respondents submitted that the trial judge had failed to recognize and address the presumption of undue influence. Stevenson J.A. agreed. He noted the deceased's history of mental health problems and the brothers' testimony that the deceased reposed trust and confidence in them. Stevenson J.A. added that when her older brothers took a leading role in obtaining legal advice, one of the objects of which was to secure benefits for their own children, a court of equity would intervene to the extent of presuming influence.

Stevenson J.A. then turned to the question whether the transaction was so disadvantageous to Mrs. Goodman as to indicate that she was or could have been victimized. After expressing some uneasiness with the propriety of this test, Stevenson J.A. concluded that the trust agreement was not simply unwise, it was "manifest folly". It was his opinion that for Mrs. Goodman to reduce her interest in the Calgary property which had been bequeathed to her outright by her mother to a mere life interest and

véritables volontés de la disposante. Subsidiairement, le juge Hutchinson a conclu que la présomption d'abus d'influence était réfutée par le fait que M^{me} Goodman avait consulté M^e Pearce séparément, après que ses frères eurent quitté Calgary. Le juge de première instance conclut, aux pp. 228 et 229:

[TRADUCTION] Somme toute, la preuve que j'ai entendue ou que l'avocat du demandeur a consignée me persuade que les rapports entre M^{me} Goodman et ses trois frères étaient tels qu'ils n'ont exercé aucune influence sur elle [. . .] Mis à part le bref intervalle durant lequel ils ont été réunis à cause de la maladie et du décès de leur mère, les trois frères et M^{me} Goodman n'ont presque pas été en contact. Elle n'a pas compté sur leur aide et leur seul souci était que l'héritage de leur mère soit disponible pour assurer la subsistance de leur sœur sans qu'ils aient eux-mêmes à subvenir à ses besoins.

Cour d'appel de l'Alberta (1989), 68 Alta. L.R. (2d) 289

Le juge Stevenson (aux motifs duquel a souscrit le juge Stratton)

En appel, les intimés ont soutenu que le juge de première instance n'avait pas reconnu ni étudié la présomption d'abus d'influence. Le juge Stevenson a approuvé ce point de vue. Il a souligné les antécédents psychiatriques de la défunte et les témoignages de ses frères selon lesquels la défunte leur faisait confiance. Le juge Stevenson a ajouté qu'étant donné que ses frères aînés avaient joué un rôle de premier plan dans l'obtention d'un avis juridique, notamment dans le but d'assurer des avantages à leurs propres enfants, une cour d'*equity* interviendrait en présument l'exercice d'une influence.

Le juge Stevenson a étudié ensuite la question de savoir si l'opération était désavantageuse pour M^{me} Goodman au point d'indiquer qu'elle avait été ou pouvait avoir été une victime. Après avoir exprimé une certaine inquiétude au sujet de l'opportunité d'appliquer ce critère, le juge Stevenson a conclu que le contrat de fiducie était non pas simplement peu judicieux, mais [TRADUCTION] «folie manifeste». À son avis, il était nettement désavantageux pour M^{me} Goodman de réduire son droit sur la propriété de

place the remainder beyond her reach was clearly disadvantageous. He said at p. 297:

Assuming that she should have been protected from the consequences of an improvident business transaction entered into when she was behaving irrationally, that protection could easily have been provided by far less drastic means. Protection against that possibility did not suggest, let alone reasonably require, that she convert a fee simple estate to a mere life interest. Even the most tightly drawn spendthrift trust would not have put the remainder beyond the control or disposition of the trustees for the advantage of the beneficiary.

It was accordingly his view that no reasonable person in the position of the settlor would have entered into this arrangement on the basis that it was reasonably necessary in order to protect herself or that it was unfair not to do so.

Stevenson J.A. then went on to consider whether the presumption of undue influence had been rebutted on the evidence. It was his opinion that Mrs. Goodman did not receive adequate independent advice. He expressed the view that an independent advisor must be in a position to satisfy himself that a proposed gift is right and proper. The evidence did not disclose that Mr. Pearce ever purported to satisfy himself as to this. Indeed, he could not have done so since he did not know the value of the property or the circumstances of Mrs. Goodman or her brothers.

Hetherington J.A. (dissenting)

Hetherington J.A. noted the settlor's illness but concluded that her competence to enter into the trust agreement was not and never had been in issue. She also noted that one had to assume that Mrs. Goodman was neither more nor less open to influence than other people.

Hetherington J.A. held, citing *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686 (H.L.), as authority, that no consideration of undue influence was necessary unless the transaction was so disadvantageous to the settlor as to suggest that she was or could have been victimized. It was her view that Mrs. Goodman's entry into the trust agreement could

Calgary que sa mère lui avait léguée sans réserve à un simple droit de tenure viager et de mettre le droit résiduel hors de sa portée. Il dit, à la p. 297:

^a [TRADUCTION] À supposer que l'on aurait dû la protéger des conséquences d'une opération commerciale conclue, de façon imprévoyante, à un moment où sa conduite était irrationnelle, cette protection aurait pu facilement être obtenue par des moyens beaucoup moins radicaux. ^b La protection contre cette possibilité ne supposait pas, et encore moins n'exigeait pas raisonnablement, qu'elle transformât un fief simple en simple droit de tenure viager. Même la fiducie à participation protégée la plus stricte n'aurait pas mis le droit résiduel hors du contrôle ou du pouvoir d'aliénation des fiduciaires dans l'intérêt ^c du bénéficiaire.

Il était donc d'avis qu'aucune personne raisonnable, dans la situation de la disposante, n'aurait conclu cet accord pour le motif que cela était raisonnablement ^d nécessaire pour se protéger ou qu'il était injuste de ne pas le faire.

Le juge Stevenson a examiné ensuite si, d'après la preuve, la présomption d'abus d'influence avait été réfutée. À son avis, M^{me} Goodman n'avait pas reçu de conseils adéquats d'une personne indépendante. Il s'est dit d'avis qu'un conseiller indépendant doit être en mesure de s'assurer qu'une donation envisagée est juste et équitable. La preuve n'a pas révélé que M^{re} Pearce ait jamais cherché à s'en assurer. En réalité, il n'aurait pas pu le faire, car il ignorait la valeur de la propriété et la situation de M^{me} Goodman et de ses frères.

Le juge Hetherington (dissidente)

Le juge Hetherington a pris note de la maladie de la disposante, mais elle a conclu que sa capacité de passer le contrat de fiducie n'était pas et n'avait jamais été contestée. Elle a également souligné qu'il fallait présumer que M^{me} Goodman n'était ni plus ni moins influençable que d'autres.

ⁱ Citant l'arrêt *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686 (H.L.), à titre de précédent, le juge Hetherington a décidé qu'il n'était pas nécessaire de tenir compte de l'abus d'influence, sauf si l'opération était désavantageuse pour la disposante au point d'indiquer qu'elle avait été ou pouvait avoir été une victime. À son avis, deux motifs pouvaient

be explained on two grounds. First, it served the purpose of protecting Mrs. Goodman in the event her illness led her to behave irrationally. Second, it was her wish that her nephews and nieces share equally with her own children in their grandmother's estate. While acknowledging that the trust agreement may have been somewhat unwise having regard to her own financial circumstances, Hetherington J.A. was of the view that it was not so disadvantageous to the settlor that the court needed to consider whether or not it was the product of undue influence. However, in case she was in error in this, Hetherington J.A. went on to consider the applicability of the doctrine of undue influence, actual or presumed.

Hetherington J.A. did not believe that the relationship of brother and sister gave rise automatically to a presumption of undue influence. Nor did it follow that simply because the settlor reposed trust and confidence in her brothers they were in a position to exercise such influence over her. On the question whether there had been actual undue influence Hetherington J.A. concluded at p. 322:

In these circumstances the trial judge found that Mrs. Goodman's brothers did not influence her to sign the trust agreement. Can it be said that he made any palpable and overriding error in his assessment of the facts? In my view it cannot. There is certainly evidence to support his finding. Indeed, I do not know how he could have come to any other conclusion. I would, therefore, not disturb his finding that the trust agreement in question in this case did not result from actual undue influence.

Alberta Court of Appeal (1990), 72 Alta. L.R. (2d) 414

Following release of the reasons for judgment, the unsuccessful respondents sought an order that they receive costs instead of having to pay costs as provided in the original judgment. *Stevenson and Stratton J.J.A.* held that the conduct of the brothers in securing the transfer from the settlor had been found wanting and that they were defending an interest which they themselves had been instrumental in creating for the benefit of persons nominated by them. Since the litigation had been for their own benefit the request for costs was denied.

expliquer la conclusion du contrat de fiducie par M^{me} Goodman. Premièrement, il servait à la protéger au cas où sa maladie la pousserait à agir de façon irrationnelle. Deuxièmement, c'était sa volonté que ses neveux et nièces partagent à parts égales avec ses enfants l'héritage de leur grand-mère. Tout en reconnaissant que le contrat de fiducie était peut-être peu judicieux compte tenu de sa propre situation financière, le juge Hetherington s'est dite d'avis qu'il n'était pas désavantageux pour la disposante au point que le tribunal doive décider s'il résultait d'un abus d'influence. Toutefois, au cas où elle se tromperait sur ce point, le juge Hetherington a ensuite examiné la question de l'applicabilité de la théorie de l'abus d'influence, réel ou présumé.

Le juge Hetherington ne croyait pas que les liens de parenté entre frères et sœurs fassent naître automatiquement une présomption d'abus d'influence. Du simple fait que la disposante avait fait confiance à ses frères, il ne s'ensuivait pas qu'ils étaient en mesure d'exercer une telle influence sur elle. Quant à la question de savoir s'il y avait eu réellement abus d'influence, le juge Hetherington conclut, à la p. 322:

[TRADUCTION] Vu ces circonstances, le juge de première instance a conclu que les frères de M^{me} Goodman n'avaient pas influencé sa décision de signer l'acte de fiducie. Peut-on affirmer qu'il a fait une erreur manifeste et dominante dans son appréciation des faits? Je ne le crois pas. La preuve permet certainement sa conclusion. En fait, je ne vois pas comment il aurait pu tirer quelque autre conclusion. Je ne modifierais donc pas sa conclusion que l'acte de fiducie dont il est question en l'espèce ne résultait pas d'un abus d'influence réel.

Cour d'appel de l'Alberta (1990), 72 Alta. L.R. (2d) 414

Après délivrance des motifs de jugement, les intimés, qui avaient été déboutés, ont demandé une ordonnance leur accordant des dépens au lieu d'avoir à en payer comme le prévoyait le jugement initial. Les juges *Stevenson et Stratton* ont décidé qu'en obtenant la cession de la disposante, les frères étaient en défaut et défendaient un intérêt qu'ils avaient eux-mêmes contribué à créer au profit de personnes qu'ils avaient désignées. Puisque le litige avait visé leur propre avantage, la demande de dépens a été rejetée.

Hetherington J.A. dissented on this point as well. In her view the trustees acted reasonably and properly in defending the action and in responding to the appeal. It was never established that the brothers had acted improperly in relation to their sister. They were obliged to defend the interests of the beneficiaries and to respond to the serious allegations contained in the statement of claim. She would have allowed the trustees their costs out of the trust property.

3. The Issues

1. Was the presumption of undue influence properly applied by the Court of Appeal?
2. Are the trustees entitled to costs out of the trust property?

4. Analysis

The Presumption of Undue Influence

This appeal raises important questions concerning the doctrine of undue influence and, in particular, the application of the presumption of undue influence. It was over this issue that the trial judge and the Court of Appeal parted company. As well, the scope of the doctrine of undue influence and its evidentiary companion, the presumption of undue influence, has recently been addressed by the House of Lords in *Morgan*. Not surprisingly, the parties to this appeal devoted the bulk of their argument both on the leave application and the appeal itself to the question whether or not we should follow the House of Lords in Canada. Indeed, the primary ground of appeal advanced by the appellant was whether there could be a presumption of undue influence where the trust agreement was not found by the trial judge to be "manifestly disadvantageous" to the party seeking to have it set aside. The respondent's response was that the doctrine of "manifest disadvantage" applies only to commercial transactions and does not apply to gifts. The Court has thus been called upon not only to resolve the dispute between the parties to this appeal

Le juge Hetherington a été dissidente sur ce point aussi. À son avis, les fiduciaires ont agi de façon raisonnable et régulière en contestant l'action et en répondant à l'appel. Il n'a jamais été établi que les frères avaient agi de façon irrégulière vis-à-vis de leur sœur. Ils étaient tenus de défendre les intérêts des bénéficiaires et de répondre aux graves allégations contenues dans la déclaration. Elle aurait accordé le paiement des dépens des fiduciaires à même la masse.

3. Les questions en litige

1. La Cour d'appel a-t-elle appliqué correctement la présomption d'abus d'influence?
2. Les fiduciaires ont-ils droit au paiement de dépens à même la masse?

4. Analyse

La présomption d'abus d'influence

Le présent pourvoi soulève d'importantes questions concernant la doctrine de l'abus d'influence et, particulièrement, l'application de la présomption d'abus d'influence. C'est sur cette question que le juge de première instance et la Cour d'appel ont exprimé des opinions divergentes. De même, la Chambre des lords, dans l'arrêt *Morgan*, a récemment examiné la portée de la doctrine de l'abus d'influence et de son pendant en matière de présentation de preuve, la présomption d'abus d'influence. Il n'est pas étonnant que les parties au présent pourvoi aient consacré la grande part de leurs arguments, tant à l'étape de la demande d'autorisation que du pourvoi lui-même, à la question de savoir si nous devrions suivre la conclusion de la Chambre des lords au Canada. En réalité, le principal moyen d'appel invoqué par l'appelant était de savoir s'il pouvait y avoir une présomption d'abus d'influence lorsque le juge de première instance n'a pas conclu que le contrat de fiducie comportait un «désavantage manifeste» pour la partie qui en réclamait l'annulation. L'intimé a répondu que la doctrine du «désavantage manifeste» ne s'applique qu'aux opérations commerciales et ne s'applique pas aux donations. La Cour est donc non seulement appelée à trancher le différend entre les parties au présent pourvoi, mais aussi à cla-

but to clarify the law and provide some guidance to our courts in this area.

The appellants submit that the Court of Appeal erred in two ways. First, they say that the facts did not give rise to a presumption of undue influence because the trust agreement did not work a "manifest disadvantage" to the settlor. Second, they say that even if this were an appropriate case for the application of the presumption, it was rebutted when the trial judge found as a fact that no actual undue influence was exercised on Mrs. Goodman to enter into the trust agreement. Accordingly, they say that the Court of Appeal committed an error of law when they overturned this finding of fact.

The respondents argue that the Court of Appeal was correct in finding that the presumption of undue influence applied in this case. They say that the doctrine of "manifest disadvantage" has no relevance in situations involving gifts as opposed to commercial transactions but that, if it does, the bequest of the Calgary home by Mrs. Goodman to her children, nephews and nieces was manifestly disadvantageous to her. The respondents contend that the evidence does not establish that the presumption was rebutted.

The equitable doctrine of undue influence was developed, as was pointed out by Lindley L.J. in *Allcard v. Skinner* (1887), 36 Ch. D. 145, not to save people from the consequences of their own folly but to save them from being victimized by other people (at pp. 182-83). In the context of gifts and other transactions, equity will intervene and set aside such arrangements if procured by undue influence. Over the years it became accepted that equitable protection could be invoked in two ways.

In *Allcard v. Skinner*, *supra*, the plaintiff joined a sisterhood devoted to charitable works under the auspices of a clergyman of the Church of England. Upon becoming a full member of the sisterhood she made the requisite vows of poverty, chastity and obedience. In accordance with these vows she from time to time handed over to the mother superior income and capital to which she was entitled under her father's will.

rifier le droit et à établir des lignes directrices dans ce domaine au profit de nos tribunaux.

Les appelants soutiennent que la Cour d'appel a commis deux erreurs. Premièrement, ils affirment que les faits ne donnaient pas lieu à une présomption d'abus d'influence parce que le contrat de fiducie n'a pas produit pour la disposante de «désavantage manifeste». Deuxièmement, ils affirment que, même s'il y avait eu lieu en l'espèce d'appliquer la présomption, celle-ci aurait été réfutée quand le juge de première instance a conclu qu'en fait M^{me} Goodman n'avait fait l'objet d'aucun abus d'influence visant à lui faire signer l'acte de fiducie. Par conséquent, ils affirment que la Cour d'appel a commis une erreur de droit quand elle a infirmé cette constatation de fait.

Les intimés soutiennent que la Cour d'appel a conclu à bon droit que la présomption d'abus d'influence s'appliquait en l'espèce. Ils affirment que la théorie du «désavantage manifeste» n'est pas pertinente dans les cas où il s'agit de donations plutôt que d'opérations commerciales, mais que, si elle était applicable, le legs de la maison de Calgary par M^{me} Goodman à ses enfants, neveux et nièces serait manifestement désavantageux pour elle. Les intimés soutiennent que la preuve n'établit pas que la présomption a été réfutée.

La théorie de l'abus d'influence reconnue en *equity* a été conçue, comme l'a souligné le lord juge Lindley dans *Alleard v. Skinner* (1887), 36 Ch. D. 145, non pas pour protéger les gens contre les conséquences de leur folie, mais pour empêcher qu'ils ne deviennent la victime d'autrui (aux pp. 182 et 183). Dans le contexte des donations et d'autres opérations, l'*equity* intervient pour annuler ces dispositions si elles ont été prises par suite d'un abus d'influence. Au fil des ans, l'on a accepté que la protection reconnue en *equity* puisse être invoquée de deux manières.

Dans l'arrêt *Allcard v. Skinner*, précité, la demanderesse était entrée dans une communauté religieuse qui se vouait à des œuvres de charité sous les auspices d'un pasteur de l'Église d'Angleterre. Lors de son entrée définitive en religion, elle a prononcé les vœux obligatoires de pauvreté, de chasteté et d'obéissance. Conformément à ces vœux, elle remettait de temps à autre à la mère supérieure le revenu et le capital aux-

1991 C 111 (91-92)

Several years later the plaintiff left the sisterhood and joined the Roman Catholic Church. She then sued for the return of the stock she had given away, claiming that she had been induced by undue influence to turn the property over to the mother superior.

Cotton L.J. began by setting out the doctrine of undue influence in broad terms. At page 171 he said:

Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes — First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.

Lindley L.J. commented to similar effect on the state of the law at that time. He said at p. 181:

The doctrine relied upon by the Appellant is the doctrine of undue influence expounded and enforced in *Huguenin v. Baseley*, and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been

quels elle avait droit aux termes du testament de son père. Plusieurs années plus tard, la demanderesse a quitté l'ordre et s'est jointe à l'Église catholique romaine. Elle a intenté alors une action en recouvrement des actions qu'elle avait données, prétendant qu'elle avait été incitée, par suite d'un abus d'influence, à céder ces biens à la mère supérieure.

Le lord juge Cotton a tout d'abord exposé la théorie de l'abus d'influence en termes généraux. Il dit, à la p. 171:

[TRADUCTION] L'affaire est-elle visée par les principes que la Cour de la Chancellerie a énoncés dans ses décisions où elle a annulé des donations effectuées volontairement par des parties qui les avaient faites sous une influence de nature, selon la Cour, à permettre, par la suite, au donateur de révoquer la donation? Ces décisions peuvent être réparties dans deux catégories — Premièrement, les cas où la cour a été convaincue que la donation résultait de l'influence exercée expressément par le donataire à cette fin; deuxièmement, ceux où les relations entre le donateur et le donataire étaient de nature, soit au moment où la donation a été faite, soit peu avant, à faire naître une présomption d'influence du donataire sur le donateur.

Le lord juge Lindley a fait des observations semblables sur l'état du droit à cette époque. Il dit, à la p. 181:

[TRADUCTION] La théorie qu'invoque l'appelante est celle de l'abus d'influence exposée et mise en application dans l'arrêt *Huguenin v. Baseley* et d'autres du même ordre. Ces arrêts peuvent être rangés en deux catégories qui se chevauchent néanmoins fréquemment.

Dans la première, on classe les affaires dans lesquelles il y a eu une conduite inéquitable et irrégulière — une contrainte extérieure, quelque fourberie, quelque escroquerie, et de façon générale, mais non dans tous les cas, quelque avantage personnel obtenu par un donataire ayant des rapports étroits avec le donateur qui a des rapports de confiance étroits avec lui . . .

Dans la deuxième catégorie d'affaires, il y a celles où la situation du donateur par rapport au donataire est telle qu'il incombe au donataire de conseiller le donateur, voire d'administrer ses biens pour lui. En pareil cas, le tribunal impose au donataire le fardeau de prouver qu'il n'a pas abusé de sa position et que la donation qui lui a été faite ne résulte pas de quelque abus d'influence de sa part. Dans ce type d'affaire, il a été estimé nécessaire de

considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.

In the present case there was no evidence of undue influence as such and it therefore remains to consider whether the relationship between the parties gave rise to a presumption of undue influence.

What are the factors that go to establishing a presumption of undue influence? This question has been the focus of much debate in recent years. Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence until the contrary is shown. These include the relationship between trustee and beneficiary (*Ellis v. Barker* (1871), 7 Ch. App. 104); solicitor and client (*Wright v. Carter*, [1903] 1 Ch. 27); doctor and patient (*Mitchell v. Homfray* (1881), 8 Q.B.D. 587); parent and child (*Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380); guardian and ward (*Hylton v. Hylton* (1754), 2 Ves. Sen. 547, 28 E.R. 349); and future husband and fiancée (*In re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289). Beginning, however, with *Zamet v. Hyman*, [1961] 3 All E.R. 933, it came to be accepted that the relationships in which undue influence will be presumed are not confined to fixed categories and that each case must be considered on its own facts. Since then it has been generally agreed that the existence of some "special" relationship must be shown in order to support the presumption although what constitutes such a "special" relationship is a matter of some doubt. In *Snell's Principles of Equity* (1982), for instance, it is stated at p. 540 that the presumption applies when the transaction has been effected between parties in a fiduciary relationship to one another. Others suggest that influence flows naturally from confidential relationships: see *Canadian Encyclopedic Digest (Western)*, Title 67, para. 94. In *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, this issue was canvassed in some detail by Sir Eric Sachs who indicated that the existence of an advisory relationship is relevant to the determination. He went on to say at p. 767:

démontrer que le donataire avait reçu l'avis d'une personne indépendante et était soustrait à l'influence du donataire au moment où la donation a été faite.

^a En l'espèce, il n'y avait pas de preuve d'abus d'influence comme tel et il reste donc à examiner si les rapports entre les parties soulèvent une présomption d'abus d'influence.

^b Quels sont les facteurs qui permettent d'établir l'existence d'une présomption d'abus d'influence? Cette question a suscité une vive controverse au cours des dernières années. Il a été reconnu en *equity* que les opérations conclues par des personnes qui entretiennent certains rapports sont présumées être, jusqu'à preuve du contraire, le produit de relations dans lesquelles une influence est exercée. Sont assimilés à ces rapports, les relations entre le fiduciaire et le bénéficiaire (*Ellis v. Barker* (1871), 7 Ch. App. 104), entre l'avocat et son client (*Wright v. Carter*, [1903] 1 Ch. 27), entre le médecin et son patient (*Mitchell v. Homfray* (1881), 8 Q.B.D. 587), entre les parents et les enfants (*Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380), entre le tuteur et le pupille (*Hylton v. Hylton* (1754), 2 Ves. Sen. 547, 28 E.R. 349), et entre le futur mari et sa fiancée (*In re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289). Toutefois, depuis l'arrêt *Zamet v. Hyman*, [1961] 3 All E.R. 933, on en est venu à accepter que les rapports dans lesquels l'abus d'influence sera présumé ne sont pas limités à des catégories immuables et que chaque cas doit être examiné en fonction de ses propres faits. Depuis lors, tous s'entendent généralement pour dire que l'existence d'une relation «spéciale» doit être établie pour que la présomption soit justifiée, quoiqu'il subsiste un doute sur ce qui constitue une relation «spéciale». Dans *Snell's Principles of Equity* (1982), par exemple, on affirme, à la p. 540, que la présomption s'applique quand l'opération a été conclue entre des parties qui ont des rapports fiduciaires entre elles. D'autres soutiennent que l'influence découle naturellement des rapports de confiance: voir *Canadian Encyclopedic Digest (Western)*, titre 67, par. 94. Dans *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, sir Eric Sachs a étudié cette question à fond; selon lui, l'existence de rapports de consultation est pertinente quant à la solution qu'il convient de retenir. Il ajoute, à la p. 767:

Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.

Sir Eric's comments were approved in *National Westminster Bank Plc. v. Morgan*, *supra*, a case raising the propriety of a bank's involvement in securing a transaction with one of its customers. Lord Scarman explained his difficulty with the existing state of the law at p. 703. To him, words and phrases such as "confidence", "confidentiality" and "fiduciary duty" were inadequate concepts to guide the inquiry and often led justices into a misinterpretation of facts:

There are plenty of confidential relationships which do not give rise to the presumption of undue influence ... and there are plenty of non-confidential relationships in which one person relies upon the advice of another. ...

In expressing his approval of Sir Eric's words, Lord Scarman noted at p. 709 that relationships in which one party develops a dominating influence over another are "infinitely various" and there was no substitute for a "meticulous examination of the facts".

It should be noted, however, that this aspect of Lord Scarman's speech in *Morgan* has met with considerable disfavour in the academic community. A number of commentators have expressed the view that the imprecision of his inquiry is very unhelpful: see Malcolm Cope, "Undue Influence and Alleged Manifestly Disadvantageous Transactions: *National Westminster Bank plc v. Morgan*" (1986), 60 *A.L.J.* 87; David Tiplady, "The Limits of Undue Influence" (1985), 48 *Mod. L. Rev.* 579; and Editorial, "Bank securities allegedly obtained by undue influence", [1985] *J. Bus. L.* 191. Professor Ogilvie in her article, "Undue Influence in the House of Lords" (1986), 11 *Can. Bus. L.J.* 503, on the other hand, favours the open-ended nature of the *Morgan* approach for more teleological reasons. She states that the test permits wider review by higher tribunals.

[TRANSDUCTION] Ce type d'affaire tend à se produire quand une personne se fie aux conseils ou aux avis d'une autre, lorsque cette dernière sait que cette confiance existe et que la personne à qui se fie la première tire, ou peut bien tirer, un avantage de l'opération ou a quelque autre intérêt à ce qu'elle soit conclue.

Les observations de sir Eric ont été approuvées dans *National Westminster Bank Plc. v. Morgan*, précitée, une affaire traitant de l'à-propos du rôle joué par une banque dans la réalisation d'une opération avec l'un de ses clients. Lord Scarman a expliqué les problèmes que posait pour lui l'état existant du droit, à la p. 703. Selon lui, les mots et expressions tels que [TRANSDUCTION] «confiance», «rapports de confiance» et «obligation fiduciaire» constituaient des notions qui étaient inadéquates pour orienter l'examen que devaient faire les juges et qui souvent les amenaient à mal interpréter les faits:

[TRANSDUCTION] Il ne manque pas de rapports de confiance qui ne font pas naître la présomption d'abus d'influence [...] et il ne manque pas de rapports non fondés sur la confiance dans lesquels une personne se fie à l'avis d'une autre ...

En exprimant son approbation des propos de sir Eric, lord Scarman fait observer, à la p. 709, que les rapports dans lesquels une partie finit par exercer une influence dominante sur l'autre sont [TRANSDUCTION] «infiniment variés» et que rien ne peut remplacer un [TRANSDUCTION] «examen méticuleux des faits».

Il y a pourtant lieu de noter que cet aspect du discours de lord Scarman dans l'arrêt *Morgan* a été considérablement réprouvé dans les milieux universitaires. Nombre de commentateurs ont émis l'avis que l'imprécision de l'examen qu'il avait fait n'apportait rien d'utile; voir Malcolm Cope, «Undue Influence and Alleged Manifestly Disadvantageous Transactions: *National Westminster Bank plc v. Morgan*» (1986), 60 *A.L.J.* 87, David Tiplady, «The Limits of Undue Influence» (1985), 48 *Mod. L. Rev.* 579, et Editorial, «Bank securities allegedly obtained by undue influence», [1985] *J. Bus. L.* 191. Dans son article intitulé «Undue Influence in the House of Lords» (1986), 11 *Can. Bus. L.J.* 503, le professeur Ogilvie préfère, par contre, la latitude qu'offre la solution de l'arrêt *Morgan* pour des raisons plus téléologiques. Elle affirme que le critère permet aux

She thinks this is a good thing. Some prefer Sir Eric's view in *Bundy*, *supra* (see Neil Andrews, "Undue Influence and Contracts of Loan", [1985] *Cambridge L.J.* 192), while others think that Lord Denning was on the right track when he suggested in *obiter* in *Bundy* that the courts should adopt the concept of inequality of bargaining power. With appropriate modification to the gifts context, power imbalances are a useful yardstick for equitable intervention: see Charles Reed, "Commentary" (1985), 19 *Law Teacher* 106; and R. D. Taylor, "Commentary" (1985), 19 *Law Teacher* 105. Still others have gone on to provide their own tests for this branch of the presumption inquiry. David Tiplady, *supra*, sees the constant feature in the cases as a circumstance whereby one party is led to believe that he can rely on another for disinterested advice and guidance and that the other will put his welfare first. Finally, Malcolm Cope, *supra*, in similar vein, says the test should be one of reliance upon guidance and advice.

The growing debate in the academic literature over the kind of relationship to which the presumption of undue influence should apply is echoed in the decisions of the English courts following *Morgan*. For instance, in *Midland Bank plc v. Shephard*, [1988] 3 All E.R. 17, and *Simpson v. Simpson*, [1989] Fam. L. 20, a test of "dominating influence" was applied while in *Goldsworthy v. Brickell*, [1987] 2 W.L.R. 133, the Court of Appeal applied the confidentiality test and explicitly rejected the domination approach, stating at p. 153:

It is natural to presume that out of that trust and confidence grows influence. But it would run contrary to human experience to presume that every patient is dominated by his doctor or every client by his solicitor. Even in just such cases must be rare. . . . it is not the function of a presumption to presume the generally improbable.

tribunaux supérieurs de procéder à un examen plus large. Elle estime que c'est une bonne chose. Certains marquent leur préférence pour le point de vue exprimé par sir Eric dans l'arrêt *Bundy*, précité (voir Neil Andrews, «Undue Influence and Contracts of Loan», [1985] *Cambridge L.J.* 192), tandis que d'autres estiment que lord Denning était sur la bonne voie quand il a affirmé, dans une opinion incidente dans l'arrêt *Bundy*, que les tribunaux devraient adopter le concept de l'inégalité du pouvoir de négociation. Si on lui apporte les modifications qui s'imposent dans le contexte des donations, le déséquilibre des pouvoirs constitue une mesure utile pour apprécier l'opportunité d'une intervention fondée sur l'*equity*: voir Charles Reed, «Commentary» (1985) 19 *Law Teacher* 106, et R. D. Taylor, «Commentary» (1985), 19 *Law Teacher* 105. Puis, d'autres encore ont énoncé leurs propres critères relativement à cet aspect de l'examen de la présomption. Pour David Tiplady, précité, la caractéristique constante de ces affaires est le fait qu'une des parties est amenée à croire qu'elle peut se fier à une autre pour obtenir un avis et des conseils désintéressés, alors que l'autre fait primer son propre intérêt. Enfin, Malcolm Cope, précité, affirme, dans le même esprit, que le critère applicable devrait être celui de la confiance dans des avis et conseils.

Le débat qui s'amplifie dans la doctrine au sujet du genre de relations auquel devrait s'appliquer la présomption d'abus d'influence se répercute dans les décisions des tribunaux anglais postérieures à l'arrêt *Morgan*. Par exemple, dans *Midland Bank plc v. Shephard*, [1988] 3 All E.R. 17, et dans *Simpson v. Simpson*, [1989] Fam. L. 20, un critère de [TRADUCTION] «l'influence dominante» a été appliqué, tandis que, dans *Goldsworthy v. Brickell*, [1987] 2 W.L.R. 133, la Cour d'appel a appliqué le critère des rapports de confiance et a rejeté catégoriquement la théorie de la domination, disant, à la p. 153:

[TRADUCTION] Il est naturel de présumer que l'influence découle de cette confiance. Mais l'expérience enseigne qu'au contraire l'on ne peut pas présumer que tout patient est dominé par son médecin ou tout client par son avocat. Même si on le dit pour plaisanter, ces cas doivent être rares [...] une présomption n'a pas pour fonction de présumer ce qui est généralement improbable.

See: Brenda Dale, "Undue Influence Recent Developments" (1989), 53 *Conv. & Prop. Law.* 63.

Voir Brenda Dale, «Undue Influence: Recent Developments» (1989), 53 *Conv. & Prop. Law.* 63.

Similar debate and disagreement has arisen over another factor thought to be relevant in establishing a presumption of undue influence. At the Court of Appeal level in *Morgan* the two-judge panel agreed that it was not necessary for a plaintiff invoking the presumption to show that the transaction entered into worked to his or her disadvantage. Dunn L.J. acknowledged that the decided cases all involved instances of disadvantage to the party influenced but went on to state that considerations of public policy required that transactions brought about through the possible abuse of a confidential relationship should not to be permitted by a court of equity to stand. Slade L.J. agreed, adding that this did not mean that proof of a fair transaction was irrelevant. In his opinion, such proof could in fact make it easier for a party to rebut the presumption once applied.

The House of Lords, however, specifically overruled the Court of Appeal on this point. Lord Scarman stated in his speech at p. 704:

Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.

The requirement that the plaintiff show manifest disadvantage was subsequently applied even to the first class of undue influence cases, i.e., those in which actual undue influence must be affirmatively shown by the person allegedly influenced: see *Bank of Credit & Commerce International S.A. v. Aboody*, [1989] 2 W.L.R. 759 (C.A.).

Une controverse semblable s'est élevée au sujet d'un autre facteur jugé pertinent pour établir l'existence d'une présomption d'abus d'influence. En Cour d'appel, dans l'affaire *Morgan*, les deux juges sont tombés d'accord pour dire qu'il n'était pas nécessaire que le demandeur qui invoque la présomption démontre que l'opération conclue l'a désavantagé. Le lord juge Dunn a reconnu que, dans tous les précédents, la partie influencée avait été désavantagée, mais il a ajouté que, pour des considérations d'intérêt public, une cour d'*equity* ne devrait pas sanctionner les opérations réalisées par suite d'un abus possible de rapports de confiance. Le lord juge Slade a souscrit à cette opinion, ajoutant que cela ne signifiait pas que la preuve de la justesse de l'opération n'était pas pertinente. À son avis, cette preuve pouvait, de fait, faciliter à une partie la tâche de réfuter la présomption qui a été appliquée.

La Chambre des lords a cependant infirmé l'arrêt de la Cour d'appel sur ce point précis. Dans son discours, lord Scarman dit, à la p. 704:

[TRADUCTION] Peu importe la nature juridique de l'opération, il ressort de la jurisprudence que celle-ci doit représenter un désavantage suffisamment sérieux pour nécessiter que l'on produise une preuve réfutant la présomption que, vu les circonstances des rapports entre les parties, cette opération résultait d'un abus d'influence. Donc, à mon sens, la Cour d'appel a commis une erreur de droit en décidant que la présomption d'abus d'influence peut découler de la preuve des rapports entre les parties sans que l'on prouve également que l'opération elle-même était répréhensible du fait qu'on avait tiré profit de la personne influencée, ce qui ne peut s'expliquer, faute de preuve contraire, que par l'abus d'influence commis pour la conclure.

L'exigence que le demandeur démontre l'existence d'un désavantage manifeste a été appliquée, par la suite, même aux cas d'un abus d'influence rentrant dans la première catégorie, c'est-à-dire ceux où la personne qui aurait été influencée doit établir qu'effectivement elle a été victime d'un abus d'influence: voir *Bank of Credit & Commerce International S.A. v. Aboody*, [1989] 2 W.L.R. 759 (C.A.).

The requirement that a plaintiff demonstrate manifest disadvantage has come under heavy criticism. Some commentators have not so much attacked the doctrine itself but have taken a dim view of its application in *Aboody*, *supra*, given the facts: see M. J. Dixon, "The Limits of Undue Influence Explained", [1989] *Cambridge L.J.* 359; and Brenda Dale, "Undue Influence and Manifest Disadvantage" (1988), 52 *Conv. & Prop. Law.* 441. Others seem to accept the relevance of a showing of manifest disadvantage at the stage of invoking the presumption but suggest that the requirement was cast too narrowly in *Morgan*, *supra*. For example, Tiplady, *supra*, has questioned Lord Scarman's objective examination of disadvantage. Citing *Re Brocklehurst*, [1978] 1 All E.R. 767 (C.A.), he observes that courts in the past have also recognized that disadvantage may have a subjective element to it. In like manner, Professor Ogilvie, *supra*, seems to accept the idea that disadvantage to the donor is relevant but would go further and say that benefit to the donee is equally important: see also Neil Andrews, *supra*. Additionally, Tiplady points out that when considering this question in the context of gifts as opposed to commercial transactions the requirement of disadvantage is always met because the nature of a gift is such that adequate consideration is never an issue.

This Court is not, of course, bound to follow decisions of the House of Lords. Nor is it, strictly speaking, necessary for us for the purposes of the present appeal to examine all aspects of the *Morgan* decision and in particular the ruling of the House of Lords respecting the requirement of a showing of manifest disadvantage in cases involving commercial transactions. It is my view, however, that the resolution of this appeal should proceed from first principles and this necessarily leads us into a consideration of the law as set out in *Morgan*. I believe we should take heed of the debate which followed *Morgan* and begin by asking ourselves what purpose the doctrine of undue influence was supposed to serve.

L'exigence que le demandeur démontre l'existence d'un désavantage manifeste a fait l'objet de critiques virulentes. Certains commentateurs n'ont pas tant attaqué la théorie elle-même que vu d'un mauvais œil son application dans l'arrêt *Aboody*, précité, compte tenu des faits de l'espèce: voir M. J. Dixon, «The Limits of Undue Influence Explained», [1989] *Cambridge L.J.* 359, et Brenda Dale, «Undue Influence and Manifest Disadvantage» (1988), 52 *Conv. & Prop. Law.* 441. D'autres semblent accepter qu'il est utile de démontrer l'existence d'un désavantage manifeste au moment où la présomption est invoquée, mais ils affirment que l'exigence a été formulée de manière trop stricte dans l'arrêt *Morgan*, précité. Par exemple, Tiplady, précité, a mis en doute l'examen objectif du désavantage que préconise lord Scarman. Citant *Re Brocklehurst*, [1978] 1 All E.R. 767 (C.A.), il fait remarquer que les tribunaux dans le passé ont également reconnu que le désavantage pouvait comporter un aspect subjectif. De la même façon, le professeur Ogilvie, précité, semble accepter l'idée que le désavantage subi par le donateur est pertinent, mais elle irait plus loin et affirmerait que l'avantage tiré par le donataire est aussi important: voir également Neil Andrews, précité. De plus, Tiplady souligne que, lorsqu'on étudie la question dans le contexte des donations par opposition à celui des opérations commerciales, on satisfait toujours à l'exigence du désavantage parce que la nature de la donation est telle que la question de la contrepartie suffisante ne se pose jamais.

Notre Cour n'est évidemment pas tenue de suivre les décisions de la Chambre des lords. Et, à proprement parler, il n'est pas nécessaire non plus, pour les fins du présent pourvoi, d'examiner tous les aspects de l'arrêt *Morgan* et en particulier la décision de la Chambre des lords concernant l'exigence de démontrer un «désavantage manifeste» dans les cas d'opérations commerciales. J'estime cependant que la solution du présent pourvoi devrait venir des premiers principes, ce qui nous amène nécessairement à un examen du droit établi dans l'arrêt *Morgan*. Je crois que nous devrions tenir compte du débat qu'a provoqué l'arrêt *Morgan* et commencer par nous demander quel but la théorie de l'abus d'influence était censée viser.

1991 CanLII 69 (SCC)

Some commentators clearly believe that the doctrine of undue influence was meant only to curtail abuses of trust or confidence which resulted in significant and measurable disadvantage to the person influenced. Thus, Charles P. Reed, "Comment" (1984), 18 *Law Teacher* 132, points out that the law has no business meddling with fair bargains. In commenting on the "paternalism" of the Court of Appeal decision in *Morgan*, he states at p. 134:

It is submitted that by claiming the right to set aside a contract even where there is no manifest disadvantage or oppression sustained by the party subject to the influence of another, the courts are open to the charge of needlessly destroying honest and reasonable bargains. It is suggested that the reason for this unfortunate situation lies in the judgments of certain nineteenth-century cases in which the principles of undue influence were too widely stated. Those cases include *Tate v. Williamson* (1866) L.R. 2 Ch.App.55 and in particular *Allcard v. Skinner* (1887) 36 Ch.D. 145, which was a very special and unusual case of a person encouraged to take a vow of poverty by a spiritual mentor. As Cheshire & Fifoot point out: "It may well be that the origin of the strict law relating to undue influence is the hostility which the courts have always shown towards spiritual tyranny" (*Law of Contract*, 10th ed. at p. 281).

For others the doctrine of undue influence aims not at preventing "bad bargains" but at redressing abuses of trust, confidence or power. For these analysts what this branch of equity seeks to do is control the process rather than the outcome of transactions. David Tiplady argues that the law regards certain relationships "as transcending mere commercialism" (at p. 582), and suggests that it is the protection of the integrity or sanctity of these bonds that underlies the doctrine. And in Canada, Professor Ogilvie emphasizes that it is abuse to which the law directs itself and manifest disadvantage (or its absence) is perceived only as evidence going to whether or not an abuse has actually occurred. She says at p. 511:

Undue influence is designed to protect more than mere commercial interests; rather it is meant to protect the integrity of the weak or the momentarily weak from entering into disadvantageous transactions, however measured.

Certains commentateurs estiment nettement que la théorie de l'abus d'influence ne vise qu'à réprimer les abus de confiance qui entraînent pour la personne influencée un désavantage important et mesurable. Ainsi, Charles P. Reed, dans «Comment» (1984), 18 *Law Teacher* 132, souligne que la loi n'a pas à se mêler des marchés équitables. À propos du «paternalisme» dont fait preuve la Cour d'appel dans l'arrêt *Morgan*, il dit, à la p. 134:

[TRADUCTION] On fait valoir qu'en revendiquant le droit d'annuler un contrat même en l'absence de désavantage ou d'oppression manifestes subis par la partie soumise à l'influence d'autrui, les tribunaux s'exposent au reproche d'anéantir inutilement des marchés honnêtes et raisonnables. On laisse entendre que ce malheureux état de choses est imputable à certains arrêts du XIX^e siècle dans lesquels les principes de l'abus d'influence ont été exposés en termes trop larges. Ce sont notamment les arrêts *Tate v. Williamson* (1866) L.R. 2 Ch.App.55 et, en particulier, *Allcard v. Skinner* (1887) 36 Ch.D. 145, lequel portait sur le cas très particulier et exceptionnel d'une personne encouragée par son mentor spirituel à prononcer un vœu de pauvreté. Comme l'ont fait observer Cheshire et Fifoot, «[i]l se peut bien que les règles de droit strictes touchant l'abus d'influence aient leur origine dans l'hostilité qu'ont toujours manifestée les tribunaux envers la tyrannie spirituelle» (*Law of Contract*, 10^e éd., à la p. 281).

Pour d'autres, la théorie de l'abus d'influence vise non pas à prévenir les «mauvais marchés», mais à réparer les abus de confiance ou d'autorité. Pour ces analystes, cette branche de l'*equity* a pour objet de contrôler le processus plutôt que le résultat des opérations. David Tiplady soutient qu'au regard de la loi, certaines relations [TRADUCTION] «transcendent le simple mercantilisme» (à la p. 582) et il affirme que le fondement de la théorie réside dans la protection de l'intégrité ou de l'inviolabilité de ces liens. Et au Canada, le professeur Ogilvie souligne que ce que vise la loi, c'est l'abus et que le désavantage manifeste (ou son absence) n'est considéré que comme un élément de preuve permettant de décider s'il y a eu réellement abus. Elle dit, à la p. 511:

[TRADUCTION] La théorie de l'abus d'influence est conçue pour protéger plus que de simples intérêts commerciaux; elle vise plutôt à protéger l'intégrité du faible ou de la personne faible momentanément contre la conclusion d'opérations désavantageuses, peu importe la manière de les apprécier.

1991 CanLII 69 (SCC)

Some support for professor Ogilvie's view can be found in the existing jurisprudence. This was unquestionably the opinion of Cotton L.J. in the seminal case of *Allcard v. Skinner* when he said at p. 93 that in cases where the presumption applies the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, "but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused." So also was the view of Lord Eldon L.C. in *Huguenin v. Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526, at p. 300 and p. 536, respectively: "The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced." See also *Csada v. Csada*, [1985] 2 W.W.R. 265 (Sask. C.A.). Finally, the same approach has been adopted in Australia: see *Johnson v. Buttress* (1936), 56 C.L.R. 113 (H.C.), discussed in Malcolm Cope, *supra*, and Malcolm Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985).

In my view, neither the result nor process focused approach to the doctrine of undue influence fully captures the true purport of this equitable rule. I say this primarily because the doctrine applies to a wide variety of transactions from pure gifts to classic contracts. In the case of the former it seems to make sense that the process leading up to the gifting should be subject to judicial scrutiny because there is something so completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity. With respect to contractual relations, however, it has long been the view of the courts that the sanctity of bargains should be protected unless they are patently unfair. I cannot think of any situation in which a contract has been rescinded on the sole basis that the process leading up to the bargain was somehow tainted. Something more, such as detrimental reliance, must be shown. It seems to me, therefore, that whatever the measure of undue influence this Court adopts, it must be sufficiently flexible to account for a wide variety of transactions.

La jurisprudence existante appuie, dans une certaine mesure, le point de vue du professeur Ogilvie. C'est incontestablement l'opinion émise par le lord juge Cotton dans l'arrêt fondamental *Allcard v. Skinner*, quand il dit, à la p. 93, que dans les cas où la présomption s'applique, la cour intervient, non parce qu'un acte répréhensible a réellement été commis par le donataire, [TRADUCTION] «mais pour des raisons d'intérêt public et pour empêcher que l'on abuse des relations qui existent entre les parties et de l'influence qui en découle». C'est aussi l'avis qu'exprime le lord chancelier Eldon dans l'arrêt *Huguenin v. Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526, aux pp. 300 et 536 respectivement: [TRADUCTION] «Il ne s'agit pas de décider si elle savait ce qu'elle faisait, avait fait ou comptait faire, mais d'où procédait son intention». (Voir également *Csada v. Csada*, [1985] 2 W.W.R. 265 (C.A. Sask.). En dernier lieu, la même solution a été adoptée en Australie: voir *Johnson v. Buttress* (1936), 56 C.L.R. 113 (H.C.), étudié par Malcolm Cope, précité, et Malcolm Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985).

Quant à moi, ni la façon d'aborder la théorie de l'abus d'influence, axée sur le résultat, ni celle axée sur le processus ne font ressortir parfaitement le véritable objectif de cette règle d'*equity*. Je dis cela principalement parce que la théorie s'applique à une grande diversité d'opérations, allant des simples donations aux contrats classiques. Dans le premier cas, il semble logique que le processus qui aboutit au don soit assujéti à l'examen judiciaire, parce que la sanction judiciaire de la générosité forcée ou obtenue frauduleusement revêt un aspect essentiellement répugnant. En ce qui a trait aux relations contractuelles, toutefois, les tribunaux ont décidé depuis longtemps qu'il y avait lieu de protéger l'inviolabilité des marchés sauf s'ils étaient manifestement abusifs. Je ne puis me rappeler de cas où un contrat a été résilié pour la seule raison que le processus ayant abouti au marché était vicié de quelque manière. Il faut établir quelque chose de plus, comme la confiance préjudiciable. Il me semble donc que, peu importe la mesure d'abus d'influence retenue par notre Cour, elle doit être assez souple pour s'appliquer à une grande diversité d'opérations.

What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in *Morgan*, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in *Goldsworthy v. Brickell*, *supra*, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing *per se* reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

What of the controversial requirement of "manifest disadvantage" articulated in *Morgan*? In my view, the critics were correct in pointing out that this test, while perhaps appropriate in a purely commercial setting, limits the doctrine of undue influence too much. In the case of gifts or bequests, for example, it makes no sense to insist that the donor or testator prove that their generosity placed them at a disadvantage. While one could say that giving away anything is in a literal sense *ipso facto* disadvantageous, it seems to me that this is a wholly unrealistic test to apply to a gift. A donor who wishes to make a gift is not really disadvantaged by doing so. On the contrary, his or her own purpose is served by doing so. Disadvantage is accordingly, to my mind, not a particularly appropriate concept for general application to the wide variety

Quelle doit être alors la nature de la relation qui fera naître la présomption d'abus d'influence? Ayant à l'esprit l'arrêt *Morgan*, les critiques dont il a fait l'objet et les divergences de vues qu'il a suscitées dans la jurisprudence, je suis d'avis que des notions comme la «confiance» ne font pas ressortir suffisamment l'essence des rapports qui peuvent faire naître la présomption. En toute déférence, je partage l'avis de lord Scarman selon lequel bien des rapports de confiance ne font pas naître la présomption tout comme bien des rapports non fondés sur la confiance la font naître. Il me semble plutôt que, lorsqu'on parle d'«influence», on veut dire en fait la capacité d'une personne de dominer la volonté d'une autre, que ce soit par manipulation, par contrainte ou par pur, mais subtil, abus d'autorité. Je ne partage pas l'avis de la Cour d'appel dans l'arrêt *Goldsworthy v. Brickell*, précité, selon lequel l'expérience humaine enseigne que les rapports de confiance ne sont pas caractérisés par la domination. Dominer la volonté d'autrui signifie simplement exercer sur lui ou elle une influence persuasive. La capacité d'exercer pareille influence peut découler d'un rapport de confiance, mais elle peut aussi résulter d'autres relations. Le fait est qu'il n'y a rien de répréhensible en soi à ce que des personnes ayant des rapports de confiance exercent une influence sur leurs bénéficiaires, voire commettent un abus d'influence à leur endroit. Tout dépend de leur mobile et de l'objectif qu'elles cherchent à réaliser par ce moyen.

Qu'en est-il de l'exigence controversée du «désavantage manifeste» formulée dans l'arrêt *Morgan*? À mon avis, les critiques ont eu raison de souligner que ce critère, quoiqu'il puisse convenir dans un contexte purement commercial, restreint trop la théorie de l'abus d'influence. Dans le cas des donations ou des legs, par exemple, il n'est pas du tout logique d'insister pour que le donateur ou le testateur prouve que sa générosité l'a désavantagé. Certes, l'on pourrait soutenir que toute libéralité, au sens littéral, est par le fait même désavantageuse, mais il me semble que ce critère est tout à fait irréaliste dans le cas des donations. Le donateur qui veut faire un don n'est pas vraiment désavantagé s'il le fait. Au contraire, il atteint, ce faisant, son propre objectif. Par conséquent, le désavantage n'est, à mon sens, pas une notion qu'il convient

of situations to which the doctrine of undue influence could conceivably apply.

What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships, which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. From the court's point of view this added requirement is justified when dealing with commercial transactions because, as already mentioned, a court of equity, even while tempering the harshness of the common law, must accord some degree of deference to the principle of freedom of contract and the inviolability of bargains. Moreover, it can be assumed in the vast majority of commercial transactions that parties act in pursuance of their own self-interest. The mere fact, therefore, that the plaintiff seems to be giving more than he is getting is insufficient to trigger the presumption.

By way of contrast, in situations where consideration is not an issue, e.g., gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

particulièrement d'appliquer de manière générale à la grande diversité de cas susceptibles de donner lieu à l'application de la théorie de l'abus d'influence.

^a Que doit donc prouver le demandeur pour que joue la présomption d'abus d'influence? À mon avis, l'examen devrait d'abord porter sur les rapports entre les parties. La première question qu'il faut trancher dans chaque cas est de savoir si la relation elle-même comporte intrinsèquement une possibilité de domination. Ce critère vise les rapports qui sont déjà reconnus, en *equity*, comme donnant lieu à la présomption, tels ceux de l'avocat et du client, des parents et des enfants, du tuteur et du pupille, ainsi que d'autres rapports de dépendance qu'on ne saurait facilement ranger dans une catégorie.

^b Une fois établi le type de relation requis pour justifier la présomption, il faut ensuite examiner la nature de l'opération. S'il s'agit d'opérations commerciales, je crois que, le demandeur devrait être tenu de démontrer, outre l'existence des rapports requis entre les parties, le caractère inéquitable du contrat, en ce sens qu'il a été désavantagé injustement ou que le défendeur a été avantagé injustement. Du point de vue de la cour, cette exigence supplémentaire est justifiée en matière commerciale, car, je le répète, une cour d'*equity*, même lorsqu'elle tempère la rigueur de la common law, doit respecter dans une certaine mesure le principe de la liberté de contracter et de l'inviolabilité des marchés. De surcroît, on peut présumer, dans la très grande majorité des opérations commerciales, que les parties agissent dans leur propre intérêt. Par conséquent, le simple fait que le demandeur semble donner plus que ce qu'il reçoit est insuffisant pour faire jouer la présomption.

^c Par contre, dans les cas où une contrepartie n'est pas en cause, par exemple, dans le cas des donations et des legs, il me semble tout à fait inopportun d'obliger le demandeur à prouver que le résultat constitue un désavantage ou un avantage injuste. En pareil cas, le souci de la cour est que ces libéralités ne soient pas entachées d'un vice. Il suffit donc d'établir la présence d'une relation de domination.

Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v. Hyman*, *supra*, at p. 938, the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.

In the present case neither the trial judge nor the Court of Appeal went into very much detail as to why the presumption of undue influence was properly applicable given the nature of the relationship between Mrs. Goodman and her older brothers. They focused instead on the details of the execution of the trust agreement itself. A review of the circumstances between the deceased and her brothers at the relevant time does, however, disclose that the relationship between them was such that a potential existed for the brothers to exercise a persuasive influence over their sister. *Halsbury's Laws of England* (4th ed. 1977), vol. 18, para. 330, at p. 149 designates the relevant time when it identifies the class of case in which a presumption of undue influence arises:

330. . . . Secondly, there are those cases in which the relationship between the donor and the donee at the time of or shortly before the making of the gift has been such as to raise a presumption that the donee had influence over the donor. In this second class of case the onus is on the donee to rebut the presumption by showing that the donor made the gift only after full, free and informed thought about it. [Emphasis added.]

It is true that the trial judge found as a fact that there was very little contact between Mrs. Goodman and her brothers over the years prior to the death of their mother. Uncontradicted evidence disclosed that

Une fois que le demandeur a établi que les circonstances sont de nature à donner lieu à l'application de la présomption, c'est-à-dire que, indépendamment des détails de l'opération contestée, la nature des rapports entre le demandeur et le défendeur étaient tels qu'il y avait possibilité d'influence, il incombe dès lors au défendeur de la réfuter. Comme l'a dit le maître des rôles, lord Evershed, dans l'arrêt *Zamet v. Hyman*, précité, à la p. 938, il faut démontrer que le demandeur a conclu l'opération [TRADUCTION] «après mûre réflexion, de son plein gré et en connaissance de cause». Essentiellement, cela peut signifier qu'il faut démontrer qu'aucune influence n'a été exercée dans cette opération particulière, que le demandeur a reçu l'avis d'une personne indépendante, et ainsi de suite. De plus, je partage le point de vue des auteurs qui affirment que l'importance du désavantage ou de l'avantage est une preuve pertinente pour décider si une influence a été exercée.

En l'espèce, ni le juge de première instance ni la Cour d'appel n'ont exposé de façon vraiment détaillée les raisons pour lesquelles la présomption d'abus d'influence était à bon droit applicable aux rapports entre M^{me} Goodman et ses frères aînés. Ils se sont plutôt concentrés sur les détails de la signature du contrat de fiducie lui-même. L'examen de la situation de la défunte et de ses frères à l'époque pertinente révèle cependant que les rapports qui existaient entre eux étaient tels qu'il y avait possibilité que ces derniers exercent une influence persuasive sur leur sœur. *Halsbury's Laws of England* (4^e éd. 1977), vol. 18, par. 330, à la p. 149, établit le moment pertinent lorsqu'il identifie la catégorie de cas où prend naissance une présomption d'abus d'influence:

[TRADUCTION] 330. . . . Deuxièmement, il y a les cas où les rapports entre le donateur et le donataire au moment de la donation ou peu avant ont été tels qu'ils donnent naissance à la présomption que le donataire avait une influence sur le donateur. Dans cette seconde catégorie de cas, il incombe au donataire de réfuter la présomption en démontrant que le donateur a fait la donation seulement après réflexion complète, libre et éclairée. [Je souligne.]

Il est exact que le juge de première instance a tiré la conclusion de fait qu'il y avait eu très peu de contacts entre M^{me} Goodman et ses frères au cours des années qui ont précédé le décès de leur mère. La

Mrs. Goodman had a history of mental health problems and that she suffered from both bipolar affective disorder and a personality disorder which at times made her domineering and aggressive but at other times withdrawn and helpless depending on her mood swings. The brothers were aware that their sister's condition made her a difficult person to deal with and affected her ability to act responsibly on her own behalf and to make an adequate living for herself. They knew that their mother had shouldered the bulk of responsibility for their sister and that without her help they would likely have to step in to assist. Even although the brothers were successful businessmen who were significantly better off than their sister, they regarded her as a potential liability and sought to avoid any financial responsibility for her. Indeed, it was the suspicion that they might be placed in a position of responsibility for their sister that prompted Jack to play a role in assisting their mother in the preparation of her first will the terms of which ensured that this would not happen.

It was when the mother died and the brothers discovered that she had executed a second will which removed the protections contained in the first one that the real potential for the brothers to influence their sister arose. The evidence discloses that Mrs. Goodman had sought the assistance of her brothers to see her through the emotional crisis of the death of her mother, her primary caregiver. Communications between Mrs. Goodman and her brothers increased during this period. They knew she needed support and protection. She consulted with them as to what the best arrangement would be. The brothers were well aware that their sister had reposed her trust and confidence in them to help her straighten out her legal and financial affairs. It was a situation where the brothers knew their sister was vulnerable, knew that she was relying upon them to help her and knew that they had interests of their own which did not necessarily coincide with hers. Thus, apart from the particular circumstances surrounding the execution of the trust agreement, the relationship between the

preuve non contredite montre que M^{me} Goodman avait souffert de troubles mentaux et qu'elle était atteinte de trouble affectif bipolaire et d'un problème de personnalité, ce qui la portait à être tantôt dominatrice et agressive, tantôt renfermée et impuissante, selon son humeur. Les frères savaient que l'état de leur sœur en faisait une personne avec qui il était difficile de traiter et que son état réduisait sa capacité d'agir de manière responsable pour son propre compte et de bien veiller à sa propre subsistance. Ils savaient que leur mère prenait en charge la majeure partie de la responsabilité de leur sœur et que sans son aide ils devraient vraisemblablement intervenir pour prêter assistance. Même si les frères étaient des hommes d'affaires prospères dont la situation financière était sensiblement meilleure que celle de leur sœur, ils la considéraient comme une charge potentielle et cherchaient à éviter toute responsabilité financière à son égard. En fait, c'est la perspective qu'ils pourraient être placés dans une situation de responsabilité à l'égard de leur sœur qui a donné à Jack l'idée d'aider leur mère dans la préparation de son premier testament qui assurait que cela ne se produirait pas.

C'est lorsque la mère est décédée et que les frères ont découvert qu'elle avait fait un deuxième testament qui supprimait les protections contenues dans le premier qu'est née la possibilité réelle que les frères influencent leur sœur. La preuve révèle que M^{me} Goodman avait demandé l'aide de ses frères pour traverser la crise émotionnelle causée par la mort de sa mère, sa principale dispensatrice de soins. Les communications entre M^{me} Goodman et ses frères ont été plus fréquentes pendant cette période. Ils savaient qu'elle avait besoin d'assistance et de protection. Elles les a consultés pour savoir quel serait le meilleur arrangement. Les frères savaient bien que leur sœur avait mis sa confiance en eux pour l'aider à redresser ses affaires juridiques et financières. C'était une situation dans laquelle les frères savaient que leur sœur était vulnérable, qu'elle comptait sur eux pour l'aider et que leurs propres intérêts ne coïncidaient pas nécessairement avec les siens. Ainsi, abstraction faite des circonstances particulières de la conclusion de l'acte de fiducie, les rapports entre la défunte et les

deceased and the appellants was such that it could have afforded them the potential to exercise undue influence over her.

Since the trust instrument is unquestionably more akin to a gift or bequest than a commercial transaction, the existence of the required relationship without more is sufficient to trigger the presumption. It remains, therefore, to be determined whether the presumption has been rebutted. In making that determination it is necessary to conduct a "meticulous examination of the facts" (*per* Lord Scarman in *Morgan*, *supra*, at p. 709) and it is significant in that connection that both the appellants and the respondents challenge the findings of fact made by the lower courts.

Solicitor Client Privilege

The trial judge's admission of the evidence of Mr. Pearce, the solicitor who drafted the trust agreement, is challenged by the respondents. Mr. Pearce's evidence is crucial in this case for two reasons. First, it may help to ascertain what the precise circumstances surrounding the deceased's entry into the trust agreement were. And secondly, this evidence is vital to the determination of whether Mrs. Goodman received independent advice concerning the proposed transaction.

At trial Hutchinson J. admitted Mr. Pearce's evidence and justified doing so on two distinct grounds. First, he held that the circumstances of this case were analogous to the wills context where a recognized class of exceptions to the rule regarding the inadmissibility of communications between solicitor and client has been well established. At pages 223-24 of his reasons he said:

I can find no logical reason why the exception to the solicitor-client privilege that exists in cases where the succession of property turns on the validity of a will would not apply to the present case. In the present case, the trust agreement entered into by Mrs. Goodman is being challenged by the plaintiff, who claims that undue influence was placed upon Mrs. Goodman to execute the agreement. There really is no distinction between an allegation of undue influence when it arises in the case of the execution of a will as opposed to the execution of a trust document when in each case the testator or the settlor has since died. In both cases, it is the duty of the court to ascertain the true intention and the capacity of

appellants étaient de nature à leur donner la possibilité de commettre un abus d'influence à son endroit.

Comme l'acte de fiducie participe incontestablement davantage d'une donation ou d'un legs que d'une opération commerciale, l'existence de la relation requise sans plus est suffisante pour faire jouer la présomption. Il reste donc à déterminer si la présomption a été réfutée. Pour en décider, il est nécessaire de procéder à «un examen méticuleux des faits» (lord Scarman, dans l'arrêt *Morgan*, précité, à la p. 709), et il importe de noter sur ce point que les appellants et les intimés contestent les constatations de fait des tribunaux d'instance inférieure.

Le secret professionnel de l'avocat

Les intimés contestent l'admission par le juge de première instance du témoignage de M^e Pearce, l'avocat qui a rédigé l'acte de fiducie. Son témoignage est crucial en l'espèce pour deux raisons. Premièrement, il peut aider à faire la lumière sur les circonstances précises de la conclusion du contrat de fiducie par la défunte. Deuxièmement, ce témoignage est déterminant quant à la question de savoir si M^{me} Goodman a reçu l'avis d'une personne indépendante sur l'opération projetée.

Au procès, le juge Hutchinson a admis le témoignage de M^e Pearce et a fourni deux motifs distincts de le faire. En premier lieu, il a décidé que les circonstances de l'espèce étaient analogues au contexte des testaments, dans lequel il est bien établi qu'il existe une catégorie d'exceptions à la règle de l'inadmissibilité des communications entre l'avocat et son client. Il dit, aux pp. 223 et 224 de ses motifs:

[TRADUCTION] Je ne vois aucune raison logique de ne pas tenir pour applicable en l'espèce l'exception au privilège du secret professionnel de l'avocat qui est reconnue dans les cas où la transmission du patrimoine légué dépend de la validité du testament. En l'espèce, le contrat de fiducie passé par M^{me} Goodman est attaqué par le demandeur qui prétend que M^{me} Goodman a fait l'objet d'un abus d'influence visant à lui faire signer ce contrat. Il n'y a vraiment aucune différence entre une allégation d'abus d'influence relative à la signature d'un testament et celle relative à la signature d'un contrat de fiducie, si le testateur ou le disposant est décédé, puisque dans l'un et l'autre cas, il incombe à la cour de s'as-

the deceased. In my view, it is in both the interest of the client and the interest of justice that the relevant evidence of the solicitor, Mr. Pearce, be admitted in evidence.

In the alternative, he found that even if no analogy could be drawn to contests over succession rights, the privilege that existed between Mrs. Goodman and Mr. Pearce had been waived. At page 224 he said:

In the present case, the plaintiffs are legal representatives of the deceased Mrs. Goodman. By raising no objection to the testimony of Mr. Pearce and by electing to extensively cross-examine him, the plaintiffs have impliedly waived any solicitor-client privilege that might have existed between Mr. Pearce and Mrs. Goodman. It is obvious that the defendants who were charged with the responsibility of carrying out the terms of the trust for the benefit of the ultimate beneficiaries named therein have also waived the solicitor-client privilege on behalf of such beneficiaries by the fact of their having called Mr. Pearce as a witness.

In the Court of Appeal Hetherington J.A. expressed her concurrence with Hutchinson J.'s first ground but made no mention of his alternative finding. The majority did not address the evidentiary issue.

In this Court the respondents attacked this aspect of the trial decision. They maintain that the trial judge erred in drawing an analogy between the wills exception and this case and that the general rule as to solicitor-client privilege should have been applied. To them Mr. Pearce as solicitor should not have been permitted to testify and the court itself should have put a stop to his evidence. They say, moreover, that if the privilege should have enured to them, they did not waive it and if it enured to the appellants, then the appellants were precluded from asserting that Mrs. Goodman was Mr. Pearce's only client.

It has long been recognized that communications between solicitor and client are protected by a privilege against disclosure. The classic statement of the rationale behind this rule was made over one hundred

surer de l'intention véritable et de la capacité de la personne décédée. À mon avis, il y va autant de l'intérêt du client que celui de la justice que le témoignage pertinent de l'avocat, M^e Pearce, soit admis en preuve.

^a Subsidiairement, il a conclu que, même s'il n'était pas possible d'établir une analogie avec les litiges en matière successorale, il y avait eu renonciation au secret professionnel pour ce qui est des communications entre M^{me} Goodman et M^e Pearce. Il dit, à la p. 224:

^b [TRADUCTION] En l'espèce, les demandeurs sont les représentants successoraux de la défunte M^{me} Goodman. En ne s'opposant pas au témoignage de M^e Pearce et en choisissant de le soumettre à un contre-interrogatoire détaillé, les demandeurs ont implicitement renoncé au privilège du secret professionnel de l'avocat qui aurait pu exister à l'égard des communications entre M^e Pearce et M^{me} Goodman. De toute évidence, les défendeurs, à qui il incombait d'exécuter les clauses de la fiducie au profit des bénéficiaires ultimes nommés dans celle-ci, ont également renoncé au privilège du secret professionnel de l'avocat au nom de ces bénéficiaires en assignant M^e Pearce comme témoin.

^c En Cour d'appel, le juge Hetherington a souscrit au premier motif donné par le juge Hutchinson, mais elle n'a pas fait référence à son autre conclusion. La majorité ne s'est pas arrêtée à la question de la preuve.

^d Devant notre Cour, les intimés ont contesté cet aspect de la décision du juge de première instance. Ils affirment qu'il a commis une erreur en établissant une analogie entre l'exception touchant les testaments et la présente affaire et que la règle générale du secret professionnel de l'avocat aurait dû s'appliquer. Pour eux, il n'aurait pas fallu permettre à M^e Pearce de témoigner comme avocat et le tribunal lui-même aurait dû mettre fin à son témoignage. Ils ajoutent que, pour autant que le privilège aurait pu être invoqué à leur bénéfice, ils n'y auraient pas renoncé et, pour autant qu'il aurait pu l'être au bénéfice des appelants, il était interdit à ces derniers d'affirmer que seule M^{me} Goodman était cliente de M^e Pearce.

^e Il est reconnu depuis longtemps que les communications entre l'avocat et son client sont protégées par un privilège de non-divulgateion. L'énoncé classique de la raison d'être de cette règle a été fait, il y a plus

and fifty years ago by Brougham L.C. in *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618; at p. 103 and at pp. 620-21, respectively:

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

More recently, this Court has described the privilege as a "fundamental civil and legal right": see *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839. Thus, while at one time it was thought that the privilege belonged to the solicitor and not to his client, there is now no doubt that the privilege belongs to the client alone. One consequence of this is that confidential communications between solicitor and client can only be divulged in certain circumscribed situations. The client may, of course, herself choose to disclose the contents of her communications with her legal representative and thereby waive the privilege. Or, the client may authorize the solicitor to reveal those communications for her. Even then, however, the courts have been cautious in allowing such disclosures, so much so that they have assumed for themselves the role of ensuring that without the client's express consent a solicitor may not testify. Thus, in *Bell v. Smith*, [1968] S.C.R. 664, this Court held that there had been a violation of solicitor-client privilege when a former solicitor of the plaintiffs in a motor vehicle accident claim was subpoenaed by the

de cent cinquante ans, par le lord chancelier Brougham, dans l'arrêt *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618, à la p. 103 et aux pp. 620 et 621 respectivement:

[TRADUCTION] Il n'est pas difficile de trouver le fondement de cette règle. Il ne réside pas (contrairement à ce qu'on lit parfois) dans l'importance particulière que le droit attribue à la profession de juriste, ni dans une tendance particulière à lui accorder une protection, quoiqu'il ne soit certainement pas très facile de découvrir pourquoi semblable privilège a été refusé à d'autres, surtout à la profession médicale.

Mais il procède d'un égard pour les intérêts de la justice, qui ne pourraient être défendus, et pour l'administration de la justice, qui ne pourrait suivre son cours, sans l'aide de personnes versées dans la science du droit, dans les règles de procédure des tribunaux et dans les questions touchant les droits et les obligations qui forment l'objet de tous les litiges soumis aux tribunaux. Si le privilège n'existait pas du tout, chacun en serait réduit à ses propres ressources en matière juridique; privée de toute aide professionnelle, une personne ne s'aventurerait pas à consulter un spécialiste et n'oserait confier à son avocat que la moitié des faits de son cas.

Plus récemment, notre Cour a défini le privilège comme un «droit civil fondamental»: voir *Solosky c. La Reine*, [1980] 1 R.C.S. 821, à la p. 839. Par conséquent, si à une époque l'on a estimé que le privilège pouvait être invoqué par l'avocat et non par son client, aujourd'hui il est certain que le privilège est établi au bénéfice du client seulement. Il en résulte notamment que les communications confidentielles entre l'avocat et son client ne peuvent être divulguées que dans certains cas précis. Le client peut bien sûr choisir de divulguer le contenu de ses communications avec son conseiller juridique et renoncer ainsi au secret professionnel. Ou il peut autoriser son avocat à en divulguer le contenu en son nom. Même dans ce cas, cependant, les tribunaux ont fait preuve de circonspection en permettant cette divulgation, à tel point qu'ils ont pris sur eux de s'assurer qu'un avocat ne témoigne pas sans le consentement exprès de son client. Ainsi, dans *Bell v. Smith*, [1968] R.C.S. 664, notre Cour a décidé que le secret professionnel avait été violé quand un ex-avocat des demandeurs dans une affaire d'accident d'automobile avait été assigné

defendants and testified as to the settlement discussions that had taken place. Spence J. said at p. 671:

It is rather astounding that Mr. Schreiber should be subpoenaed to give evidence on behalf of the defendants as against his former clients and that he should produce his complete file including many memoranda and other material all of which were privileged as against the plaintiffs and whether the plaintiffs' counsel objected or not that he should be permitted to so testify and so produce without the consent of the plaintiffs being requested and obtained.

Lord Chancellor Eldon said, in *Beer v. Ward* (1821), Jacob 77, 37 E.R. 779, at p. 80:

... it would be the duty of any Court to stop him if he was about to disclose confidential matters... the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the Court will make him claim it.

So important is the privilege that the courts have also stipulated that the confidentiality of communications between solicitor and client survives the death of the client and enures to his or her next of kin, heirs, or successors in title: see *Bullivant v. Attorney-General for Victoria*, [1901] A.C. 196; *Stewart v. Walker* (1903), 6 O.L.R. 495; and *Langworthy v. McVicar* (1913), 25 O.W.R. 297.

An exception has, however, developed to permit a solicitor to give evidence in wills cases and a variety of explanations for this exception to the general rule concerning solicitor-client privilege have been advanced by commentators and courts alike. In *Wigmore on Evidence* (vol. 8, § 2314), for example, the author suggests that, in so far as issues relating to the execution or contents of a will are concerned, the rationale underlying the exception relates to the testator's desire for secrecy. At page 610 of vol. 8, Professor Wigmore states:

But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought

comme témoin par les défendeurs et avait témoigné sur les discussions qui avaient porté sur le règlement. Le juge Spence dit, à la p. 671:

[TRADUCTION] Il est plutôt étonnant que M^e Schreiber soit assigné comme témoin par les défendeurs contre ses anciens clients, qu'il produise tout son dossier, y compris de nombreuses notes et d'autres documents qui étaient privilégiés au bénéfice des demandeurs et que, peu importe que l'avocat des demandeurs s'y soit opposé ou non, il soit autorisé à témoigner et à produire quoi que ce soit sans qu'ait été demandé et obtenu au préalable le consentement des demandeurs.

Dans *Beer v. Ward* (1821), Jacob 77, 37 E.R. 779, le lord chancelier Eldon dit, à la p. 80:

... il serait du devoir de tout tribunal de l'interrompre s'il était sur le point de divulguer des choses confidentielles [...] le tribunal connaît le privilège dont jouit le client et il faut tenir pour acquis que l'avocat agira correctement et invoquera ce privilège, ou que, s'il ne le fait pas, le tribunal le forcera à l'invoquer.

Le secret professionnel est tellement important que les tribunaux ont également précisé que le caractère confidentiel des communications entre l'avocat et son client subsiste après le décès du client et est transmis à ses parents, héritiers ou ayants droit: voir *Bullivant v. Attorney-General for Victoria*, [1901] A.C. 196, *Stewart v. Walker* (1903), 6 O.L.R. 495, et *Langworthy v. McVicar* (1913), 25 O.W.R. 297.

Une exception a toutefois été prévue afin de permettre à l'avocat de témoigner en matière testamentaire, et les commentateurs de même que les tribunaux ont donné diverses explications de cette exception à la règle générale du secret professionnel de l'avocat. Dans *Wigmore on Evidence* (vol. 8, § 2314), par exemple, l'auteur affirme que, pour ce qui est des questions relatives à la signature ou au contenu d'un testament, le raisonnement qui sous-tend l'exception se rapporte à la volonté du testateur de préserver le secret. À la page 610 du vol. 8, le professeur Wigmore dit:

[TRADUCTION] Mais, dans le cas des testaments, un élément particulier entre en jeu. L'on ne peut guère douter que le client souhaite tacitement que la signature et surtout le contenu demeurent secrets pendant sa vie et qu'ils font donc partie de sa communication confidentielle. Il faut présumer que, durant cette période, l'avo-

not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain.

In those cases dealing with the validity of a will as opposed to its execution or contents Professor Wigmore acknowledges that the secrecy rationale does not fully explain why a testator's communications with his solicitor should be admitted. In such circumstances he suggests at pp. 612-13 that a solicitor may testify as to the state of mind of the testator since, if the testator were insane or unduly influenced, his utterances were "obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and therefore could not possibly be said to have communicated them". Professor Wigmore then goes on to cite numerous American cases in which a solicitor has been permitted to testify where the validity of a will has been challenged on the ground that the testator was unduly influenced.

Professor Phipson, on the other hand, appears to be of the view that a different rationale supports the exception to the solicitor-client privilege in the wills context. In his opinion, any time claimants have a joint interest with the client in the subject matter of the communication, whether dealing with wills or some other matter, no privilege attaches. Hence, he states that as between joint claimants under a testator as to communications between the latter and his solicitor, the privilege does not apply: see *Phipson on Evidence* (13th ed. 1982), at p. 300.

In *The Law of Evidence in Civil Cases* (1974), the authors argue that Canadian courts have approached the admissibility of this sort of evidence in a unique way, although the same result has been arrived at. For instance, in *Stewart v. Walker*, *supra*, it was alleged that the testator had died intestate. The deceased's solicitor, however, had in his possession a copy of a

cat ne devrait pas être appelé à divulguer même le fait qu'il y a eu signature d'un testament, et encore moins sa teneur. Mais, en revanche, ce caractère confidentiel n'est destiné à être que temporaire. Il est évident qu'une telle restriction peut être apportée au privilège.

Dans les cas où est en cause la validité d'un testament par opposition à sa signature ou à son contenu, le professeur Wigmore reconnaît que la raison d'être du secret n'explique pas complètement pourquoi les communications du testateur avec son avocat devraient être admises. Il dit aux pp. 612 et 613 qu'en pareils cas l'avocat peut témoigner sur l'état d'esprit du testateur puisque, si ce dernier n'était pas sain d'esprit ou a été victime d'un abus d'influence, ses paroles étaient [TRADUCTION] «de toute évidence dénuées de caractère confidentiel, le secret ne s'étendant pas au fait qu'il n'est pas sain d'esprit ni à celui qu'il a été victime d'un abus d'influence, car il va sans dire que le testateur ne croyait pas à l'existence de ces faits et que l'on ne pourrait pas affirmer qu'ils les a communiqués». Le professeur Wigmore cite ensuite divers précédents américains dans lesquels on a permis à un avocat de témoigner dans des cas où la validité d'un testament avait été contestée pour le motif que le testateur avait été victime d'un abus d'influence.

Par contre, le professeur Phipson semble être d'avis que, dans le contexte des testaments, l'exception au privilège du secret professionnel de l'avocat a une justification différente. À son avis, chaque fois que ceux qui l'invoquent et le client ont un intérêt commun dans le sujet des communications, qu'il s'agisse de questions de testament ou d'autres types de questions, le privilège ne s'applique pas. C'est pourquoi il affirme que le privilège ne s'applique pas lorsque les ayants droit d'un testateur, qui partagent un intérêt commun, l'invoquent à propos des communications faites par ce dernier à son avocat: voir *Phipson on Evidence* (13^e éd. 1982), à la p. 300.

Dans *The Law of Evidence in Civil Cases* (1974), les auteurs soutiennent que les tribunaux canadiens ont abordé l'admissibilité de ce genre de preuve d'une manière particulière, bien qu'ils aient abouti au même résultat. Par exemple, dans l'affaire *Stewart v. Walker*, précitée, on alléguait qu'une personne était décédée sans avoir fait de testament. Toutefois, l'avo-

will providing that he, the solicitor, was to be left the greater part of the deceased's estate and was appointed as sole executor. It was contended that the solicitor should not be permitted to give evidence as to the existence or validity of the will. The Ontario Court of Appeal, however, felt that the solicitor should have been permitted to testify, saying at pp. 497-98:

The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client. As said by Sir George Turner, Vice-Chancellor, in *Russell v. Jackson* (1851), 9 Ha. 387, at p. 392: "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor ... and the disclosure when made can expose the Court to no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions of parties, or the objects and purposes for which dispositions have been made." It has been the constant practice to apply the rule here stated in cases of contested wills where the evidence of the solicitors by whom the wills were prepared, as to the instructions they received, is always received. And the application of a different rule in this action would deprive the plaintiff of a considerable part of the proof of his case.

Similarly, in *Re Ott*, [1972] 2 O.R. 5 (Surr. Ct.), where the issue was whether the testator by tearing it up intended to revoke a later will and revive an earlier one, Anderson Surr. Ct. J. held that the discussion that took place between the deceased and his solicitor at the time of the destruction of the will was admissible. At page 11 he said:

... since it is of essence to the case to find out the intention of the testator when he destroyed the will whether or not he was revoking his will unconditionally or whether he was only tearing it up on condition that an earlier will was thus revived, the whole issue turns on this question and it would seem to me that to invoke the privilege of the client, after the client is deceased would make it impossible for the Court to determine the intention of the testator in tearing up the will. In the interests

cat du défunt avait en sa possession une copie d'un testament dans lequel il lui léguait la majeure partie de ses biens et le nommait seul exécuteur testamentaire. L'on a prétendu que l'avocat ne devait pas être autorisé à témoigner sur l'existence ou la validité du testament. La Cour d'appel de l'Ontario a cependant estimé que l'avocat aurait dû être autorisé à témoigner, affirmant, aux pp. 497 et 498:

[TRADUCTION] La nature de l'affaire empêche de soulever la question du secret professionnel. La règle a pour objet de protéger les intérêts du client ou de ses ayants droit quand ils s'opposent à ceux de tierces personnes qui ne sont pas ou qui ne prétendent pas être des ayants droit. Et ce n'est pas le cas en l'espèce puisqu'il s'agit de décider quelles ont été les dispositions testamentaires du client, si tant est qu'il en a formulé. Comme l'a dit sir George Turner, vice-chancelier, dans *Russell v. Jackson* (1851), 9 Ha. 387, à la p. 392: «La divulgation en pareil cas ne peut toucher à aucun droit ni à aucun intérêt du client. Toute crainte à cet égard ne peut aucunement l'empêcher d'exposer sans réserve son cas à son avocat [...] et la divulgation qui a été faite ne pose pas plus de difficulté à la cour que dans les cas où elle doit vérifier les idées et les intentions des parties ou les objets et objectifs des dispositions.» Selon l'usage, la règle énoncée ci-dessus est appliquée dans les affaires où un testament est contesté et où le témoignage de l'avocat, qui a rédigé le testament suivant les instructions reçues, est toujours admis. En outre, l'application d'une autre règle dans cette action priverait le demandeur d'une partie importante de la preuve tendant à établir ses droits.

De même, dans l'affaire *Re Ott*, [1972] 2 O.R. 5 (C. succ.), où il s'agissait de décider si le testateur qui avait déchiré son testament avait voulu révoquer un testament et redonner effet à un testament antérieur, le juge Anderson a décidé que la discussion qui avait eu lieu entre le défunt et son avocat au moment de la destruction du testament était admissible. Il dit, à la p. 11:

[TRADUCTION] ... puisqu'il est essentiel en l'espèce de découvrir l'intention du testateur au moment où il a détruit le testament, c'est-à-dire s'il révoquait son testament sans condition ou s'il ne faisait que le déchirer afin de redonner effet à un testament antérieur, tout le débat se circonscrit autour de cette question et il me semble que la cour, si elle faisait jouer le privilège du client, après son décès, ne pourrait plus dès lors déterminer l'intention qu'avait le testateur au moment où il a

of justice, it is more important to find out the true intention of the testator.

In the present case the respondents argue that no analogy can be drawn between these wills cases and the situation here. I disagree. It is implicit in their argument that the common law has as yet only recognized an "exception" to the general rule of the privileged nature of communications between solicitor and client when dealing with the execution, tenor or validity of wills and wills alone. Their argument is reminiscent of earlier days when the "pigeon hole" approach to rules of evidence prevailed. Such, in my opinion, is no longer the case. The trend towards a more principled approach to admissibility questions has been embraced both here and abroad (see, for example, in Canada, *Ares v. Venner*, [1970] S.C.R. 608 (hearsay), and *R. v. Khan*, [1990] 2 S.C.R. 531 (hearsay), and in the United Kingdom, *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421 (H.L.) (similar fact)), a trend which I believe should be encouraged.

In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing the inquiry on who those heirs or successors properly are. In summary, it is, in the words of Anderson Surr. Ct. J. in *Re Ott*, *supra*, "[i]n the interests of justice" to admit such evidence.

Before leaving this aspect of the case, I should like to note that the trial judge's second ground for admitting the evidence confused the issue. While his reasoning on this point is somewhat less than clear, he seems to suggest that both the plaintiffs and the defendants had, by their conduct, waived whatever privilege they had. This finding undoubtedly inspired the respondents' rather tortured argument that they

déchiré le testament. Dans l'intérêt de la justice, il est plus important de découvrir l'intention véritable du testateur.

a En l'espèce, les intimés soutiennent qu'aucune analogie ne peut être établie entre ces affaires de testament et le cas qui nous occupe. Je ne suis pas d'accord. Par leur argument, ils affirment implicitement que la common law n'a reconnu jusqu'à présent qu'une «exception» à la règle générale du caractère privilégié des communications entre l'avocat et son client, et ce, en matière de signature, de teneur ou de validité des testaments et seulement des testaments. b Leur argument rappelle l'époque où la compartimentation était de mise au chapitre des règles de preuve. c Or, il n'en est plus ainsi, à mon sens. La tendance à la rationalisation de la façon d'aborder les questions d'admissibilité peut être observée autant au pays qu'à l'étranger (voir, par exemple, au Canada, *Ares c. Venner*, [1970] R.C.S. 608 (oui-dire), et *R. c. Khan*, [1990] 2 R.C.S. 531 (oui-dire), et au Royaume-Uni, *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421 (H.L.) (fait similaire)); c'est une tendance e qu'il y a lieu d'encourager, selon moi.

À mon avis, les considérations qui justifient l'admissibilité des communications entre l'avocat et son client en matière de testament s'appliquent avec la même force en l'espèce. Le principe général qui justifie la protection de ces communications est respecté. Les intérêts de la cliente maintenant décédée sont servis, en ce sens que l'admission du témoignage a précisément pour but d'établir ses intentions véritables. Et en faisant porter l'examen sur l'identité des héritiers ou ayants droit légitimes de la défunte, l'on respecte le principe qui veut que l'on étende le privilège à ses héritiers ou ayants droit. En résumé, pour reprendre les mots du juge Anderson de la Cour des successions dans l'affaire *Re Ott*, précitée, il y va de «l'intérêt de la justice» d'admettre ce témoignage.

Un dernier mot au sujet de cet aspect de l'affaire. Je tiens à faire remarquer que le second motif exposé par le juge de première instance pour admettre le témoignage a embrouillé la question. Certes, son raisonnement sur ce point n'est pas tout à fait clair, mais il semble affirmer que tant les demandeurs que les défendeurs avaient renoncé, par leur conduite, à tout privilège dont ils auraient pu jouir. Cette conclusion a

never waived the privilege and that the appellants, if the privilege enured solely to them, were in no position to then turn around and claim that Mrs. Goodman was the sole client of Mr. Pearce. As I have indicated, I prefer to base my decision on the footing that in circumstances such as these there is no privilege to waive until the true intentions of the settlor are ascertained, which in turn requires the testimony of the solicitor to be received.

Review of Factual Findings

The second factual matter in dispute relates to the findings of the trial judge. The respondents allege that Hutchinson J. committed three palpable errors of fact, thereby committing an error of law reviewable by this Court. In particular, they say that the trial judge failed to consider all the evidence in making the finding that there was hardly any contact between Mrs. Goodman and her three brothers, that Mrs. Goodman was not relying on her brothers for assistance, and that their only concern was that Mrs. Goodman be adequately maintained preferably not at their expense. On the other hand, the appellants maintain that the Court of Appeal committed an error of law when it acted in disregard of the trial judge's finding that the brothers had not unduly influenced their sister into making the trust agreement.

It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts: see *Lensen v. Lensen*, [1987] 2 S.C.R. 672, at p. 683, and the cases cited therein. Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. Thus, in *Harper v. The Queen*, [1982] 1 S.C.R. 2, where the question was

sans doute inspiré l'argument plutôt tortueux des intimés selon lequel ils n'avaient jamais renoncé au privilège et selon lequel les appelants, si le privilège pouvait être invoqué à leur seul bénéfice, ne pouvaient pas ensuite faire volte-face et prétendre que seule M^{me} Goodman était cliente de M^e Pearce. Je le répète, je préfère fonder ma décision sur le raisonnement qu'en pareil cas il ne peut être question de renoncer à quelque privilège que ce soit avant que les intentions véritables de la disposante n'aient été établies, ce qui nécessite l'admission du témoignage de l'avocat.

Examen des constatations de fait

La deuxième question de fait en litige concerne les constatations du juge de première instance. Les intimés allèguent que le juge Hutchinson a commis trois erreurs de fait manifestes, commettant ainsi une erreur de droit sujette à l'examen de notre Cour. En particulier, ils affirment que le juge de première instance n'a pas pris en considération toute la preuve pour conclure que M^{me} Goodman et ses trois frères n'avaient guère de contacts, que M^{me} Goodman ne comptait pas sur l'aide de ses frères et que leur seule préoccupation était d'assurer des moyens de subsistance à M^{me} Goodman, de préférence sans qu'ils aient eux-mêmes à déboursier un sou. Par contre, les appelants soutiennent que la Cour d'appel a commis une erreur de droit en ne tenant aucun compte de la conclusion du juge de première instance selon laquelle les frères n'avaient commis à l'endroit de leur sœur aucun abus d'influence visant à lui faire signer l'acte de fiducie.

C'est maintenant un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne soit prouvé que le juge de première instance a commis une erreur manifeste et dominante qui a faussé son appréciation des faits: voir l'arrêt *Lensen c. Lensen*, [1987] 2 R.C.S. 672, à la p. 683, et les arrêts qui y sont cités. Même si une constatation de fait ne dépend pas de la crédibilité, notre Cour a pour principe de ne pas intervenir pour réviser les constatations des tribunaux de première instance. Ainsi, dans l'arrêt *Harper c. La Reine*, [1982] 1 R.C.S. 2, où il s'agissait de déterminer si le juge du procès avait omis de prendre en con-

whether the trial judge had failed to address himself to certain relevant evidence, Estey J. stated at p. 14:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

In the present case there is no indication either from the reasons for judgment or from the record that the trial judge misapprehended the evidence or otherwise erred in the process of making his findings of fact. Accordingly, the Court of Appeal erred in overturning such findings.

Given that the trial judge found that there was very little contact between the brothers and the deceased at the relevant time, that the deceased was not in fact relying on her brothers to advise her, and that the prime motivation of the brothers was to advance their sister's welfare, it is difficult to conclude that the appellants have not successfully rebutted the presumption of undue influence. In addition to these findings it is also relevant that the evidence establishes that the deceased received some independent advice from Mr. Pearce and that the agreement ulti-

sideration certains éléments de preuve pertinents, le juge Estey dit, à la p. 14:

Un tribunal d'appel n'a ni le devoir ni le droit d'apprécier à nouveau les preuves produites au procès afin de décider de la culpabilité ou de l'innocence. Il incombe toutefois au tribunal d'appel d'étudier le dossier du procès pour déterminer si la cour a bien tenu compte de l'ensemble de la preuve se rapportant aux questions litigieuses. S'il se dégage du dossier, ainsi que des motifs de jugement, qu'il y a eu omission d'apprécier des éléments de preuve pertinents et, plus particulièrement, qu'on a fait entièrement abstraction de ces éléments, le tribunal chargé de révision doit alors intervenir.

Et même dans les cas où une constatation de fait n'est ni liée inextricablement à la crédibilité du témoin ni fondée sur une mauvaise compréhension de la preuve, la règle reste la même: l'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. C'est pourquoi, dans l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, notre Cour a refusé d'infirmer la conclusion du juge de première instance que certaines marchandises étaient défectueuses, disant, aux pp. 84 et 85, qu'une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve (citant *Métivier c. Cadorette*, [1977] 1 R.C.S. 371).

En l'espèce, rien n'indique, dans les motifs de jugement ou dans le dossier, que le juge de première instance a mal compris la preuve ou qu'il a par ailleurs commis une erreur quelconque en faisant ses constatations de fait. Par conséquent, la Cour d'appel a commis une erreur en infirmant ces constatations.

Étant donné que le juge de première instance a conclu qu'il y avait eu très peu de contacts entre la défunte et ses frères à l'époque pertinente, que la défunte ne se fiait pas, en réalité, sur ses frères pour la conseiller et que le principal mobile des frères était de veiller au bien-être de leur sœur, il est difficile de conclure que les appelants n'ont pas réussi à réfuter le présomption d'abus d'influence. Outre ces conclusions, il est aussi utile de souligner que la preuve établit que la défunte a consulté M^{re} Pearce séparément, et qu'en fin de compte le contrat passé concordait

mately concluded was in accord with her wishes. I acknowledge that in other situations the fact that the brothers took a leading role in the initial meeting with Mr. Pearce might militate against a finding of independent advice. However, after the departure of the brothers for their respective homes, Mrs. Goodman continued on her own initiative to seek Mr. Pearce's advice.

It does cause me some concern that the solicitor did not inquire in any detailed way into Mrs. Goodman's financial position. In particular, his failure to find out that the estate bequeathed to her was her only asset of any value and that she did not have the benefit of steady employment raises questions as to whether she fully appreciated the economic effect of the trust on her personally. However, any imperfection in the legal advice obtained is not, in my view, fatal to the appellants' case.

Costs

The final issue to be determined relates to the appropriate award of costs. The appellants claim full reimbursement out of the trust property, for their actual and reasonable costs (including legal fees) incurred in defending the respondents' lawsuit.

Much of the respondents' argument on the issue of costs was made on the assumption that the trust agreement would be set aside on the ground of undue influence. They submitted that in such circumstances the trustees should not be permitted to benefit in any way from their own misconduct. Since I have found no misconduct on the part of the trustees, nothing more need be said on this aspect. However, the respondents also urge the Court not to allow the appellants to charge their costs against the trust property, even if they are successful, on the ground that they were acting for their own benefit. I cannot agree.

The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended; see *Re Dingman* (1915), 35 O.L.R. 51. In

avec ses volontés. Je reconnais que, dans d'autres situations, le fait que les frères ont joué un rôle de premier plan lors de la première rencontre avec M^e Pearce pourrait empêcher de conclure qu'elle a reçu les conseils d'une personne indépendante. Toutefois, après que les frères furent repartis chez eux, M^{me} Goodman a continué elle-même de consulter M^e Pearce.

Le fait que l'avocat n'a pas demandé de précisions sur la situation financière de M^{me} Goodman m'inquiète un peu. En particulier, son omission de découvrir que le patrimoine légué à sa cliente était son seul bien de valeur et qu'elle n'avait pas d'emploi stable nous autorise à nous demander si elle se rendait bien compte des conséquences financières qu'entraînait la fiducie pour elle. Toutefois, toute lacune que pourrait comporter l'avis juridique reçu n'est pas, à mon sens, fatale pour la cause des appelants.

Les dépens

La dernière question à trancher touche les dépens. Les appelants demandent le remboursement complet, à même la masse, des frais réels et raisonnables (y compris les honoraires d'avocat) qu'ils ont engagés pour répondre à l'action des intimés.

L'argument des intimés sur la question des dépens repose en grande partie sur l'hypothèse que le contrat de fiducie serait annulé pour cause d'abus d'influence. Ils ont avancé qu'en pareil cas les fiduciaires ne devraient pas être autorisés à tirer profit de quelque manière que ce soit de leur propre inconduite. Comme j'ai conclu qu'aucune inconduite ne pouvait être reprochée aux fiduciaires, il est inutile d'ajouter quoi que ce soit là-dessus. Les intimés exhortent cependant la Cour à ne pas permettre aux appelants de recouvrer leurs frais à même la masse, même s'ils ont gain de cause, pour le motif qu'ils ont agi à leur propre profit. Je ne puis accepter cet argument.

Les tribunaux ont décidé, depuis longtemps, que les fiduciaires ont le droit de se faire rembourser tous les frais, dont les honoraires d'avocat, qu'ils ont engagés raisonnablement. Les dépenses raisonnables comprennent les frais d'une action contre laquelle ils

Re Dallaway, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:

In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

There can be no question that the trustees in this action acted reasonably. They were initially accused of having perpetrated a fraud against the deceased, an allegation which has not won the approval of any of the courts that have heard the matter. They were, however, obliged to defend the action. The appellants were cleared at trial of any exercise of undue influence on the settlor and, although they lost in the Court of Appeal on the basis of a presumption of undue influence, they were ultimately vindicated in this Court on the basis of the trial judge's finding that no undue influence had in fact been exercised.

Nor can there be any serious question that the appellants in defending the action were acting, not for their own benefit, but for the good of the trust. For William Geffen, of course, defending the action promoted both his personal interest as well as that of his fellow beneficiaries. While we have not been referred to a case in which trustees seeking indemnification from a trust were also beneficiaries of the trust, I do not consider the co-existing interest of trustee and beneficiary a valid basis for denying costs. Similarly, the fact that the Geffen brothers were acting in the interests of their children, nephews and nieces does not, in my view, cast any doubt upon the propriety of their actions.

The only question, therefore, is whether the appellants should have their costs against Stacy Randall Goodman personally instead of having them charged to the trust property. It is noted in this connection that the trial judge ordered Stacy Randall Goodman to

se sont défendus raisonnablement: voir *Re Dingman* (1915), 35 O.L.R. 51. Dans l'arrêt *Re Dallaway*, [1982] 3 All E.R. 118, le vice-chancelier sir Robert Megarry énonce la règle dans ces termes, à la p. 122:

[TRADUCTION] Pour autant que cette personne [le fiduciaire] ne se fasse pas rembourser ses frais par d'autres personnes, elle a le droit de les récupérer sur les fonds qu'elle détient, sauf ordonnance contraire de la cour, et cette dernière ne peut ordonner autrement que si la personne en question a agi de façon déraisonnable ou, essentiellement, à son propre bénéfice, plutôt qu'au profit des fonds.

Il ne fait aucun doute que les fiduciaires ont agi de façon raisonnable dans cette action. Ils ont d'abord été accusés d'avoir commis une fraude au détriment de la défunte, allégation que n'a retenue aucune cour saisie de l'affaire. Ils ont néanmoins dû répondre à l'action. Les appelants ont été dégagés au procès de toute imputation d'abus d'influence à l'endroit de la disposante et, bien que la Cour d'appel ait rejeté leur appel sur la base d'une présomption d'abus d'influence, ils ont finalement été innocentés devant notre Cour en raison de la conclusion du juge de première instance qu'aucun abus d'influence n'avait réellement été commis.

L'on ne saurait non plus mettre sérieusement en doute que les appelants, en répondant à l'action, ont agi, non pas à leur propre profit, mais pour le bien de la fiducie. Pour ce qui est de William Geffen, bien sûr, répondre à l'action servait à la fois son propre intérêt et celui de ses cobénéficiaires. Certes, on ne nous a cité aucun précédent dans lequel des fiduciaires, qui demandaient d'être indemnisés à même une fiducie, étaient en outre les bénéficiaires de celle-ci, mais les intérêts coexistants du fiduciaire et du bénéficiaire ne constituent pas, à mon sens, un motif valable pour refuser de leur accorder des dépens. De la même façon, j'estime que le fait que les frères Geffen agissaient dans l'intérêt de leurs enfants, neveux et nièces ne met pas du tout en doute la justesse de leurs actions.

Il ne reste donc qu'à décider si les appelants ont le droit de se faire rembourser leurs dépens par Stacy Randall Goodman personnellement, plutôt que de les récupérer sur le bien en fiducie. Remarquons à cet égard que le juge de première instance a ordonné à

pay the appellants' costs in his personal capacity and not to charge them against Mrs. Goodman's estate or the trust property. In view of the respondents' success in the Court of Appeal it is clear that the respondents had a tenable case against the appellants and I think it appropriate that they simply bear their own costs but not have to bear the appellants' costs as well.

5. Disposition

I would allow the appeal, set aside the decision of the Court of Appeal, and restore the decision of the trial judge. The appellants are entitled to full reimbursement from the trust property for their actual and reasonable costs (including legal fees) incurred in defending the respondents' lawsuit.

The reasons of *La Forest* and *McLachlin JJ.* were delivered by

LA FOREST J.—I have had the advantage of reading the reasons of my colleague, Justice Wilson. While I agree with the result she has reached, I have found it necessary to express my own separate views for reasons that will appear.

As my colleague has noted, the first issue to be considered is whether the circumstances in this case are such as to give rise to a presumption of undue influence. Wilson J. concludes that such a presumption will arise only when the parties are in a relationship of "influence", where one person is in a position to dominate the will of another. I agree with this.

My colleague then proceeds to consider whether the additional requirement of "manifest disadvantage" must be present before a presumption of undue influence will be applied. The "manifest disadvantage" requirement was adopted by the House of Lords in *National Westminster Bank Plc. v. Morgan*, [1985] A.C. 686, a case in which undue influence was alleged in a loan transaction between a bank and one of its customers. At issue there was whether to apply a presumption of undue influence in the con-

Stacy Randall Goodman de payer lui-même aux appelants leurs frais et non de les porter au compte de la succession de M^{me} Goodman ou de la masse. Étant donné que les intimés ont eu gain de cause en Cour d'appel, il est clair que les intimés avaient une thèse défendable à opposer aux appelants et je pense qu'il est opportun qu'ils assument simplement leurs propres frais, mais non pas également ceux des appelants.

5. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel et de rétablir la décision du juge de première instance. Les appelants ont droit au remboursement complet, à même la masse, des frais réels et raisonnables (y compris les honoraires d'avocat) qu'ils ont engagés pour répondre à l'action des intimés.

Version française des motifs des juges *La Forest* et *McLachlin* rendus par

LE JUGE LA FOREST—J'ai eu l'avantage de lire les motifs de ma collègue le juge Wilson. Bien que je sois d'accord avec sa conclusion, j'estime nécessaire d'exprimer mes propres opinions pour les raisons que j'énoncerai.

Comme l'a noté ma collègue, il faut d'abord déterminer si les circonstances en l'espèce sont de nature à engendrer une présomption d'abus d'influence. Le juge Wilson conclut que cette présomption ne prend naissance que lorsqu'il existe entre les parties des relations dans lesquelles une «influence» est exercée, lorsqu'une personne est en mesure de dominer la volonté d'une autre personne. Je suis d'accord avec cela.

Ma collègue se demande ensuite s'il faut en outre exiger la présence d'un «désavantage manifeste» pour que s'applique la présomption d'abus d'influence. L'exigence du «désavantage manifeste» a été adoptée par la Chambre des lords, dans l'arrêt *National Westminster Bank Plc. v. Morgan*, [1985] 1 A.C. 686, une affaire dans laquelle on alléguait l'abus d'influence dans le cadre d'un prêt consenti par la banque à un de ses clients. La question était de savoir si l'on devait appliquer une présomption

text of such a transaction. Lord Scarman found such a presumption will be applied in appropriate circumstances, but only when manifest disadvantage to the party influenced can be shown. He stated, at p. 707:

A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. . . . Similarly a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence.

Wilson J. finds that the requirement of manifest disadvantage simply does not make sense in the context of this case, where the challenged transaction concerns a gift. I would agree. A gift is by its nature inherently disadvantageous, at least in a material sense, so the requirement is superfluous. Having made this finding, it seems to me that it becomes unnecessary to discuss the issue of manifest disadvantage further on the facts of this case. My colleague nonetheless proceeds to elaborate upon this point at some length, and I accordingly feel obliged to say a few words about it.

It may well be appropriate to require a showing of undue disadvantage or benefit before a presumption of undue influence will be applied. Given that the effect of the presumption of undue influence is to shift the burden of proof to the defendant, it may not be unreasonable to require that there be some showing of undue disadvantage or benefit in a commercial transaction before the presumption will arise. It is a substantially different question, however, whether undue influence itself must always involve undue disadvantage or benefit.

As my colleague correctly points out, there is a difference of opinion as to whether manifest disadvantage should be a required element of undue influence in a commercial transaction. This stems from differing views on what the doctrine of undue influence is designed to protect. One view is that it should protect against abuses of trust, confidence or power. From this perspective, the focus is upon the process of the

d'abus d'influence dans le cadre d'une telle opération. Lord Scarman a conclu qu'une telle présomption s'applique dans des circonstances appropriées, mais seulement lorsque l'on peut démontrer qu'il y a désavantage manifeste pour la partie influencée. Il a dit, à la p. 707:

[TRADUCTION] Une relation commerciale peut devenir une relation dans laquelle une partie exerce sur l'autre une influence dominante. [...] De la même façon, les rapports entre banquier et client peuvent devenir tels que le banquier acquiert une influence dominante. Si c'est le cas et qu'il y a preuve d'une opération manifestement désavantageuse, il est alors loisible au tribunal de présumer qu'elle résulte d'un abus d'influence.

Le juge Wilson conclut que l'exigence d'un désavantage manifeste n'est pas du tout logique dans le contexte de cette affaire, où l'opération contestée est une donation. Je suis d'accord. Un don est intrinsèquement désavantageux, tout au moins au plan matériel, de sorte que l'exigence est superflue. Étant donné cette conclusion, il me semble inutile de discuter plus longuement de la question du désavantage manifeste vu les faits de l'espèce. Comme ma collègue en parle néanmoins assez longuement, je me sens tenu de dire quelques mots à ce sujet.

Il peut être indiqué d'exiger la preuve d'un désavantage ou d'un avantage injuste avant de faire jouer la présomption d'abus d'influence. Étant donné que cette présomption a pour effet de déplacer le fardeau de la preuve en l'imposant au défendeur, il peut ne pas être déraisonnable d'exiger quelque preuve de désavantage ou d'avantage injuste résultant d'une opération commerciale avant que la présomption n'entre en jeu. Toutefois, la question de savoir si l'abus d'influence lui-même doit toujours supposer un avantage ou désavantage injuste est une question très différente.

Comme ma collègue l'a correctement souligné, les avis sont partagés sur la question de savoir si l'on devrait exiger que le désavantage manifeste soit un élément de l'abus d'influence dans une opération commerciale. Ce désaccord tient aux opinions divergentes sur ce que la doctrine de l'abus d'influence vise à protéger. Selon certains, elle devrait garantir contre les abus de confiance ou de pouvoir. Dans

undue influence itself, rather than the result. Manifest disadvantage to the person influenced is not a requirement, but merely evidence that goes to show whether or not an abuse of confidence took place. The opposing view is that the law should not interfere with reasonable bargains, and that the doctrine of undue influence should only address abuses of trust or confidence resulting in a significant and demonstrable disadvantage to the person influenced.

It is unnecessary for us to choose between these two opposing positions in the context of this case, which does not even concern a commercial transaction, and I think it is unwise to do so. I therefore cannot adopt my colleague's comment, at p. 377, that there is "nothing *per se* reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries" (emphasis added). Nor would I want to be taken as agreeing with the proposition that the law will never interfere with a contract that does not necessarily lead to a material disadvantage, even where it is clear that the process leading up to the contract has been tainted.

Turning then to the issue of whether the presumption of undue influence should be applied in the present case, the relevant question is whether the relationship of Mrs. Goodman to her brothers was such that they had the ability to dominate her. Without repeating the facts at length, I would note that I approve in large part of the approach taken to this question by Hetherington J.A. in her dissenting reasons in the Court of Appeal. As she notes, Mrs. Goodman's relationship with her brothers was not a close one. In fact, the trial judge found (1987), 52 Alta. L.R. (2d) 210, at pp. 228-29, that:

If anything, the evidence which I have heard and which was read in by counsel for the plaintiff persuades me that the relationship between Mrs. Goodman and her three brothers was such that they had no influence on their sister at all. Particularly brother Jack. Any suggestion made by him seems to have been rebuffed by Mrs. Goodman almost automatically. The poor relationship between the two of them was longstanding and deep-rooted. Apart from the brief interval of time when they

cette perspective, l'accent porte sur le processus de l'abus d'influence lui-même plutôt que sur son résultat. Le désavantage manifeste pour la personne influencée n'est pas une exigence, mais simplement un élément de preuve qui permet de déterminer s'il y a eu abus d'influence. Selon l'opinion opposée, le droit ne devrait pas s'immiscer dans les marchés raisonnables, et la doctrine de l'abus d'influence ne devrait s'intéresser qu'aux abus de confiance résultant en un désavantage considérable et démontrable pour la personne influencée.

Il ne nous est pas nécessaire de choisir entre ces deux positions opposées dans le contexte de cette affaire, qui ne vise même pas une opération commerciale, et je crois peu sage de le faire. Je ne puis donc pas souscrire à la remarque de ma collègue lorsqu'elle dit, à la p. 377, qu'«il n'y a rien de reprehensible en soi à ce que des personnes ayant des rapports de confiance exercent une influence sur leurs bénéficiaires, voire commettent un abus d'influence à leur endroit» (je souligne). Je ne veux pas non plus que l'on pense que je souscris à la proposition voulant que le droit ne s'intéressera jamais à un contrat qui n'entraîne pas nécessairement un désavantage matériel, même s'il est clair que le processus ayant conduit au contrat est vicié.

Si l'on en vient à la question de savoir s'il y a lieu en l'espèce d'appliquer la présomption d'abus d'influence, il faut alors se demander si les rapports entre M^{me} Goodman et ses frères étaient de nature à leur permettre de la dominer. Sans m'étendre sur les faits, je souligne que j'approuve dans une large mesure la façon dont le juge Hetherington a abordé cette question dans ses motifs dissidents à la Cour d'appel. Comme elle l'a noté, les rapports que M^{me} Goodman avait avec ses frères n'étaient pas étroits. De fait, le juge d'appel a conclu ce qui suit (1987), 52 Alta. L.R. (2d) 210, aux pp. 228 et 229:

[TRADUCTION] Somme toute, la preuve que j'ai entendue ou que l'avocat du demandeur a consignée me persuade que les rapports entre M^{me} Goodman et ses trois frères étaient tels qu'ils n'ont exercé aucune influence sur elle. Particulièrement son frère Jack. La moindre de ses suggestions semble avoir été presque automatiquement repoussée par M^{me} Goodman. Les mauvais rapports entre eux deux duraient de longue date et avaient de profondes racines. Mis à part le bref intervalle durant

were together as a result of their mother's last illness and death, there was hardly any contact between the three brothers and Mrs. Goodman. [Emphasis added.]

In another situation, the relationship of brother and sister might well support a presumption of undue influence. Given these findings of fact by the trial judge, however, it is difficult to accept that the relationship between Mrs. Goodman and her brothers was one where the potential for a dominating influence existed. In so holding, I am not insensitive to the fact that the trust agreement was first proposed during the difficult period immediately following their mother's death. However, the facts as found by the trial judge simply do not bear out the view that Mrs. Goodman was relying upon her brothers for assistance even during this troubled time. I accordingly conclude that there could be no presumption of undue influence at that time.

The facts are even stronger as they relate to the subsequent period. In this regard, it must be remembered that the trust arrangement was not finalized until several months after the death of Mrs. Goodman's mother. It was only entered into by Mrs. Goodman after numerous independent consultations with her attorney, Mr. Pearce, and "following periods of independent thought by her". In the words of the trial judge, at p. 228:

By the time Mrs. Goodman had decided to include all of the grandchildren, that is to say, to include her own children as beneficiaries as well as all of her nieces and nephews, contact between herself and her three brothers no longer existed. [Emphasis added.]

For these reasons, I would dispose of the appeal in the manner proposed by Wilson J.

The following are the reasons delivered by

SOPINKA J.—I have had the advantage of reading the reasons herein of my colleagues Justice Wilson and Justice La Forest which differ as to whether a presumption of undue influence arises in this case. In my view, given the positive finding by the trial judge, supported by the evidence, that there was no undue influence, the existence of a presumption is immaterial and any discussion of it by the trial judge and the

lequel ils ont été réunis à cause de la maladie et du décès de leur mère, les trois frères et Mme Goodman n'ont presque pas été en contact. [Je souligne.]

Dans une situation différente, les rapports entre frère et sœur pourraient fort bien étayer une présomption d'abus d'influence. Cependant, étant donné les conclusions de fait du juge de première instance, il est difficile de convenir que les rapports entre Mme Goodman et ses frères offraient la possibilité d'une influence dominante. En tirant cette conclusion, je n'oublie pas que le contrat de fiducie a d'abord été envisagé au cours de la période difficile suivant immédiatement le décès de leur mère. Toutefois, les conclusions de fait du juge de première instance n'appuient tout simplement pas l'opinion selon laquelle Mme Goodman comptait sur l'aide de ses frères même pendant ces moments difficiles. J'en conclus donc qu'il ne pouvait y avoir aucune présomption d'abus d'influence à ce moment-là.

Les faits sont encore plus solides en ce qui concerne la période qui a suivi. À cet égard, il faut se rappeler que le contrat de fiducie n'a été signé que plusieurs mois après le décès de la mère de Mme Goodman. Il n'a été conclu par Mme Goodman qu'à la suite de nombreuses consultations indépendantes avec son avocat, M^e Pearce, et [TRADUCTION] «après qu'elle y ait réfléchi librement». Comme l'a dit le juge de première instance, à la p. 228:

[TRADUCTION] Au moment où Mme Goodman a décidé d'inclure tous les petits enfants, c'est-à-dire d'inclure ses propres enfants en qualité de bénéficiaires aussi bien que ses nièces et neveux, les contacts entre elle et ses trois frères avaient cessé. [Je souligne.]

Pour ces motifs, je suis d'avis de trancher ce pourvoi de la façon proposée par le juge Wilson.

Version française des motifs rendus par

LE JUGE SOPINKA—J'ai eu l'avantage de lire les motifs de mes collègues les juges Wilson et La Forest qui diffèrent sur la question de savoir si cette affaire donne lieu à une présomption d'abus d'influence. À mon sens, étant donné la conclusion positive du juge de première instance, appuyée par la preuve, qu'il n'y avait pas abus d'influence, l'existence d'une présomption est sans importance et toute discussion à

Court of Appeal was unnecessary and *obiter*. The same applies to the consideration of this matter here.

Wilson J. accurately points out in her reasons, at p. 363, that:

Based on the testimony of the solicitor as well as the other witnesses, Hutchinson J. found on the evidence that the Geffen brothers did not in fact influence their sister into signing the trust agreement. In doing so he placed particular emphasis on the fact that the agreement in substance reflected the true wishes of the settlor.

The trial judge made the following positive determination of this issue ((1987), 52 Alta. L.R. (2d) 210, at pp. 228-29):

If anything, the evidence which I have heard and which was read in by counsel for the plaintiff persuades me that the relationship between Mrs. Goodman and her three brothers was such that they had no influence on their sister at all. . . . Apart from the brief interval of time when they were together as a result of their mother's last illness and death, there was hardly any contact between the three brothers and Mrs. Goodman. She did not rely on them for assistance and they were only concerned that their mother's estate be available for her maintenance without the need on their part to assume any personal responsibility for their sister's care. [Emphasis added.]

The presumption of undue influence is a presumption of law. As such, its influence on the resolution of the issue is limited to the burden of proof. Text writers and courts are divided on whether presumptions of law affect only the evidential burden or both the evidential burden and the legal burden. In *S v. S*, [1972] A.C. 24, Lord Reid espoused the latter view and explained a presumption in the following language, at p. 41:

Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is not other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly

son sujet par le juge de première instance et la Cour d'appel était inutile et constituait une remarque incidente. Il en va de même pour l'étude de cette question par notre Cour.

Le juge Wilson souligne correctement à la p. 363 de ses motifs que:

Se fondant sur le témoignage de l'avocat et ceux d'autres témoins, le juge Hutchinson a conclu qu'en fait, d'après la preuve, les frères Geffen n'avaient pas influencé la décision de leur sœur de signer l'acte de fiducie. Ce faisant, il a insisté particulièrement sur le fait que l'acte de fiducie traduisait pour l'essentiel les véritables volontés de la disposante.

Le juge de première instance a tiré la conclusion positive suivante sur cette question, (1987), 52 Alta. L.R. (2d) 210, aux pp. 228 et 229:

[TRADUCTION] Somme toute, la preuve que j'ai entendue ou que l'avocat du demandeur a consignée me persuade que les rapports entre M^{me} Goodman et ses trois frères étaient tels qu'ils n'ont exercé aucune influence sur elle[. . .] Mis à part le bref intervalle durant lequel ils ont été réunis à cause de la maladie et du décès de leur mère, les trois frères et M^{me} Goodman n'ont presque pas été en contact. Elle n'a pas compté sur leur aide et leur seul souci était que l'héritage de leur mère soit disponible pour assurer la subsistance de leur sœur sans qu'ils aient eux-mêmes à subvenir à ses besoins. [Je souligne]

La présomption d'abus d'influence est une présomption de droit. Comme telle, son effet sur la solution de la question en litige est limité au fardeau de la preuve. Les commentateurs ainsi que les tribunaux ont des opinions divergentes quant à savoir si les présomptions de droit ont une incidence sur le fardeau de présentation seulement ou à la fois sur le fardeau de présentation et le fardeau ultime. Dans l'arrêt *S v. S*, [1972] A.C. 24, lord Reid a adopté le dernier point de vue et expliqué une présomption dans les termes suivants, à la p. 41:

[TRADUCTION] Dès lors que la preuve a été faite, il faut l'apprécier sans ajouter la présomption dans la balance de la légitimité comme complément de poids. Ainsi, même une faible preuve contre la légitimité doit l'emporter en l'absence de preuve pour y faire contrepoids. La présomption n'entrera en jeu à cette étape que dans

balanced that the court is unable to reach a decision on it.

This Court, in *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602, adopted the former or evidentiary burden view, citing *Wigmore on Evidence*, 3rd ed., § 2491(2). Judson J., speaking for the court, stated, at p. 606:

It must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. [Emphasis in original.]

This view was reaffirmed in *Powell v. Cockburn*, [1977] 2 S.C.R. 218, Dickson J. (as he then was) said at p. 225:

Evidence having been led on each issue the presumptions disappeared. It fell then to the trier of fact to decide the issues upon all of the evidence adduced.

I need not resolve which of these views is the correct one because in my opinion, on either view, the presumption of undue influence played no role in this case. An evidentiary burden casts on the burdened party the obligation of going forward with some evidence while the legal burden is applied against the burdened party if the evidence, after being weighed, fails to persuade. This latter burden is also referred to as the burden of non-persuasion. The modern view of the legal burden is generally attributed to the decision of the Privy Council in *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, in which Viscount Dunedin stated at p. 101:

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes

le cas très rare où la preuve est si égale que le tribunal est incapable d'en tirer une conclusion décisive.

Dans l'arrêt *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] R.C.S. 602, notre Cour a adopté le premier point de vue, celui du fardeau de présentation, en citant *Wigmore on Evidence*, 3^e éd., § 2491(2). Le juge Judson a dit au nom de la Cour, à la p. 606:

[TRADUCTION] Il faut se rappeler que l'effet particulier de la présomption «de droit» (c'est-à-dire la véritable présomption) est simplement d'invoquer une règle de droit qui oblige le jury à tirer la conclusion en l'absence de preuve contraire de la partie adverse. Si cette dernière soumet effectivement une preuve contraire (suffisante pour satisfaire à la preuve exigée par le juge), la présomption disparaît comme règle de droit, et l'affaire est entre les mains du jury libre de toute règle. [Italiques dans l'original.]

Le juge Dickson (plus tard Juge en chef) a réaffirmé ce point de vue dans l'arrêt *Powell c. Cockburn*, [1977] 2 R.C.S. 218, à la p. 225:

Chaque point ayant été couvert par des éléments de preuve, les présomptions se sont trouvées repoussées. Il appartenait donc au juge des faits de trancher les questions litigieuses à la lumière de toute la preuve produite.

Je n'ai pas à décider lequel de ces points de vue est exact puisque, à mon avis, la présomption d'abus d'influence ne joue aucun rôle en l'espèce. Un fardeau de présentation impose à la partie qui en est chargée l'obligation d'avancer des éléments de preuve, tandis que le fardeau ultime est imposé à la partie qui en est chargée si la preuve, une fois appréciée, ne réussit pas à convaincre. Ce dernier fardeau est également appelé le fardeau de non-persuasion. La conception moderne du fardeau ultime est généralement attribuée à l'arrêt du Conseil privé *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, dans lequel le vicomte Dunedin a dit, à la p. 101:

[TRADUCTION] Cependant, la question du fardeau de la preuve ne peut se soulever pour juger une cause que si le tribunal conclut que la preuve de l'affirmative et celle de la négative s'équilibrent si bien qu'il ne peut en arriver autrement à une conclusion. Alors le fardeau de la preuve décide de l'affaire. Cependant si le tribunal, après avoir entendu et apprécié la preuve, en arrive à une conclusion définie, le fardeau de la preuve n'a rien à

to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

It is the legal burden or burden of non-persuasion that is occasionally misapplied by treating it as a make-weight in the assessment of the evidence. This is characteristic of some of the undue influence cases that refer to matters that must be proved in order to discharge the burden of proof imposed by the presumption. See *Allcard v. Skinner* (1887), 36 Ch. D. 145, at p. 181.

This is not an application of the burden of proof but rather a particular application of the familiar maxim that in applying the standard of proof all evidence is to be weighed in light of the gravity of the issue to be decided. See *Blyth v. Blyth*, [1966] A.C. 643, at p. 673; *Hornal v. Neuberger Products Ltd.*, [1957] 1 Q.B. 247, at p. 266. This maxim is applied in undue influence cases. The evidence is subjected to close scrutiny and the cases indicate that before coming to a conclusion, the court must act only on clear and convincing evidence. The factors that are often cited in the undue influence cases are just that, factors that the judge should consider in weighing the evidence. These factors ensure that the evidence is carefully scrutinized. They are to be heeded but are not cast in stone. They are not, however, a product of the application of the legal burden of proof. In this regard, I adopt that portion of the reasons of Rand J. in *New York Life Insurance Co. v. Schlitt*, [1945] S.C.R. 289, in which he states at p. 308:

In the conception of a function of requiring a quantum of proof, the presumption plays no part in the drawing of conclusions from the facts presented in rebuttal, and this circumstance has made a generous contribution to the confusion and difficulty which surround the practical application of this very necessary device.

Schlitt involved a claim on a policy of life insurance which was resisted by way of reliance on the defence of suicide. The issue was whether the presumption of suicide had been rebutted. The insured contended it was death by accident and the insurer death by suicide. After reviewing the evidence, Rand J., in a dissenting opinion, concluded that the Court

y voir et il n'est pas nécessaire de le prendre en considération.

C'est le fardeau ultime ou le fardeau de non-persuasion qui est mal appliqué à l'occasion lorsqu'il est utilisé comme complément de poids dans l'appréciation de la preuve. C'est le cas dans certaines affaires d'abus d'influence qui font mention de certaines questions qu'il faut prouver afin de s'acquitter du fardeau de preuve imposé par la présomption. Voir *Allcard v. Skinner* (1887), 36 Ch. D. 145, à la p. 181.

Il ne s'agit pas d'une application du fardeau de la preuve, mais plutôt d'une application particulière de la maxime connue selon laquelle, dans l'application de la norme de preuve, tous les éléments de preuve doivent être appréciés en fonction de la gravité de la question en litige. Voir *Blyth v. Blyth*, [1966] A.C. 643, à la p. 673; *Hornal v. Neuberger Products Ltd.*, [1957] 1 Q.B. 247, à la p. 266. Cette maxime est appliquée dans des affaires d'abus d'influence. La preuve est soumise à un examen serré et la jurisprudence révèle qu'avant d'arriver à une conclusion, la cour doit s'appuyer uniquement sur une preuve claire et convaincante. Les facteurs souvent cités dans les affaires d'abus d'influence ne sont que ce qu'ils sont, des facteurs dont le juge doit tenir compte dans l'appréciation de la preuve. Ces facteurs assurent que la preuve est examinée avec soin. Il faut en tenir compte mais ils ne sont pas coulés dans le béton. Ils ne sont cependant pas le produit de l'application du fardeau ultime de preuve. À cet égard, j'adopte l'extrait suivant des motifs du juge Rand dans *New York Life Insurance Co. v. Schlitt*, [1945] R.C.S. 289, à la p. 308:

[TRADUCTION] Dans la conception du rôle de l'exigence d'un degré de preuve, la présomption n'entre pas en jeu dans l'établissement de conclusions tirées des faits présentés en contre-preuve, et cela a beaucoup contribué à la confusion et aux difficultés qui entourent l'application pratique de ce mécanisme très nécessaire.

L'affaire *Schlitt* portait sur une réclamation en matière d'assurance-vie à laquelle on s'était opposé en invoquant le suicide. Il s'agissait de savoir si la présomption de suicide avait été réfutée. Le bénéficiaire prétendait qu'il s'agissait d'un décès accidentel et l'assureur alléguait le suicide. Après avoir examiné la preuve, le juge Rand, dissident, a conclu que la

1991 CanLII 69 (SCC)

was left in a state of doubt and therefore the burden of proof had to be applied. While Rand J. disagreed with his colleagues with respect to the factual conclusion to be reached, his reasons, alone, contain a definitive analysis of the operation of presumption and they do not conflict with those of other members of the Court.

In this case, there is no reason to consider whether there was an evidentiary burden on the appellants to adduce evidence nor whether they had the legal burden of proof. Evidence was adduced which persuaded the trial judge in accordance with the requisite standard that undue influence had not been exerted. This was not a case where the evidence was evenly balanced thereby requiring a determination of where the burden of proof lay. That ended the matter and there is no reason to consider whether that which has been found not to exist ought to be presumed.

I would dispose of the appeal as proposed by Wilson J.

Appeal allowed with costs.

Solicitors for the appellants: Bennett Jones Verchere, Calgary.

Solicitors for the respondents: Barron & Barron, Calgary.

Cour était laissée dans le doute et qu'il fallait donc appliquer le fardeau de la preuve. Bien que le juge Rand ait été en désaccord avec ses collègues quant à la conclusion sur les faits, ses motifs, à eux seuls, contiennent une analyse définitive du fonctionnement de la présomption et n'entrent pas en conflit avec ceux des autres membres de la Cour.

En l'espèce, il n'y a aucune raison de se demander si les appelants étaient tenus à un fardeau de présentation ou au fardeau ultime de la preuve. Des éléments de preuve ont été présentés qui ont convaincu le juge de première instance, conformément à la norme requise, qu'il n'y avait pas eu abus d'influence. Il ne s'agit pas d'un cas où la preuve était égale de part et d'autre et exigeait donc une décision sur l'attribution du fardeau de preuve. Cela mettait fin à l'affaire, et il n'y a aucune raison de se demander si ce qui a été déterminé ne pas exister devrait être présumé.

Je suis d'avis de trancher le pourvoi de la manière proposée par le juge Wilson.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Bennett Jones Verchere, Calgary.

Procureurs des intimés: Barron & Barron, Calgary.

Tab 8

CITATION: The Canada Trust Company v. Russell Browne et al., 2011 ONSC 4400
COURT FILE NO.: 02-115/06
DATE: 20110822

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **THE CANADA TRUST COMPANY** Trustee of the Primo Poloniato
Grandchildren's Trust, Applicant

AND:

**RUSSELL BROWNE, JOHN MORI, JR., ANDREA L. MORI-MICKUS,
LAURA LEE, MARLA L. ASHMORE, TERESA O'NEIL, MICHAEL
POLONIATO, KRISTEN WILEY, BRANDON AHSMORE and THE
CHILDREN'S LAWYER** on behalf of the minors **RACHEL BROWNE,
HAILEY BROWNE, MICHELLE WILEY, JESSICA ASHMORE, JULIA
MICKUS, ROBERT MICKUS, OLIVIA MICKUS, JOHN MICKUS,
MARISSA LEE, ERICA LEE** and on behalf of the unborn and
unascertained beneficiaries of the Primo Poloniato Grandchildren' Trust,
Respondents

BEFORE: L.A. Pattillo J.

COUNSEL: *Archie J. Rabinowitz and David Lobl*, for the Estate Trustee/Applicant

Ian M. Hull and Nadia M. Harasymowycz, Agent for the Children's Lawyer

Mark Abradjian and Christopher R. Durdan, for the Respondent John Mori, Jr.,

Michael G. Emery for the Respondents *Andrea L. Mori-Mickus, Marla L. Ashmore and Teresa O'Neil*

Susanne Balpataky, for the Respondent Michael Poloniato

M. Zemel, for Miller Thomson, LLP

HEARD: June 22, 2011

COSTS ENDORSEMENT

Introduction

[1] On January 5, 2011, I released reasons for decision in an Application by The Canada Trust Company (the “Trustee”) for advice and direction concerning the interpretation of certain terms of The Primo Poloniato Grandchildren’s Trust (the “Trust”), as varied by agreement dated December 15, 1997 and approved by order of this Court dated March 5, 1988 (the “1997 Variation”). In the absence of agreement on costs, the Trustee, the Office of the Children’s Lawyer (“OCL”) and some, but not all of the beneficiaries who appeared on the Application now seek their costs of the Application, payable from the Trust.

Background

[2] The Application was commenced on July 13, 2007. The Trustee sought advice and direction from the court as to whether it had discretion, under the terms of the Trust as varied by the 1997 Variation to cause the holding company the Trust owned and in which it held its investments, to distribute sufficient income to the Trust in order to meet the minimum annual distribution requirements to the income beneficiaries and, if so, was the Trustee subject to the duty to maintain an “even hand” between the income beneficiaries and the capital beneficiaries when exercising that discretion.

[3] The Trust was initially settled in 1980 by Primo Poloniato for his seven grandchildren and their issue. It held, indirectly, the growth shares of Primo Foods Limited, which was founded by Mr. Poloniato. The grandchildren are the income beneficiaries and their issue, the great-grandchildren, the capital beneficiaries. The terms of the Trust initially provided, among other things that the income was to accumulate until the earlier of 21 years from the date of settlement or the death of the first grandchild. In 1988, the Trust was varied by agreement of

the beneficiaries and the Official Guardian on behalf of the minor and unascertained beneficiaries and approved by the Court. Essentially, the 1988 variation accelerated the income beneficiaries' entitlement to receive income. The Trust was again varied by the 1997 Variation by order of the Court following agreement by the beneficiaries and the OCL. Among other things, the 1997 Variation re-defined income to include capital appreciation and provided for minimum annual distribution requirements for the income beneficiaries.

[4] The Application involved a number of parties. The first seven respondents named in the style of cause are Mr. Poloniato's grandchildren, the income beneficiaries. At the argument on the Application, in addition to counsel on behalf of the Trustee, counsel appeared for John Mori Jr. ("Mori Jr."), for Andrea L. Mori-Mickus, Marla L. Ashmore and Teresa O'Neil, ("Mori-Mickus, Ashmore and O'Neil") and for Michael Poloniato. The OCL appeared on behalf of the minor and unborn and unascertained beneficiaries. In addition, counsel appeared on behalf of Rachael Browne and on behalf of Kristen Wiley, Brandon Ashmore, Michelle Wiley and Jessica Ashmore, ("Wiley, Ashmore, Wiley and Ashmore") each of whom are Mr. Poloniato's great-grandchildren and capital beneficiaries over the age of 18.

[5] The Trustee has submitted a Bill of Costs detailing its fees on both a partial and full indemnity basis. It claims a total of \$917,215.07 on a full indemnity basis, made up of \$801,291.50 in fees, \$58,977.33 in disbursements and \$56,946.24 in taxes.

[6] The OCL has submitted a Bill of Costs on a full indemnity basis totalling \$367,695.32, and made up of \$322,192.50 in fees, \$37,576.74 in disbursements and \$7,926.08 in taxes.

[7] Mori Jr. has submitted a Bill of Costs on a full indemnity basis totalling \$336,351.06, made up of \$317,474.88 in fees and taxes and \$18,876.18 in disbursements and taxes.

[8] Mori-Mickus, Ashmore and O'Neil have submitted a Bill of Costs for substantial indemnity totalling \$270,479.73, made up of \$238,201.57 in fees (after a fee reduction of \$13,617.50 as agreed with client), \$17,076.47 in disbursements and \$15,201.69 in taxes.

[9] Michael Poloniato has submitted a Bill of Costs on a full indemnity basis of \$59,897.67, made up of \$56,299.00 in fees, \$303.24 in disbursements and \$3,295.43 in taxes.

[10] Wiley, Ashmore, Wiley and Ashmore submitted a Bill of Costs on a full indemnity basis totalling \$45,406.56, made up of \$41,542.25 in fees, \$1,003.23 in disbursements and \$3,903.02 in taxes.

[11] In addition, Miller Thomson, LLP, seeks payment from the Trust of its account dated April 30, 2010 in the amount of \$19,293.75 in connection with the Application.

The Trustee's Costs

[12] Mori Jr. submits that the Trustee is not entitled to its costs of the Application from the Trust and, if so ordered, takes issue with the quantum of the costs claimed. Mori-Mickus, Ashmore and O'Neil do not oppose the Trustee's entitlement but take issue with the quantum. The remaining parties appearing take no position in respect of the Trustee's costs.

1) Entitlement

[13] In *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (C.A.), the Court of Appeal confirmed that costs in estate litigation follow the cost rules that apply in civil litigation

as set out in s. 131 of the *Courts of Justice Act* and in the *Rules of Civil Procedure* and particularly Rule 57 except in circumstances where the litigation arose as a result of the actions of the testator or those with an interest in the residue of the estate or where the litigation was reasonably necessary to ensure the proper administration of the estate, in which case, where the basis for the dispute was reasonable, the costs of the litigation will be borne by the estate.

[14] In a similar vein, it has long been held that where trustees have reasonably incurred expenses, including solicitor and client costs, on behalf of the trust, the trustees are entitled to be indemnified for such costs from the trust: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 (S.C.C.) at para. 74. See too: *Kaptyn Estate v. Kaptyn Estate*, [2011] O.J. No. 285 (S.C.J.) at para. 21.

[15] Applications to the court for advice and directions are normally regarded as expenses reasonably incurred by the trustee. But the trustee's costs of the application are not necessarily recoverable from the trust in every case. In *Kaptyn Estate*, *supra*, Brown, J. stated at para. 22:

22 Trustees' costs of applications seeking advice and direction on the construction of a testamentary instrument normally are regarded as properly incurred. As put by Professor Waters, "the court is only likely to take a different view in those rare circumstances where it considers the answers to the questions put to the court to be well-settled and obvious" or, as stated by Jenkins and Scott, where the court determined that the application was unwarranted. Mr. Schnurr, in his text, *Estate Litigation*, stated:

- However, parties to interpretations of wills, including trustees, have in recent cases been denied costs and, in a number of examples, been required to pay costs of the other parties, where a court felt that the interpretation was unnecessary, that the results were clear and the provisions of the will unambiguous, or where the application was made necessary by the unreasonable position of one of the parties.

[16] In opposing the Trustee's request for costs from the Trust, Mori Jr. submits that the Application was unnecessary. It is his position that the terms of the Trust, as varied, are clear and unambiguous and the Trustee knew or ought to have known exactly what the terms of the Trust were. He further submits that the result obtained in the Application was consistent with the way in which the Trustee (and its predecessor trustee) had interpreted and administered the Trust since its variation in 1997. It is further submitted that the Application was brought for the simple purpose of inoculating the Trustee from past and future payments of income by means of a Judgment of this Court. Finally, Mori, Jr. submits that the Trustee was not neutral in its submissions but rather took a position contrary to the income beneficiaries' interests.

[17] In my view, the Application for advice and directions was reasonable and was properly brought by the Trustee in the circumstances. As a result of a decrease in the performance of the Trust's assets beginning in 2002, a conflict arose between the beneficiaries concerning the terms of the Trust and specifically whether the Trustee was permitted to source the payments to the income beneficiaries from the capital of the Trust. The Trustee attempted to resolve the issue by agreement of the beneficiaries without success. Because of the doubt raised by certain of the beneficiaries as to the construction of the Trust, as varied and in the absence of agreement, the Trustee commenced the Application on July 13, 2007.

[18] In my view, the decision in *Montreal Trust Co. of Canada v. James* (1985), 19 E.T.R. 135 (B.C.S.C.), relied upon by Mori Jr., is clearly distinguishable from this case. In *Montreal Trust*, supra, the trustee was denied its costs of the application because the judge found

it was unnecessary and ill-advised. In my view, the Application here was neither unnecessary nor ill-advised.

[19] While I found that the terms of the Trust, as varied, to be clear and unequivocal, the issue involved was complex and not straight forward. Further, and notwithstanding the result obtained was consistent with the way in which the Trustee and its predecessor had historically interpreted and administered by the Trust, the record supports the position that, once the conflict arose, the Trustee was uncertain as to the proper interpretation of the Trust. The conflict between the beneficiaries which gave rise to the Application remained throughout its course, including argument.

[20] Mori Jr. submits that the Trustee should have continued to administer the Trust as it had been and if the matter needed to be resolved by a court, any concerned beneficiary could have commenced an action, with the result that the Trust would not have been burdened with the Trustee's costs. In my view, given the issue that arose, such a course on the part of the Trustee would have been a breach of its duty. As noted by the learned authors Donovan W.M. Waters, Q.C., Mark Gillen & Lionel D. Smith in their text, *Waters' Law of Trust in Canada*, 3rd ed. (Toronto: Thompson Carswell, 2005) at p. 1156, trustees are under a duty to seek the court's advice whenever they are in doubt as to the construction of the trust instrument, the scope of their duties or powers, or any other legal question.

[21] I also do not consider that the Trustee brought the Application for the purpose of inoculating itself from liability. While such an outcome was possible, it was also possible that the Court's decision could expose the Trustee to significant liability. In my view, the Trustee's

purpose in bringing the Application was to resolve the issue of construction which had arisen to enable it to administer the Trust and was not for its own self interest.

[22] Nor do I think that the Trustee took sides in the Application. The Trustee presented the issues, the alternatives which arise and the law in a non-partisan manner. It remained neutral in its position throughout.

[23] Accordingly, I am of the view that the costs of the Trustee were properly incurred in respect of its administration of the Trust and it is entitled to be indemnified by the Trust.

2) Quantum

[24] Both Mori Jr. and Mori-Mickus, Ashmore and O'Neil dispute the quantum of costs claimed by the Trustee. They submit that the amount claimed by the Trustee, who was neutral, greatly exceeds the fees incurred by those parties who had a stake in the outcome. In particular, they complain that the costs claimed in relation to preparation for the Application totalling \$633,389.50 are excessive.

[25] The Trustee has provided a summary of the total fees claimed of \$801,291.50 broken out into 10 categories as set out in its Bill of Costs. The largest amount is \$633,389.50 with respect to Application Preparation. That cost amount is further broken down as follows:

Application Preparation

Notice of Application (drafting/finalizing/issuing/serving)	\$ 40,101.00
Court Attendances/Case Management	\$ 129,838.00
Joint Briefs	\$ 81,153.00

Facta	\$ 142,761.00
Affidavit of Documents	\$ 72,177.00
Settling Terms of Orders	\$ 5,665.50
Obtaining production and files pursuant to parties requests and Court Orders	\$ 161,693.50

[26] At first blush, fees of \$633,389.50 for preparation of the Application seem high, particularly given that the Trustee took a neutral position in the Application. It is understandable, however, when the specifics of the preparation are viewed against the backdrop of how the Application proceeded and the tasks that the Trustee carried out, either at the request of the parties or by order of the Court.

[27] Production issues encompassed significant time and court appearances. Notwithstanding its neutral position, as the Applicant, the Trustee was required, either by request of the parties or by order of the court to produce documents and obtain not only its numerous files but also the files of third parties who had a prior involvement with the Trust before the Trustee's appointment in 2000 and in particular the 1997 Variation. This included all files relating to the Trust from Davies Ward Philips and Vineberg LLP and Ernst & Young, the lawyers and accounting advisors to the Trust at the time of the 1997 Variation.

[28] By order dated April 30, 2008, the Trustee was required to use best efforts "to obtain and produce to counsel for each of Russell Browne, John Mori Jr. and the Children's Lawyer, any and all legal opinions provided to the Trustee and the predecessor trustee with respect to any legal matters affecting the Trust, to include any and all legal opinions for which fees were charged to the Trust in the period from June 1, 1966 to present and to include copies of

any and all retainer agreements.” On March 2, 2009, the Trustee was ordered by the court to obtain all files relating to both the 1997 and 1988 variations including any predecessor trustee files and retrieve and produce the sealed court file with respect to the 1997 Variation.

[29] In addition to retrieving, reviewing and producing a significant number of documents, the Trustee was also ordered within certain time periods to serve a sworn affidavit of documents. In total, the Trustee served two affidavits of documents listing 2,771 documents. At the request of certain of the respondents, the Trustee was further ordered to provide a detailed Schedule “B” to its affidavit of documents.

[30] The Trustee also co-ordinated and compiled both a Joint Document Brief and a Joint Brief of Authorities on the Application. In so doing the Trustee had to deal with numerous requests from the parties or their counsel.

[31] The Trustee’s counsel has produced their dockets. It is the only party to have done so. Although concern is raised with respect to total amounts in respect of various tasks, I have not been provided with any detailed analysis of the dockets which would indicate that any one person or group of persons spent too much time at any particular task. From the outset, the parties were advised by the Trustee of the expense arising from document production. I accept counsel for the Trustee’s submission that, whenever possible, they staffed the tasks to keep the costs down while still being able to comply with the court orders and party requests.

[32] Litigation can be very expensive. This is particularly so when significant document production is involved, not only from the Trustee but from third parties who had prior involvement. The parties were aware that document production was expensive from the outset.

Although the amounts claimed by the Trustee for preparation of the Application are high in comparison with usual litigation, in all the circumstances, I think they are reasonable.

[33] I endorse the comments of Kekewich J. in *In Re Buckton*, [1907] 2 Ch. 406 at p. 414 to the effect that where trustees properly come before the court, they are “entitled to the fullest possible protection which the Court can give them.” Accordingly, the Trustee’s full indemnity costs as claimed in the total amount of \$917,215.07 inclusive of disbursements and taxes are allowed and shall be paid out of the Trust.

3) Allocation of Costs

[34] Ordering that the Trustee’s costs be paid out of the Trust raises the question of whether such payment should be from capital, income or both. In that regard, it is my view that it is appropriate in the circumstances of the Application for the Trustees’ costs to be allocated 1/3 to income and 2/3 to capital. An award of costs against both income and capital is not unusual in estate litigation: see: *Re Flaska Estate*, [2001] O.J. No. 4764 (S.C.J.). Such an award is within the discretion of the court and is appropriate in the present circumstances where the litigation related to the administration of the Trust and all beneficiaries received a benefit from it. See: *Water’s Law of Trusts*, supra at p.1033 and pp.1111-12. Further, and while the arguments on behalf of the income proponents prevailed on the Application, the issues arose as a result of wording initiated by the income beneficiaries in respect of the 1997 Variation to the terms of the Trust. To allocate all of the Trustee’s costs against the capital of the Trust in the circumstances, in my view, would be both unfair and inappropriate.

[35] Mori, Jr. submits that none of the Trustee's costs should be awarded against the income of the Trust because such an award would be contrary to the terms of the Trust in that it will reduce the guaranteed amount the income beneficiaries are entitled to receive. I am unable to agree that because the Trust provides for a minimum amount of income, the court is prevented from making an award of costs against the income. An award of costs against income by its very nature results in the income beneficiaries receiving less than their entitlement under the Trust, whether or not the terms of the Trust require a minimum amount to be paid.

[36] Accordingly, the Trustee's costs in the amount of \$917,215.07 shall be allocated 1/3 against income and 2/3 against capital.

The Children's Lawyer's Costs

[37] The OCL seek costs on a full indemnity basis totalling \$367,695.32, and made up of \$322,192.50 in fees, \$37,576.74 in disbursements and \$7,926.08 in taxes.

[38] The OCL was appointed by order of this court on December 19, 2008, to act as the litigation guardian for the minor, unborn and unascertained beneficiaries of the Trust on the Application. It became the lead advocate on behalf of what I termed in my reasons as the Capital Proponents, those beneficiaries who asserted that the Trustee cannot source any payments to the income beneficiaries from capital. Other than Rachael Browne, who is not seeking costs, no other Capital Proponents made submissions, either in writing or at the argument other than to support the position put forth by the OCL.

[39] None of those appearing at the costs argument had any issue with the amount of the costs claimed by the OCL. Mori Jr., Mori-Mickus, Ashmore and O'Neil and Michael

Poloniato submit that the OCL is not entitled to costs on the Application. They submit that the position taken by the OCL on the Application was very aggressive and was done more to protect its own interests rather than those of the beneficiaries it represented.

[40] The OCL's roll was to act on behalf of the minor, unborn and unascertained beneficiaries. In so doing, it must advocate on their behalf and must do so strongly. Where the OCL actively participates in estate litigation on behalf of minors, it would normally be entitled to its costs. Such entitlement, however, is not absolute. In circumstance where the OCL's conduct during the course of the litigation is so egregious that it can be said to have departed from its role of defending minors, for example by adopting an extremely combative a position and/or promoting its own interests over those of its clients, then it will be disentitled to costs and may even be subject to costs being awarded against it: *Mackey Estate v. Mackey*, [1986] O.J. No. 410 (S.C.O.).

[41] There is no question that the OCL took a strong position in the Application on behalf of the minor capital beneficiaries. It asserted that the Trustee could not source income payments from capital. It attempted, with only partial success, to obtain interim relief preventing the Trust from paying any income to the income beneficiaries. While such actions were undoubtedly viewed with concern by the income beneficiaries, in my view, they did not come close to the type of conduct necessary to disentitle it to costs. Strong advocacy on behalf of a client does not amount to egregious conduct. Nor do I consider that the position the OCL adopted was based on self interest. Notwithstanding that the OCL agreed to the 1997 Variation, it did so based on the material provided at the time. It was entitled to take the position it did on the Application and none of the parties argued it couldn't.

[42] In my view, the OCL is entitled to its costs in the total amount of \$367,695.32 to be paid from the capital of the Trust.

The Income Proponents' Costs

[43] Mori Jr., Mori-Mickus, Ashmore and O'Neil, Michael Poloniato and Wiley, Ashmore, Wiley and Ashmore (collectively the "Income Proponents") each seek their costs of the Application from the Trust. They each made submissions both in writing and at the argument that the Trust Deed as varied required the Trustee to pay the required distributions regardless of whether such payments came from "Yearly Income" as defined or from capital. In the end result, and based on the wording of the Trust Deed, as varied, I agreed with their position.

[44] None of the parties appearing at the costs argument took issue with the quantum of costs claimed by each of the Income Proponents. The OCL submits that the Income Proponents were represented by four different sets of counsel which was unnecessary and greatly increased the costs well beyond what was necessary to advance their interests. As a result, the OCL submitted that the Income Proponents be granted full indemnity costs for one set of counsel for the Income Proponents and that the remaining Income Proponents be denied their costs.

[45] The Income Proponents are opposed to the OCL's position and submit that they were required to each have separate counsel to represent their interests because those interests were different. In particular, it is submitted on behalf of Mori Jr. and Michael Poloniato that because they have no children and the other income beneficiaries do, that created a significant divergence of interest which necessitated separate representation.

[46] While I accept that not all the interests of the Income Proponents were aligned during the early stages of the Application, once the OCL became a party and began to assert its position that ceased to be the case. The Income Proponents were all aligned in preserving the distributions they had been receiving from the Trust since the 1997 Variation was approved. I am unable to determine from the material provided the precise time when that alignment occurred. Clearly by the argument the interests of the Income Proponents were aligned in respect of the position advanced. Counsel on behalf of Mori Jr. took the lead and advanced the significant portion of the argument. Counsel for Mori-Mickus, Ashmore and O'Neil followed. Counsel for Michael Poloniato made no submissions and counsel for Wiley, Ashmore, Wiley and Ashmore, four great-grandchildren over 18, spoke very briefly of how devastating it would be to them if the income payments to their parents were reduced or terminated.

[47] There is no question that the parties are each entitled to retain counsel to advise them if so desire. That does not mean, however, that they are entitled to have their counsel's costs paid by the Trust on a full indemnity basis. The days of trusts or estates being bank machines for litigation costs are over. Once the interests are aligned, it is incumbent on the parties to agree on single representation or risk receiving reduced costs or no costs at all.

[48] The total amount of the Income Proponents costs claimed is \$712,135.02. In my view they are entitled to the costs of one counsel on a full indemnity basis to be paid from the capital of the Trust, I fix those costs at \$375,000 inclusive of disbursements and taxes which amount is similar to the OCL's full indemnity costs.

[49] In my view, payment of costs to only one of the Income Proponents would be unfair in that it would be more than any one party requested. More importantly, it would not

recognise the early divergent interests necessitating separate representation. Accordingly I allocate the \$375,000 as follows: \$280,000 to Mori Jr.; \$85,000 to Mori-Mickus, Ashmore and O'Neil; \$10,000 to Michael Poloniato and \$0 to Wiley, Ashmore, Wiley and Ashmore.

[50] I allocated \$0 to Wiley, Ashmore, Wiley and Ashmore because in my view their support of their parents' position arose only in the later stages of the litigation and could have been easily set out in a letter to the court.

The Miller Thompson Account

[51] The Miller Thompson LLP account dated April 30, 2010 in the amount of \$19,293.75 was submitted to the Trustee for payment in May 2010. Although the Trustee and the OCL were agreeable to its payment from the Trust, not all of the beneficiaries agreed. Accordingly, Miller Thompson has requested that the issue of payment be dealt with as part of the costs determination on the Application.

[52] Miller Thompson's account relates to the time spent by Martin Rochweg, a lawyer in the firm, for both preparation and attendance at an examination pursuant to Rule 39. Mr. Rochweg was the principal lawyer involved in the drafting of the 1997 Variation.

[53] Mori Jr. and Mori-Mickus, Ashmore and O'Neil oppose payment of the account from the Trust. They submit that Mr. Rochweg was examined as a fact witness and not as an expert and accordingly is only entitled to witness fees.

[54] Mr. Rochweg was summoned to give evidence concerning his services as the lawyer who acted on behalf of the Trust and, in particular, as the lawyer who drafted the 1997 Variation. Although Mr. Rochweg was testifying primarily as a fact witness, his evidence was

in relation to his work as a lawyer. In such circumstances, it is unreasonable to assume that because he was examined in his capacity as a lawyer in respect of legal work he did that he is only entitled to standard witness fees. As a professional being examined in respect of his work, Mr. Rochweg is entitled to be paid his normal hourly rate for both his reasonable preparation time and for his attendance at the examination.

[55] In my view, Miller Thompson's account is reasonable and should be paid by the Trust. Because Mr. Rochweg's evidence benefited all parties on the Application, for the reasons outlined earlier in respect of the Trustee's costs, the account should be paid 1/3 from income and 2/3 from capital.

Conclusion

[56] In conclusion therefore, the costs of the Application shall be paid from the Trust as follows:

1. To the Trustee, \$917,215.07 payable 1/3 from income and 2/3 from capital;
2. To the OCL, \$367,695.32 payable from capital;
3. To Mori Jr., \$280,000 payable from capital;
4. To Mori-Mickus, Ashmore and O'Neil, \$85,000 payable from capital;
5. To Michael Poloniato, \$10,000 payable from capital; and

6. To Miller Thompson LLP, \$19,293.75 payable 1/3 from income and 2/3 from capital.
7. To Wiley, Ashmore, Wiley and Ashmore, no costs.

L. A. Pattillo J.

Released: August 22, 2011

Tab 9

A trustee may retain a solicitor, but, unless he is authorized by the trust instrument, he may not employ the solicitor to carry out those tasks which do not require professional skill, and can be performed by a layman. The position of a professional trustee who is a solicitor, is different; he has a statutory right to a "fair and reasonable" allowance in respect of the "necessary professional services" which he has rendered.³⁶ What charges of a solicitor employed by the trustees may be imposed on the trust fund depends on such circumstances as the complexity of the trust terms, the ambiguity of its language, and the expenses of litigation. A solicitor is employed by the trustees, there is no such person as the so-called solicitor to the trust, and the solicitor's charges must therefore be presented to the beneficiaries as the trustees' costs. When the relationship is that of trustee and beneficiary, the trustees' litigation costs are payable on a solicitor and client basis,³⁷ but when it is that of trustee and a third party, his litigation costs are on a party and party basis. It is only when he comes to claim those costs against the trust property that the solicitor and client basis is relevant.³⁸

It is the duty of trustees to seek the court's advice whenever they are in doubt as to the construction of the trust instrument, the scope of their duties or powers, or any other legal question. Their costs in connection with applications to the court for advice are therefore normally regarded as properly incurred; the court is only likely to take a different view in those rare circumstances where it considers the answers to the questions put to the court to be well-settled and obvious.³⁹ However, the normal allowance of litigation costs goes further; a trustee will usually be able to recover his costs from the trust even when the action which he brought or the defence which he entered was unsuccessful.⁴⁰ He should seek the advice of the court before he undertakes or defends an action, but in practice, particularly it would seem in Ontario, he often takes the risk that the court will retrospectively approve what he did as proper and in the interests of the trust. However, it is entirely in the discretion of the court⁴¹ what costs he is allowed when his accounts are being passed. As to appeals, the allowance of costs out of the trust funds depends on whether an original application to the court for advice would have solved the matter, and, if not, whether

³⁶ *Trustee Act*, R.S.O. 1990, c. T.23, s. 61(4). See further, *infra*, Part II.

³⁷ But see *Widdifield on Executors and Trustees*, 6th ed. (Carswell, 2002), chapter 4, para. 4.5.7, as to the position of a solicitor-trustee under s. 61(4) of the *Trustee Act*, R.S.O. 1990, c. T.23.

³⁸ *Royal Trust Co. v. Penny Spruce Mills Ltd.* (1962), 35 D.L.R. (2d) 120 (B.C. C.A.).

³⁹ *Re Vant* (1958), 27 W.W.R. 429 (Man. Q.B.). However, a trustee who seeks the advice of the court under the *Trustee Act* on matters which are essentially within his discretion may be required to carry his own costs: *Re Boukydis*, 60 O.L.R. 561, [1927] 3 D.L.R. 558 (Ont. C.A.) (see also *Montreal Trust Co. of Canada v. James* (1985), 66 B.C.L.R. 265, (sub nom. *Re Lotzkar*) 19 E.T.R. 135 (B.C. S.C.) applying this principle of *Re Boukydis* to an executor). There are several other decisions to the same effect. See, e.g., *Tecumseh Public Utilities Commission v. MacPhee*, 66 O.L.R. 231, [1931] 1 D.L.R. 538 (Ont. C.A.). For refusal of costs to both applicant beneficiary and respondent trustee in an advice and direction application, see *Hinton v. Canada Permanent Trust Co.* (1979), 5 E.T.R. 117 (Ont. H.C.); affirmed (February 1980), (Ont. C.A.) (unreported). *Widdifield*, *supra*, note 37, discusses the matter at para. 12.1.

⁴⁰ *Smith v. Beal* (1894), 25 O.R. 368 (Ont. C.A.).

⁴¹ *Re Dingman*, *supra*, note 34.

Tab 10

Alberta Statutes
Trustee Act
Various Powers and Liabilities

R.S.A. 2000, c. T-8, s. 25

s 25. Liability of trustee

Currency

25. Liability of trustee

A trustee is chargeable only for money and securities actually received by the trustee, notwithstanding the trustee signing any receipt for the sake of conformity, and is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults and not for

- (a) those of any other trustee,
- (b) any banker, broker or other person with whom any trust money or securities may be deposited,
- (c) the insufficiency or deficiency of any securities, or
- (d) any other loss, unless it happens through the trustee's own wilful default,

and may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee's trust or powers.

Currency

Alberta Current to Gazette Vol. 113:14 (July 31, 2017)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Alberta Statutes
Trustee Act
Variation of Trusts

R.S.A. 2000, c. T-8, s. 42

s 42. Variation of trusts

Currency

42. Variation of trusts

42(1) In this section, "**beneficiary**", "**beneficiaries**", "**person**" or "**persons**" includes charitable purposes and charitable institutions.

42(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

42(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

42(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

42(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

- (a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,
- (b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,
- (c) any person who after reasonable inquiry cannot be located, or
- (d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

42(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

42(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

42(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

42(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

Amendment History

2004, c. P-44.1, s. 52

Currency

Alberta Current to Gazette Vol. 113:14 (July 31, 2017)

Alberta Statutes
Trustee Act
Variation of Trusts

R.S.A. 2000, c. T-8, s. 43

s 43. Application to court for advice

Currency

43.Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

43(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

43(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

Currency

Alberta Current to Gazette Vol. 113:14 (July 31, 2017)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.