Court File No.: CV-18-590105-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

LESLIE AUSTIN

Plaintiff

- and -

BELL CANADA, BELL MEDIA INC.,
EXPERTECH NETWORK INSTALLATION INC., and BELL MOBILITY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE PLAINTIFF

(Approval of Implementation Order, Opt Out Order, and Order re Payment of Fees, Honorarium to Representative Plaintiff and Class Proceedings Fund Levy)

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I N D E X

Caselaw

19. *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 605 (CanLII)

20. *Lima v. Kwinter*, 2019 O.J. No. 3683 (SCJ)

21. *Lima v. Kwinter*, [2021] O.J. No. 317 (C.A.)

22. *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 (CanLII)

23. *Martin v. Barrett*, 2008 CarswellOnt 9521

24. *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537

25. *Pro-Sys Consultations Ltd. V. Infineon Technologies AG*, 2016 BCSC 964 (CanLII)

26. *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 (CanLII)

27. *Riddle v. Canada*, 2018 FC 641 (CanLII), [2018] 4 FCR 491

28. *Romeo v. Ford Motor Co.* [2019] O.J. No. 1416 (S.C.J)

29. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233

30. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 at p. 1265

31. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117 (S.C.)

32. *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)

33. *Berry v Schulman*, 807 F (3d) 600 (4th Cir 2015)

34. *Carter et al., v City of Lost Angeles*, 169 Cal Rptr 3d 131 (Sup Ct 2014)

35. *Thompson v Merck & Co.*, 2004 US Dist. LEXIS 540 (ED Penn 2004)

Secondary Sources

36. ***Report of the Attorney General's Advisory Committee on Class Action Reform***, February 1990

37. Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, ***The Law of Class Actions in Canada*** (Toronto: Thomson Reuters, 2014)

38. Ontario Law Reform Commission, ***Report on Class Actions***, vol. II (Toronto: Ontario Law Reform Commission, 1982)

CASELAW

Tab 1

Abdulrahim v. Air France

CITATION: Abdulrahim v. Air France**,** 2011 ONSC 512
COURT FILE NO.: 05-CV-294746 CP
DATE: 20110121

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Hussein Abdulrahim and Fadi Abedrabbo,** Plaintiffs

Air France, **Greater Toronto Airports Authority, NAV Canada et al.,** Defendants

BEFORE: G.R. Strathy J.

COUNSEL: *J.J. Camp Q.C.*, for the Plaintiffs

Robert Fenn, for NAV Canada

Timothy Trembley, for Air France

DATE HEARD: January 14, 2011

E N D O R S E M E N T

(Class Counsel Fee Approval)

[1] This is a motion for approval of the fees of class counsel with respect to the global settlement reached in this action.

[2] The details of the action, and of the settlement, are set out in my endorsement approving the settlement, which is being released this day: *Abdulrahim v. Air France*, 2011 ONSC 398. It is not necessary to repeat the details, save to highlight that the settlement was for the total sum of $20,750,000, inclusive of costs. The settlement will result in compensation to approximately 250 passengers on Air France Flight 358 and some 454 relatives who claim under the *Family Law Act*, R.S.O. 1990, c.F.3.

[3] Class counsel is requesting a fee of $6,225,000, plus disbursements and taxes. This is based on 30% of the settlement amount. The retainer agreement between class counsel and the representative plaintiff provides for a fee of 33%. This is, of course, subject to the review and approval of the court.

[4] Counsel also seek approval of the following costs, all of which I approve:

(a) applicable GST of $311,250.00 on class counsel fees;

(b) a further payment of disbursements from July 16, 2009 to December 31, 2010, in the amount of $154,406.50 plus applicable taxes of $10,768.49 for a total of $165,174.99;

(c) payment of G.S.T. in the amount of $18,403.76 which was overlooked in previously approved class counsel disbursements;

(d) a disbursement of $22,275.00 for payment of expert accounting fees which were deferred pending settlement (as set out in the affidavit of Paul Miller, filed); and

(e) a reserve of $25,000.00 to cover reasonable expenses incurred after January 1, 2011 up to February 28, 2011.

[5] In addition, class counsel agreed to protect the accounts of certain medical facilities that provided services to seventeen class members and that agreed to defer their fees pending settlement. The total amount owing is $155,413.70. On presentation of appropriate evidence, I will issue an order directing the administrator to pay the relevant portions of this amount out of the damages awarded to the affected class members.

[6] The right of representative plaintiffs to enter into contingency fee arrangements with class counsel is recognized in the *Class Proceedings Act, 1992*, S.O. 1992 c. 6 (the "*C.P.A.*"). Section 32(1) of the *C.P.A.* provides that an agreement respecting fees and disbursements shall be in writing and shall:

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

[7] On January 21, 2010, Madam Justice Lax approved the retainer agreements between class counsel and the representative plaintiffs, and payment of the disbursements sought by class counsel in the amount of $1,155,420.69. The retainer agreement entered into between class counsel and the representative plaintiffs complies with the *C.P.A.* and is approved.

[8] The following factors, among others, may be considered in determining the reasonableness of a lawyer's fee:

(a) the time expended by the lawyer;

(b) the legal complexity of the matters dealt with;

(c) the risks undertaken and the degree of responsibility assumed by the lawyer;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by the lawyer;

(g) the results achieved; and

(h) the ability of the client to pay and the client's expectation as to the amount of the fee.

See: *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369, [1996] O.J. No. 2897 at para. 8 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386, [1996] O.J. No. 3038 (Gen. Div.); *Jones v. American Heyer-Schulte Corp.*, [1998] O.J. No. 6293 (Gen. Div.); *Gariepy v. Shell Oil Co.* (2003), 48 C.P.C. (5th) 340, [2003] O.J. No. 2490 at para. 13 (S.C.J.); *McArthur v. Canada Post Corp.*, [2004] O.J. No. 1406 (S.C.J.); *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344, [1985] O.J. No. 160 (C.A.).

[9] In class action litigation, the court must also consider the goals of class proceedings, particularly in terms of access to justice. The fee of class counsel must be both fair and reasonable. It should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important considerations in determining the fee: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304, [1996] O.J. No. 2644 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, above; *Serwaczek v. Medical Engineering Corp.*, above; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.).

[10] The courts have recognized that the objectives of the *C.P.A.* – judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. A premium on fees is the reward to class counsel for accepting this risk and taking on meritorious but difficult matters: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Parsons v. Canadian Red Cross Society*, above, at 287.

[11] In my view, the following factors are particularly significant in determining the fee:

(a) <u>The result</u>

[12] As I observed in my endorsement approving the settlement with NAV, the result of the settlement is an excellent one for every member of the class, who will be indemnified for approximately 80% of his or her compensable damages. Considering that the settlement leaves no individual issues for determination, this is a very significant accomplishment. No class member has objected to the settlement.

(b) The contingent fee arrangement

[13] A contingency fee of one-third is standard in class action litigation and has been commonplace in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

(c) The time spent by class counsel

[14] The counsel team included J.J. Camp, Q.C. and Mr. Fiorante at Camp Fiorante Matthews, as well as other lawyers at Will Barristers LLP and the firm of Sutts, Strosberg LLP. Class counsel retained French counsel to assist with respect to the law of France, civil procedures in France, and specific issues arising with respect to some of the French passengers, including subrogated claims of various French agencies, and more particularly, the claims associated with Mr. Haddad, Mr. M. Fawaz and Mr. K. Fawaz. Also part of the class counsel team is Laura Bruneau, a bilingual lawyer and class action administrator, who had the primary responsibility for day-to-day contact with the class members as well as the compilation of an electronic file for each class member, which included all relevant hospital, medical, economic, and other reports and data. In addition, she orchestrated the frequent reports by class counsel to the class members and was responsible for management of class members' personal information, communications with class members and design of the claims process.

[15] As of December 31, 2010, the time docketed by all class counsel in this proceeding, including the time docketed on the Haddad and Fawaz Claims, amount to $4,717,155.02 (exclusive of applicable taxes). The time spent by Mr. Camp's firm alone is almost $2.5 million.

[16] It should be noted in this regard that this action was commenced in 2005. Thus, for over five years class counsel has undertaken this action without any remuneration. In the meantime, rent had to be paid, lawyers and staff had to be paid salaries, and expenses were incurred and paid. Without a substantial firm infrastructure and resources, an action of this kind would be an impossible undertaking.

(d) The complexity of the matter

[17] This was complex litigation involving challenging factual and legal issues, including:

- the cause of the crash;
- the application of two international conventions on carriage by air, the *Montreal Convention* and the *Warsaw Convention* (the "*Conventions*");
- jurisdiction under the *Conventions*;

- the extent of damages recoverable from the carrier under the *Conventions*;

- contribution and indemnity under the *Conventions:*

- the proper scope of a bar order in the settlement of complex, multi-party litigation;

- the liability of the various defendants other than Air France; and

- individual issues of damages including psychological harm, loss of earning capacity, future care and baggage loss.

[18] In order to address these issues, class counsel were required to:

- conduct extensive discoveries – there were approximately 25 days of oral discovery;

- undertake extensive investigations into the cause of the crash in order to conduct examinations for discovery and prosecute the claim. In particular, class counsel retained and worked with numerous experts to investigate a wide range of liability issues including pilot experts, crash investigation experts, weather experts, air traffic control experts, an airport safety expert, an airport runway expert and human factors experts;

- retain experts, both in Canada and in France, to assist in the analysis and work-up of the individual damages issues including expert physicians, psychiatrists, psychologists, economists and future care experts;

- prepare work-ups based on detailed questionnaires sent to all members of the passenger class. In addition, class counsel conducted interviews, in person and by phone, with virtually all passenger class members in Canada and in France. In most cases, the briefs were extensive and included detailed accounts of each passenger's recollection of the accident, physical and psychological injuries and their impact, symptoms, any income loss, any future care claims, baggage loss, and out-of-pocket expenses. All of this was backed up by hospital records, medical records, loss of earnings records and other expert reports as required; and

- perform extensive legal research with regard to a number of complex legal issues arising under the *Conventions*, including jurisdiction and the scope of compensable damages - these issues had a significant impact on the structure of the settlements achieved and the terms of the bar order.

(e) Efforts to settle

[19] Class counsel expended considerable effort to settle with all defendants. I have outlined the scope and nature of these settlement discussions in my reasons approving the settlement and it is not necessary to restate them. Suffice to say that these settlements were accomplished as a result of a focused, strategic, well-prepared and arduous process. I am as satisfied as I possibly can be that these efforts led to a superior result which is extremely beneficial to all members of the class.

[20] In considering the approval of counsel's fee, it is appropriate to recognize that, had these efforts to settle been entirely unsuccessful, class counsel would have expended a very large amount of time and resources without bearing any fruit in this litigation.

(f) The skill and diligence of class counsel

[21] I am convinced that this settlement would not have been possible but for the skill and diligence displayed by class counsel, particularly by Mr. Camp, Mr. Fiorante, Mr. Miller and Ms. Bruneau. No doubt others deserve credit. Mr. Camp and Mr. Fiorante have extensive experience in both class action and aviation litigation. Mr. Miller has considerable experience in personal injury litigation and was the lawyer primarily responsible for the work-up of damages. Ms. Bruneau is an experienced lawyer. As I have noted, she was responsible for the creation of the administrative structure that managed the damages documentation and she handled the communication of class members in both French and English. It was the creation of this impressive system that made it possible for class counsel to assess the damages of each class member and to effectively negotiate with the defendants based on a reasoned and persuasive calculation of the damages.

[22] I am also convinced that class counsel pursued these claims aggressively and were able to negotiate favourable settlements because the defendants and their counsel were well aware that if a settlement was not achieved, they would be facing a skilled adversary who was quite prepared to take the case to trial if necessary.

(g) Risks assumed by class counsel

[23] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, above, the court recognized that class counsel take on significant risk in undertaking a class proceeding on a contingency basis and that it is important to reward successful lawyers for accepting this risk.

[24] There is a risk in every case that the action will ultimately be unsuccessful. While this risk was mitigated in this case, to some extent, by the liability provisions of the *Warsaw*

Convention pertaining to Air France, it was by no means a sure thing against the other defendants, all of which were substantial entities with significant resources. In taking on a case of this magnitude, class counsel was required to incur and carry disbursements in excess of $1 million. Vast amounts of time have been spent on the case and also carried on the books of counsel's firm.

[25] There was, in this case, a real risk that the action would not be successful against some defendants and that the efforts, time and resources spent by class counsel would go unrewarded.

(g) The progress of the opt-out actions

[26] While not directly relevant to the issue before me, a measure of the success of class counsel, who pursue this matter on behalf of some 700 class members (including passengers and their families), is that some of the opt-out actions, which seek to pursue individual actions on behalf of passengers who opted out of the class action, have not advanced particularly expeditiously – see my reasons dismissing NAV's motion for a common liability trial: *Abdulrahim v. Nav Canada*, 2010 ONSC 5542, [2010] O.J. No. 4660. While some of these actions are barely off the ground, or bogged down in procedural battles, class counsel has successfully managed to prosecute this action to a state of trial readiness and has persistently and successfully orchestrated its complete resolution.

[27] I would add to this that the Fawaz and Haddad claims were languishing until they were taken over by class counsel.

(h) Importance of the matter to the class

[28] It is quite obvious that involvement in a traumatic air crash is an experience from which no one emerges unscathed and obtaining fair compensation for their injuries was vitally important to all passengers on the flight. The settlements will result in substantial monetary compensation to all class members.

(i) Communications with class members

[29] This is a case in which class counsel's communications with members of the class have been exemplary. Class counsel has met at least once with every single passenger class member. This includes two meetings of class counsel, together with local French counsel, with all passengers living in France. Class counsel have had extensive communications with all class members, ranging from personal interviews to periodic reports via e-mails and letters. To date, class counsel have reported to the passenger class members approximately fifteen times.

Conclusion

[30] In summary, the hard work, outstanding organization, tactical and legal skills, and persistence of class counsel have resulted in an excellent result in this class action. It has achieved real justice for real people who were victims of a very serious aviation accident. It will give them significant compensation through a simple and expeditious claims process. The

benefits will begin to flow almost immediately. While the proposed fee is a large one, it was well-earned and it is fair and reasonable in the circumstances.

[31] For these reasons, an order will issue approving the retainer agreement between class counsel and the representative plaintiffs and approving fees in the amount of $6,225,000.00 as well as the taxes and disbursements set out above.

[32] In accordance with counsel's undertaking, these fees will not be paid until the claims of all class members have been paid.

[33] I will remain seized of the matter for the purpose of any issues that may arise with respect to the implementation of the settlement or with respect to class counsel's fees.

G.R. Strathy J.

DATE: January 21, 2011

Tab 2

APEIQ c. Corp. Nortel Network

2009 CarswellQue 5368
Superior Court of Quebec

Assoc. protection of Quebec savers & investors(APEIQ) v. Corp. Nortel Networks

2009 CarswellQue 5368, 2009 J.E. 1229, EYB 2009-159611

Association de protection des épargnants et investisseurs du Québec(APEIQ),Representative, and André Dussault, Personne désignée, v. Nortel NetworksCorporation , Defendant, and Belleau Lapointe, S.A. and Unterberg, Labelle, Lebeau, LLP.C., Solicitors-Applicants, and Ontario Public Service Employees' Union Pension Plan Trust Fund, Intervener, and Class Action Fund, Mis en cause

(500-06-000277-059) Clifford W. Skarstedt, Representative, v. Nortel NetworksCorporation , Defendant, and Ontario Teacher's Pension Plan Board and Department if the Treasury of the State of New Jersey and its Division of Investment, Interveners, and Class Action Assistance Fund, Mis en cause

Monast J.C.S.

Judgment: May 28, 2009
Dossier: C.S. Que. Montreal 500-06-000126-017, 500-06-000277-059

Subject: Civil Practice and Procedure

Monast J.C.S.:

introduction

1 The issue is whether the out-of-court fees charged by the solicitor-applicants in two class action cases are reasonable.

2 Lawyers Belleau Lapointe, S.A. ("Belleau Lapointe"), and Unterberg, Labelle, Lebeau, S.E.N.C. ("Unterberg, Labelle, Lebeau") acted as solicitors in the class action brought on behalf of the Association de protection des épargnants et investisseurs du québec ("APEIQ") against Nortel Networks Corporation ("NORTEL »)

3 This action was brought after NORTEL announced on 15 February 2001 that its financial forecasts for the financial year 2001 were too optimistic and that they should be revised downwards. This news was not well received by the market and NORTEL's stock lost more than 30% of its value in the hours that followed. Nortel's share price on the New York Stock Exchange increased from US$29.75 on February 15, 2001, to US$19,000 on February 16, 2001.

4 Numerous appeals have been brought as a result of these events. In Quebec, APEIQ filed a motion for authorization to bring a class action against NORTEL in February 2001.

5 In that application, it was alleged that NORTEL's falsely optimistic financial forecasts of its anticipated results had the effect of artificially inflating the price and value of its securities and of encouraging investors to buy shares at a price higher than their true value.

6 The purpose of the remedy, if allowed, was to obtain compensation for the economic losses suffered by investors.

7 The action brought by the APEIQ in 2001 is one of the files included in the so-called Nortel I files.

8 Counsel Trudel & Johnston LLP.C ("Trudel & Johnston") acted as solicitors in the class action that was brought on behalf of Clifford Skarstedt ("SKARSTEDT") against Nortel Networks Corporation ("NORTEL").

9 That action was brought following announcements made by NORTEL on 10 March 2004 and 28 April 2004 concerning the revision of its financial results for the 2003 financial year, the dismissal of certain directors for serious reasons, and an anticipated reduction in its profits for 2003 of the order of 50%. The market reacted to these announcements and NORTEL's share value fell by about 30%. Between March 10, 2004 and April 28, 2004, the share price increased from US$6.88 to US$4.05.

10 Numerous class actions have been brought against NORTEL as a result of these events. In Quebec, SKARSTEDT filed a motion for authorization to bring a class action against NORTEL in February 2005.

11 In that application, it was alleged that the financial results published by NORTEL had the effect of artificially increasing the price and value of its shares, which would have had the effect of encouraging investors to acquire securities on the basis of inaccurate and misleading statements. The purpose of the remedy, if allowed, was to obtain damages to compensate for the damages suffered by investors.

12 The action brought by SKARSTEDT in 2005 is one of the cases included in the so-called Nortel II files.

13 Class actions have also been brought against NORTEL in the United States, Ontario and British Columbia.

14 The U.S. actions were consolidated and principal plaintiffs were named. The lawsuits filed in 2001 were consolidated in *The In re Nortel Networks Corp. Securities Litigation, Consolidated Civil Action No. 2001-CV-1855 (Nortel I)* and those filed in 2004 and 2005 were consolidated in the case *of In re Nortel Networks Corp. Securities Litigation, Consolidated Civil Action, Master File No. 04 Civ. 2115 (Nortel II.)*

15 The Board of Directors of the Trust Fund of the Ontario Public Service Employees Union Pension Plan ("OP TRUST") was appointed to act as lead plaintiff in the Nortel I case, and the Board of Directors of the Ontario Teachers' Pension Plan ("TEACHERS") jointly with the New Jersey Department of the Treasury and its Investment Division ("NEW JERSEY DEPARTMENT OF THE TREASURY") were appointed to act as lead plaintiffs in the Nortel II case.

16 Proceedings in the United States have progressed more rapidly than those in Canada for a variety of reasons.

17 In September 2003, the U.S. courts allowed a class action against NORTEL to benefit all persons who had purchased shares or traded securities of the company between October 24, 2000 and February 15, 2001, including Canadian residents in the Nortel I case.

18 The consolidated class actions in the Nortel II case were in the process of being certified but were not yet certified when the lead plaintiffs in the Nortel I and Nortel II cases participated with Nortel and their respective counsel in a mediation presided over by a federal judge in New York with the aim of finding an acceptable compromise to settle these disputes out of court.

19 In February 2006, an agreement in principle was reached to comprehensively settle all of the actions brought in the Nortel I and Nortel II cases in the United States and Canada in order to compensate all investors in the same manner regardless of their place of residence.

20 That agreement was based on the premise that the representations made by NORTEL's management with respect to its future results had potentially influenced the price and value of the company's shares and encouraged investors to purchase its shares. It also took note of the fact that NORTEL's ability to pay was not unlimited.

21 For the purposes of the Nortel I Settlement, it was estimated that the artificial increase in the value of the shares that could have resulted from NORTEL's erroneous financial forecasts would be 27.5% of their value, or approximately US$8.18 per share as of February 15, 2001. Approximately 868 million shares of NORTEL were allegedly traded between 24 October 2000 and 15 February 2001. The value of the losses incurred was estimated at approximately $7.1 billion.

22 For the purposes of the Nortel II Regulation, the parties considered that the artificial increase in the value of the shares that might have resulted from the erroneous information contained in the financial results published by NORTEL in 2003 would

correspond to 42% of their value, or US$2.90 per share, as at 10 March 2004. Approximately 2.9 billion shares were reportedly traded between April 24, 2003 and April 27, 2004. The value of the losses incurred was estimated at approximately $8.4 billion.

23 The proposed settlement in respect of the Nortel I groups provided for the payment by NORTEL and its insurers of US$438,667,428 and additional compensation in the form of 314,333,875 shares, the value of which was estimated at the time at approximately US$704,107,880.

24 The approximate value of the Nortel I settlement fund was estimated at the time at US$1,141,775,308 (US$1.14 billion).

25 This Nortel I settlement fund was to be distributed proportionately among the members of the Nortel I groups as long as they filed acceptable proof of claim to attest to the losses they had incurred and those losses were recognized as eligible by the claims administrator designated by the parties.

26 The proposed settlement with respect to the Nortel II groups provided for the payment by NORTEL and its insurers of US$370,157,418 and additional compensation in the form of 314,333,875 shares, the value of which was estimated at the time at approximately US$704,107,880.

27 It provided that persons who had purchased shares of NORTEL between 24 October 2000 and 15 February 2001, and who had sold them at a loss by 15 February 2001 at the latest, would be entitled to receive 2.75% (10% of 27.5%) the difference between the purchase price and the selling price paid. Those who had purchased shares during the reporting period and retained them after February 15, 2001, would be entitled to receive 27.5 per cent of the purchase price paid. As for persons who had made option transactions, they would be entitled to compensation which, however, could not exceed 5% of the value of the fund overall.

28 The approximate value of the Nortel II settlement fund was estimated at the time to be US$1,074,265,298.

29 As in the case of the Nortel I settlement fund, the Nortel II settlement fund, which was thus made up of both cash and NORTEL shares, was to be apportioned among the members of the Nortel I groups as long as they filed acceptable proof of claim to attest to the losses they allegedly incurred and those losses were recognized as eligible by the claims administrator designated by the parties.

30 The settlement entitles to an average recovery per common share of 10.7 cents in cash and 0.127 cents in shares, excluding attorneys' fees and administrative costs:

> (a) Common shares of Nortel purchased between April 24, 2003 and March 10, 2004 and sold at a loss prior to March 11, 2004 will be compensable by the lesser of (i) 0.29 US cents per share and (ii) 10% of the difference between the purchase price and the sale price.
>
> (b) Common shares of Nortel purchased between April 24, 2003 and March 10, 2004 and sold at a loss between March 11, 2004 and March 12, 2004 will be compensable at the lesser of (i) the purchase price less the sale price and (ii) 0.44 US cents per share.
>
> (c) The common shares of Nortel purchased between April 24, 2003 and March 10, 2004 and sold at a loss between March 15, 2004 and April 27, 2004 will be compensable at the lesser of (i) the purchase price less the sale price and (ii) US$1.48 cents per share.
>
> (d) The common shares of Nortel purchased between April 24, 2003 and March 10, 2004 and held at the close of business on April 27, 2004 will be compensable at the lesser of (i) the purchase price less US$4.05 and (ii) US$2.90 per share.
>
> (e) Common shares of Nortel purchased between March 11, 2004 and March 12, 2004 and sold at a loss prior to March 15, 2004 will be compensable by the lesser of (i) 0.25 US cents per share and (ii) 10% of the difference between the purchase price and the sale price.

(f) The common shares of Nortel purchased between March 11, 2004 and March 12, 2004 and sold at a loss between March 15, 2004 and April 27, 2004 will be compensable at the lesser of (i) the purchase price less the sale price and (ii) US$1.04 per share.

(g) The common shares of Nortel purchased between March 11, 2004 and March 12, 2004 and held at the close of business on April 27, 2004 will be compensable at the lesser of (i) the purchase price less US$4.05 and (ii) US$2.46 per share.

(h) Common shares of Nortel purchased between March 15, 2004 and April 27, 2004 and sold between March 15, 2004 and April 27, 2004 will be compensable at least (i) 0.14 US cents per share and (ii) 10% of the difference between the purchase price and the sale price.

(i) The common shares of Nortel purchased between March 15, 2004 and April 27, 2004 and held at the close of business on April 27, 2004 will be compensable at the lesser of (i) the purchase price less US$4.05 and (ii) US$1.42 per share.

(j) In the area of put or put option transactions, the total amount of recovery that may be paid to members shall not exceed 5% of the net settlement fund. The rules applicable for the determination of the eligible claim are relatively complex. They are set out in the Nortel II Notice of Settlement.

(k) Group members who had negotiated stock options could also receive a payment from the settlement fund, but it was not possible to meaningfully estimate the number of options affected and the total amount of claims to which they could be entitled. [1]

31 From February to June 2006, discussions continued to clarify the terms of the regulation which were envisaged in order to dispose of all the actions brought against NORTEL in the United States.

32 At the same time, negotiations were initiated with the applicant attorneys in Quebec, Ontario and British Columbia to seek their adherence to this settlement and to terminate the legal proceedings in those jurisdictions.

33 In June 2006, agreements were reached with all Canadian prosecutors. Settlement agreements have been drafted to clarify the terms and conditions of the regulations in the Nortel I and Nortel II files. Following the signing of these agreements, transactions were signed to give them effect in the APEIQ and SKARSTEDT files and the Tribunal authorized the bringing of a class action in each of these cases for settlement purposes.

34 In November 2006, the solicitor-applicants asked the Court to approve the transactions concluded with NORTEL and the settlement agreements to which those transactions referred in order to settle amicably the actions brought in those cases.

35 In January 2007, the Tribunal approved the Nortel I and Nortel II settlement agreements and the transactions signed by the parties to give effect to the groups involved in the class actions brought in Quebec.

36 Garden City Group, which was responsible for administering all of the claims, received 296,029 pieces of evidence of claims in the Nortel I case. It accepted 226,050, including 37,821 from Quebec. [2]

37 The total losses recognized in the case of the claimants involved in the class action brought by the APEIQ amount to $482,406,103.62. [3]

38 Garden City Group received 174,568 pieces of claim in the Nortel II case. It accepted 86,503, including 12,019 from Quebec. [4]

39 The total acknowledged losses for the claimants in the SKARSTEDT case amount to US$94,564,183. [5]

40 The solicitors-applicants estimated that the Quebec claimants whose losses had been recognized would receive approximately $101,000,000 under the Nortel I and Nortel II settlements.

41 It was agreed with NORTEL that solicitors acting in each of the jurisdictions where remedies had been brought against the company should apply to the court in their jurisdiction for approval of their requests for out-of-court fees.

42 As part of the discussions that led to the resolution of all of the cases, prosecutors seeking the United States and Canada collectively agreed to limit their out-of-court fee claims to no more than 9.9% of the Nortel I and Nortel II settlement funds.

43 U.S. attorneys agreed to limit their fee requests to no more than 8.5% of the Nortel I and Nortel II settlement funds, or approximately US$188,400,000.

44 In the Nortel I case, lawyers Milberg Weiss Bershad & Schulman LLP requested out-of-court fees of $98 million. Judge Berman awarded them a fee of US$34 million, about double their basic fees (US$16.6 million) and US$3.75 million in reimbursement of disbursements.

45 In Nortel II, counsels Bernstein, Litowitz Berger & Grossman requested and obtained an amount equivalent to 8% of the Nortel II settlement fund as out-of-court fees.

46 In Ontario, solicitors seeking in *Frohlinger* (Nortel I) and *Gallardi* (Nortel II) agreed to limit their fee claims to no more than 0.7% of the Nortel I and Nortel II settlement funds, or US$15,500,000.

47 They asked for a fee of $8.25 million, which they later reduced to $5 million. Judge Winkler awarded them $5 million, or about two and a half (2.5) times their basic fees and the reimbursement of their disbursements.

48 B.C. counsel agreed to limit their request for a fee in the *Jeffery* (Nortel II) case to no more than 0.25% of the Nortel I settlement fund, or US$2,900,000.

49 They claimed out-of-court fees of $1 million, about double their basic fees plus applicable taxes and reimbursement of their disbursements. Their application was approved by Justice Groberman.

50 Quebec attorneys agreed to limit their fee requests to no more than 0.45% of the Nortel I and Nortel II settlement funds, or US$6,000,000.

51 It is now necessary to determine whether this is the amount of fees to which they are entitled for the services they rendered to the members in these matters.

52 In the APEIQ (Nortel I) file Belleau Lapointe and Unterberg, Labelle, Lebeau are asking for fees of US$3,117,244.34. This represents $3,491,001.94 in Canadian dollars.

53 In the case of SKARSTEDT(Nortel II), Trudel & Johnston seeks fees of US$2,864,440.17. This represents $3,207,886.55 in Canadian dollars.

54 Overall, the fees charged by the applicant attorneys amount to C$6,669,888.49.

55 The interveners dispute the requests for fees submitted by the applicant prosecutors.

56 They argue that the fees should be limited to $1,073,572 in the APEIQ file and $949,937 in the SKARSTEDT file. In both cases, they suggest that hours worked after October 19, 2006, should be compensated in excess of these amounts at a single rate.

57 The Tribunal must decide whether the fees charged by the solicitor-applicants are reasonable. If this is the case, it must grant their requests. Otherwise, he must determine the remuneration to which they will be entitled.

FACTS AND PROCEDURES

58 In February 2001, lawyers Belleau Lapointe filed a motion for authorization to bring a class action on behalf of APEIQ against NORTEL on behalf of the natural persons who had suffered damages as a result of the fact that they had purchased shares of that company between January 19 and February 15, 2001 and that they still held them on February 15, 2001.

59 In that application, it was alleged that on several occasions between 24 October 2000 and 15 February 2001, NORTEL had made falsely optimistic and erroneous financial forecasts of its anticipated results for 2001, and that those forecasts had the effect of artificially inflating the price and value of the company's shares and of

encouraging investors to buy them at a disproportionately high price, thereby causing them damage.

60 It was also suggested that NORTEL had deliberately failed to disclose its inability to meet its forecasts when it reported its financial results for 2000 on 18 January 2001 because it wanted to take advantage of the high price of its shares to complete a purchase of assets from a foreign company on optimal terms.

61 The following paragraphs of the motion for leave correctly summarized the APEIQ's submissions in that case:

> 2.34 As shown in the table below, on no less than five (5) occasions, NORTEL announced for the 2001 financial year an increase in its revenues and an increase in operating profit of between 30% and 35% and finally revised its forecast on 15 February2001 by halving the anticipated increase in its revenues and 2/3 of the increase in operating income*(sic);* [. . .]
>
> > 2.35 Similarly, on four (4) occasions, NORTEL announced that its revenues for the first quarter of 2001 would be between US$8.1 billion and US$8.3 billion and that its earnings per share would be US$0.16, only to change its mind, as of 15 February 2001, and to anticipate revenues of US$6.3 billion and a loss per share of US$0.04;
> >
> > 2.36 By NORTEL'sown admission , the revision of its financial forecasts for the first quarter and for the year 2001 constitutes a material change within the meaning of the applicable securities legislation, and more particularly to the provisions of section 75 of the Securities *Act* of Ontario, R.S.O. 1990, c. S-5 . . .];
> >
> > 2.37 The stock market's reactions to this announcement of 15 February 2001 were immediate and devastating. For example, at the close of trading on Thursday, February 15, 2001, NORTEL's stock on the Toronto Stock Exchange closed at $46.15, while the day after the announcement, on February 16, 2001, NORTEL's stock ended at $31.00, a fall of some 33% in its market value. [. . .];
> >
> > [. . .]
> >
> > 2.48 As at 18 January 2001, NORTEL was aware or should have been aware of the U.S. market downturn and the likely negative impact of such a slowdown on its optimistic financial forecasts for the first quarter and throughout 2001;
> >
> > 2.49 In addition, but without limiting the generality of the foregoing, NORTEL knew or should have anticipated the likely negative impact of such a slowdown on its customers' orders and consequently on its anticipated financial results;
> >
> > 2.50 However, as at 18 January 2001, NORTEL should have informed the public and its shareholders that it was unable to meet such optimistic financial forecasts;
> >
> > 2.51 NORTEL'soptimistic and erroneous financial forecasts, as well as its failure to report its inability to meet those financial forecasts, had the effect of artificially inflating the price and value of NORTEL's securities and of inciting group members to purchase NORTEL shares at an artificially high price, thereby causing them damage;
> >
> > 2.52 By failing to disclose its failure to meet its optimistic financial forecasts in its press release of 18 January 2001. . . . NORTEL breached both its legal and statutory obligations to its shareholders, including, in particular, its occasional disclosure obligations under section 73 of the *Quebec Securities Act* and section 75 of the Ontario Securities *Act;*
> >
> > [. . .]
> >
> > 2.53 Nortel's failure to disclose a material change that could have a significant influence on the value of its shares constitutes a breach of its disclosure and transparency obligations and a civil fault entailing its liability;
> >
> > 2.54 In addition, NORTEL is subject to the general rules of the Civil Code of Québec, which require it to act in good faith and prohibit it from making false

representations, at the risk of incurring liability for damages caused to members of the group. » [6]

62 The purpose of the APEIQ class action was to obtain damages to fully compensate the economic losses suffered by the group and to collectively recover the sums paid for distribution to the members whose losses had been acknowledged.

63 It was estimated at the time that the group should consist of several thousand people because NORTEL had more than 3 billion shares outstanding and approximately 500 million shares of that company had been traded between January 19 and February 15, 2001 on the Toronto and New York stock exchanges.

64 It was impossible to know in advance the amount that NORTEL could be ordered to pay if APEIQ were successful, but it was reasonable to believe that it would be a considerable sum.

65 In March 2001, an agreement was reached between Belleau Lapointe and Unterberg, Labelle, Lebeau & Morgan to specify how their respective firms would be involved in future class actions brought in Quebec on behalf of the APEIQ.

66 In April 2001, Unterberg, Labelle, Lebeau & Morgan appeared in the case to assist Belleau Lapointe as counsel for the APEIQ. The name of the firm later changed to Unterberg, Labelle, Lebeau.

67 There were few procedural developments in this case between the filing of the motion for leave in February 2001 and the hearing on the merits of that motion in June 2006, with the exception of a motion for inadmissibility and dismissal of an action which was brought by NORTEL's counsel in November 2001, and which was referred to the judge who would be seized of the merits of the motion for leave.

68 In fact, this motion was never argued on the merits because a settlement was reached between the parties in June 2006.

69 Between January 2001 and June 2006, several class actions, based essentially on the same facts, were initiated in the United States and elsewhere in Canada(Nortel I).

70 Thus, in March 2001, OP TRUST filed an action to bring a class action against NORTEL in the*United States District Court for the Southern District of New York*. He applied to the court for leave to represent all persons who had acquired common shares of NORTEL or who had traded options during the period from October 24, 2000 to February 15, 2001, and who had suffered damages as a result of the publication by that company of erroneous financial forecasts.

71 This action was certified on September 5, 2003, and OP TRUST was appointed to act as lead plaintiff for all of the consolidated class actions in the so-called *In Re Nortel Networks Corp Securities Litigation, Consolidated Civil Action No. 2001-CV-1855 (Nortel I)*.

72 In Canada, proceedings have also been taken against NORTEL as a result of the events previously reported.

73 One class action was commenced in Ontario in the *Frohlinger* [7] case and another was commenced in British Columbia in the *Jeffery case.* [8]

74 When OP TRUST's U.S. action was certified in September 2003, none of the pending actions in Canada had yet been certified or authorized. The situation was still the same in February 2006.

75 In 2004 and 2005, a new series of class actions was brought against NORTEL in the United States and Canada, when the company announced that it had to revise its financial results for 2003.

76 In the United States, teachers and the NEW JERSEY DEPARTMENT OF THE TREASURY filed class actions against NORTEL on behalf of all persons who had acquired common shares between April 23, 2003 and April 27, 2004 or had traded options during the relevant period and who had suffered damages as a result of the company's review of its financial results for the year 2003.

77 In Canada, too, proceedings have been instituted against NORTEL as a result of these events. An action was filed to bring a class action in the *Gallardi case.* [9]

78 In Quebec, lawyers Trudel & Johnston filed a motion for authorization to bring a class action against NORTEL in February 2005. This is the SKARSTEDT dossier. The group to which this action was brought included all persons resident in Quebec who had purchased shares of NORTEL between January 29 and March 15, 2004 and who still held them on March 15, 2004.

79 In that application, it was alleged that certain nortel executives had misrepresented the company's financial results for 2003, with the intention of misleading the public and artificially increasing the price and value of the shares, which would have had the effect of inciting investors to acquire securities on the basis of inaccurate and misleading statements.

80 In January 2004, nortel's financial results for 2003 showed net profits of US$499 million on sales of US$2.83 billion for the fourth quarter of 2003 and net profits of US$732 million on sales of US$9.81 billion for 2003. Shortly after the publication of these results, the company's share price would have appreciated by more than 17%.

81 In March 2004, however, NORTEL indicated that its financial results for the 2003 financial year were incorrect and that they should be revised. As a result of this announcement, the value of the company's shares fell by 28%. In January 2005, NORTEL announced that its net profits for the 2003 financial year actually amounted to USD 434 million.

82 Few procedural developments occurred in this case after the filing of the motion for leave in February 2005. A motion for estreability was scheduled to be filed for adjudication in April 2006 but was never argued because an agreement in principle was reached between the principal plaintiffs and NORTEL in the United States and discussions initiated with Canadian counsel as a result of that agreement led to a resolution of the appeals in all the jurisdictions concerned.

83 In February 2006, Nortel announced that it had reached an agreement in principle in the Nortel I and Nortel II cases to settle all the legal proceedings brought against it or in the process of being instituted because of the facts previously reported:

> **TORONTO** - Nortel announced that as a result of the previously announced mediation process entered into by the Company with the lead plaintiffs in two significant class action lawsuits pending in the Southern District of New York, and based on the recommendation of a senior Federal Judge, the Company and the lead plaintiffs have reached an agreement in principle to settle these lawsuits.
>
> The proposed settlement would be part of, and is conditioned on, the Company reaching a global settlement encompassing all pending shareholder class actions and proposed shareholder class actions, commenced against the Company and certain other defendants following the Company's announcement of revised financial guidance during 2001and the Company's revision of its 2003 financial results and restatement of other prior periods. The proposed settlement is also conditioned on Nortel and the lead plaintiffs reaching agreement on corporate governance related matters and the resolution of insurance related issues.
>
> [. . .]
>
> Under the terms of the proposed global settlement contemplated by the agreement in principle, the Company would make a payment of US$ 575 million in cash, issue 628,667,750 of its common shares (representing 14.5% of its current equity), and contribute one-half of any recovery in the existing litigation by Nortel against Messrs. Frank Dunn, Douglas Beatty and Michael Gollogly, the Company's former senior officers who were terminated for cause in April 2004. The agreement in principle is also conditioned on the contribution of available insurance which has yet to be resolved. The total settlement amount will include all plaintiff's court-approved attorney's fees. Nortel has agreed to respond to the corporate governance proposals of the lead plaintiffs and enter into a dialogue to review the Company's corporate governance.
>
> The proposed global settlement would also be conditioned on the receipt of all required court, securities regulatory and stock exchange approvals. The Company and the lead plaintiffs are continuing discussions towards a definitive settlement agreement. At this time, there can be no assurance that such an agreement can be reached, that each of the actions noted above can be brought into, or otherwise bound by, the proposed settlement, if finalized, or that the proposed settlement

> would receive the required court and other approvals in all applicable jurisdictions. These settlement discussions are being mediated by United States District Court Judge, the Honourable Robert W. Sweet, who is not presiding over any of the actions that are the subject of the proposed settlement.
>
> The proposed settlement would contain no admission of wrongdoing by the Company or any of the other defendants. [. . .] » [10]

84 In March 2006, NORTEL announced the conclusion of an agreement, this time for the contribution of its insurers to the regulation and certain amendments to its corporate governance rules:

> Nortel today announced that as a result of the continuing discussions in the mediation process with respect to the previously announced agreement in principle for a proposed settlement of certain shareholder class action lawsuits with lead plaintiffs in two significant class action lawsuits pending in the Southern District of New York, the Company and the lead plaintiffs have reached an agreement on the related insurance and corporate governance matters.
>
> [. . .]
>
> The proposed global settlement remains conditioned on the settlement encompassing all pending and proposed shareholder class actions commenced against the Company and certain other defendants following the Company's announcement of revised financial guidance during 2001, and the Company's revisions of its 2003 financial results and restatement of other prior periods effected during the first half of 2005. Discussions are ongoing regarding a process to resolve Canadian actions as part of the terms of this proposed global settlement. The proposed global settlement would also be conditioned on the receipt of all required court securities regulatory and stock exchange approvals. » [11]

85 It was the U.S. attorneys, who were acting for the principal plaintiffs in the Nortel I and Nortel II cases, who negotiated these agreements with NORTEL following the mediation that was presided over by R. Sweet J.

86 Canadian prosecutors were not involved in these negotiations. However, as the settlement of the Nortel I and Nortel II cases was conditional on the approval of the settlement in all jurisdictions where class actions had been commenced or were in the process of being commenced, discussions were undertaken to secure their membership and thus terminate all proceedings, including those against NORTEL in Canada:

> Ontario-based pension funds acted as lead plaintiffs in each of the Nortel I and Nortel II actions in the United States, which is indicative of the fact that Nortel securities were widely held on both sides of the border. The U.S. actions advanced more quickly than the Ontario actions for various reasons, and settlement negotiations, under the supervision of Senior United States District Judge Robert W. Sweet, were initiated in September 2005 between the U.S. lead plaintiffs and the defendants. The negotiations culminated in a two-day mediation with Judge Sweet in early February 2006. A conditional agreement in principle was announced in a Nortel press release on February 8, 2006.
>
> Neither the plaintiffs nor the class counsel in the Canadian actions participated in the settlement negotiations in the United States. However, since it was intended that the settlement would represent a global resolution of all outstanding class action litigation, further discussions were necessary in order to have the Canadian classes adopt the settlement and thereby achieve the desired global resolution. The end result was a settlement agreement dated June 20, 2006, accepted by all of the parties to all outstanding class actions in both countries. That settlement has now been presented to this court for approval. Approval has also been sought from the courts in New York, British Columbia and Quebec pursuant to the terms of the settlement agreement. In order for the settlement to take effect it must be approved by all of the courts. » [12]

87 These discussions led to negotiations and audits, including with respect to the potential value of the claims and Nortel'sability to pay. Meetings were held with U.S. prosecutors and their experts in New York.

88 In June 2006, the parties agreed on all the terms of the Nortel I Regulation and an agreement was signed by Milberg Weiss Bershad & Schulman LLP for OP TRUST and

Shearman & Sterling LLP for NORTEL to establish that agreement:

> **STIPULATION AND AGREEMENT OF SETTLEMENT (NORTEL I)**
>
> This Stipulation and Agreement of Settlement (the "Stipulation") is submitted in the above-captioned *In Re Nortel Networks Corp Securities Litigation,* Consolidated Civil Action No. 01 Civ. 1855 (RMB) (the "Nortel I US Action"), pursuant to Rule 23 of the Federal Rules of Civil Procedure. Subject to the approval of the United States District Court for the Southern District of New York, this Stipulation is entered into between Lead Plaintiff and Class Representative Ontario Public Service Employees's Union Pension Fund ("OP Trust") (hereinafter "Lead Plaintiff"), on behalf of itself and the U.S. Global Class (as defined herein), and defendant Nortel Networks Corporation ("Nortel"), by and trough their respective counsels.
>
> The following separate class actions in British Columbia, Ontario and Quebec, raising claims on behalf of persons who purchased Nortel securities (as defined herein), are also being settled contemporaneously as part of a single settlement of those actions and the Nortel I U.S. Actions on the terms herein: Association de Protection des *Épargnants et Investisseurs du Québec v. Corporation Nortel Networks*, Superior Court of Quebec, District of Montreal, No: 500-06-000126-017 (the " Quebec A.P.E.I.Q. Action"), *Frohlinger v. Nortel Networks Corporation et al.,*Ontario Superior Court of Justice, Court File No. 02-CL-4605 (Ont. Sup. CT.J.) (the "Ontario Frohlinger Action"); and *Jeffery at al. V. Nortel Networks Corporation et al*, Supreme Court of British Columbia, Vancouver Registry Court File No. S015159 (B.C.S.C) (the "B.C. Jeffery Action") (collectively the "Nortel I Canadian Actions")
>
> A separate class action brought on behalf of persons who purchased Nortel common stock or call options or wrote (sold) put options on Nortel common stock from April 24, 2003 through April 27, 2004, inclusive (the "Nortel II Class Period"), captioned *In re Nortel Networks Corp Securities Litigation*, Master File No. 05-Md-1659 (LAP) (the "Nortel II U.S. Action") is also pending in the United States District Court for the Southern District of New York and is being settled contemporaneously herewith.
>
> Also being setteld contemporaneously herewith are the following separate class actions brought in Ontario and Quebec as part of a single settlement including the Nortel II U.S. Action: *Gallardi et al v. Nortel Networks Corp. et al.,*Ontario Superior Court of Justice, Court File No. 05-CV-285606CP (the "Ontario Gallardi Action"); and *Skarstedt v. Nortel NetworksCorporation*, Superior Court of Quebec, District of Montreal, No. 500-06-000277-059 (the "Quebec Skarstedt Action") (collectively the "Nortel II Canadian Actions").
>
> It is a condition of the Settlement (as defined herein) that the Nortel I U.S. Action and the Nortel I Canadian Actions (collectively, the " Nortel I Actions "), as well as the Nortel II U.S. Actions and the Nortel II Canadian Actions (collectively, the " Nortel II Actions ") be settled contemporaneously and that the Settlement, and the settlement of the Nortel II Actions be approved by all of the respective courts." [13]

89 In Quebec, a transaction was signed by Belleau Lapointe and Unterberg, Labelle, Lebeau for APEIQ and by Ogilvy Renault LLP for NORTEL in order to confirm the amicable settlement of the dispute under the terms and conditions set out in the Nortel I settlement agreement:

> 1. The Petitioner, the Designated person and Nortel agree to settle this Proceeding as between themselves and also as between Nortel and the Settlement Class upon the terms contained in the attached Stipulation and Agreement of Settlement and hereby adopt and ratify such terms as the terms for the settlement of this Proceeding. » [14]

90 The parties agreed on all the terms of the settlement in Nortel II and an agreement was signed by attorneys Bernstein Litowitz Berger & Grossmann LLP for TEACHER'S and the NEW JERSEY DEPARTMENT OF THE TREASURY and by attorneys Shearman & Sterling LLP for NORTEL to confirm this agreement:

> **STIPULATION AND AGREEMENT OF SETTLEMENT (NORTEL II)**

> This Stipulation and Agreement of Settlement (the "Stipulation") is submitted in the above-captioned *In Re Nortel Networks Corp Securities Litigation*, Master File No. 05-MD-1659 (LAP) (the "Nortel II U.S. Action"), pursuant to Rule 23 of the Federal Rules of Civil Procedure. Subject to the approval of the United States District Court for the Southern District of New York, this Stipulation is entered into among Lead Plaintiffs and Class Representatives Ontario Teacher's Pension Plan Board and the Department of the Treasury of the State of New Jersey and its Division of Investment (hereinafter "Lead Plaintiffs"), on behalf of themselves and the U.S. Global Class (as defined herein), and defendant Nortel Networks Corporation ("Nortel"), by and through their respective counsel.
>
> The following separate class actions in Ontario and Quebec, raising claims on behalf of persons who purchased Nortel securities (as defined herein), are also being settled contemporaneously as part of a single settlement of those actions and the Nortel II U.S. Actions on the terms herein: *Skarstedt v. Corporation Nortel Networks*, Superior Court of Québec, District of Montreal, No: 500-06-000277-059 (the "Quebec Skarstedt Action"), and *Gallardi v. Nortel Networks Corporation et al.*, Ontario Superior Court of Justice, Court File No. 05-CV-285606CP (Ont. Sup. CT.J.) (the "Ontario Gallardi Action") (collectively, the "Nortel II Canadian Actions")
>
> A separate class action brought on behalf of persons who purchased Nortel common stock or call options or wrote (sold) put options on Nortel common stock from October 24, 2000 through February 15, 2001, inclusive (the "Nortel I Class Period"), captioned *In re Nortel Networks Corp Securities Litigation*, Consolidated Civil Action NO. 01 Civ. 1855 (RMB) (the "Nortel I U.S. Action") is also pending in the United States District Court for the Southern District of New York and is being settled contemporaneously herewith.
>
> Also being settled contemporaneously herewith are the following separate class actions brought in British Columbia, Ontario and Quebec as part of a single settlement including the Nortel I U.S. Action: *Jeffery v. Nortel Networks Corp et al.*,Supreme Court of British Columbia, Vancouver Registry, File No. S015159 (the "B.C. Jeffery Action"); *Frohlinger v. Nortel Networks Corp. et al.*,Ontario Superior Court of Justice, Court File No. 02-CL-4605 (the "Ontario Frohlinger Action"); and *Association de Protection des Épargnants et Investisseurs du Québec v. Corporation Nortel Networks*, Superior Court of Quebec, District of Montreal, No. 500-06-000126-017 (the " Quebec A.P.E.I.Q. Action") (collectively the "Nortel I Canadian Actions").
>
> It is a condition of the Settlement (as defined herein) that the Nortel II U.S. Action and the Nortel II Canadian Actions (collectively, the " Nortel II Actions "), as well as the Nortel I U.S. Actions and the Nortel I Canadian Actions (collectively, the " Nortel I Actions ") be settled contemporaneously and that the Settlement, and the settlement of the Nortel I Actions be approved by all of the respective courts." [15]

91 In Quebec, a transaction was signed by lawyers Trudel & Johnston for SKARSTEDT and by lawyers Ogilvy Renault LLP for NORTEL to confirm the amicable settlement of the dispute under the terms and conditions prescribed by the Nortel II settlement agreement.

> 1. The Petitioner and Nortel agree to settle this Proceeding as between themselves and also as between Nortel and the Settlement Class upon the terms contained in the attached Stipulation and Agreement of Settlement and hereby adopt and ratify such terms as the terms for the settlement of this Proceeding. » [16]

92 A few days after the signing of those documents, the Court authorized the class actions brought against NORTEL in the APEIQ file and in the SKARSTEDT file.

93 In December 2006, the Nortel I and Nortel II settlement agreements were approved by Berman(Nortel I) and Preska(Nortel II) J.A. in the United States. [17]

94 Canadian courts did the same in January 2007. In Ontario, Justice Winkler approved the settlement of the proceedings in the *Frohlinger* and *Gallardi* cases under the terms of the Nortel I and Nortel II settlement agreements on January 18, 2007. [18]

95 In British Columbia, Groberman J. approved the out-of-court settlement of the proceedings in the *Jeffery* case pursuant to the terms of the Nortel I settlement

agreement on January 19, 2007. [19]

96 In Quebec, the undersigned approved the proposed regulations to put an end to the legal proceedings brought against NORTEL in the APEIQ and SKARSTEDT files on January 31, 2007. [20]

97 It is important to recall that the Nortel I settlement agreement provided for the creation of a fund consisting of US$438,667,428 in cash and 314,333,875 shares. Nortel's share price was valued at US$704,107,880 as at June 30, 2006, so the overall value of nortel I settlement fund was estimated at US$1,142,775,308 (US$1.142 billion).

98 With respect to the Nortelsettlement agreement, it provided for the creation of a fund consisting of US$370,157,418 in cash and 314,333,875 shares. Nortel's share price was valued at US$704,107,880 as of June 30, 2006, so the total value of the Nortel II settlement was estimated at US$1,074,265,298 (US$1.074 billion).

99 In both cases, it was also specified that if NORTEL recovered money from its former officers in the course of the proceedings it had instituted against them, 25% of the sums that would be recovered would be deposited in the settlement funds.

100 It has been expressly provided that out-of-court fees for plaintiffs in the United States and Canada should be approved by the courts in each of the jurisdictions concerned.

101 The U.S. attorneys representing the principal plaintiffs (interveners) in the Nortel I and Nortel II cases undertook to charge fees that would not exceed 8.5% of the settlement funds.

102 In the case of Ontario and Quebec prosecutors, this percentage was 0.25% and 0.45%, respectively. B.C. attorneys agreed to claim a fee that would not exceed 0.7%.

103 Overall, the out-of-court fees of counsel seeking in nortel I and nortel II were not to exceed 9.9% of the Nortel I and Nortel II settlement funds.

104 Milberg Weiss Bershad & Schulmann LLP acted as prosecutors for OP TRUST in the Nortel I case in the United States. They claimed 8.5% of the Nortel I settlement fund in fees and US$3,750,041 in disbursements. The remuneration requested was approximately US$101 million.

105 They argued that they had spent 47,846 hours on this case, representing an investment in fees of US$16.6 million, and they asked the court to award them remuneration 5.8 times higher than their basic fees.

106 Berman J.A. considered this request to be exaggerated. It awarded 3% of the Nortel I settlement fund, or approximately US$34 million, which was 2.05 times their basic fees, and ordered the reimbursement of their disbursements amounting to US$3,750,041. [21] This judgment was appealed.

107 In the Nortel II case, Bernstein, Litowitz Berger & Grossman acted as prosecutors for TEACHER'S and THE NEW JERSEY DEPARTMENT OF THE TREASURY. They requested a fee equivalent to 8.5% of the Nortel II settlement fund and reimbursement of their disbursements. This request was not contested. Justice Preska awarded 8% of the Nortel II settlement fund in fees and reimbursement of their disbursements. [22]

108 In Ontario, prosecutors Rochon Genova LLP acted as solicitors in the Frohlinger and Gallardi cases. They requested fees of $8.25 million or 0.33% of the Nortel I and Nortel II settlement funds and reimbursement of their disbursements totalling $332,000. They later reduced their fee request to $5 million.

109 They submitted that they had spent approximately 4,500 hours on these files and that their ongoing work represented an investment in fees of $1,951,777. The value of the additional hours of work expected in the short term was estimated at $200,000, so that their basic fees would be in the order of $2,151,777 as at November 6, 2006. They asked the court to pay them 3.75 times more than their basic fees and subsequently reduced this multiple to 2.5. Winkler J.A. considered this request to be reasonable. He awarded them a fee of $5 million and ordered the reimbursement of their disbursements. [23]

110 In British Columbia, prosecutors requested and obtained a fee of $1 million plus taxes and reimbursement of their disbursements. Groberman J.A. held that the fee was reasonable. The remuneration that was granted is 2 times higher than the value of the hours worked in the file. [24]

111 In Quebec, the fees of the applicant attorneys in the APEIQ and SKARSTEDT files have not yet been determined. Consideration of this issue was deferred to allow them to debate the merits of certain orders made in the course of the proceedings requiring them to disclose and disclose their time statements and billing summaries in each file.

112 In February 2008, the Court of Appeal upheld the validity of the orders made.

113 In April 2008, the Court authorized an initial distribution in both cases so that 90% of the cash and 100% of the shares were paid to the claimants, less certain amounts that might be appropriate for fees and expenses.

114 At the same time, the Supreme Court refused to grant the applicant prosecutors the leave to appeal they were seeking in order to appeal that judgment.

115 In August 2008, detailed time and billing statements were filed by Belleau Lapointe and Unterberg, Labelle, Lebeau in the APEIQfile. At the same time, Trudel & Johnston produced an estimate of hours worked in the SKARSTEDT file.

116 In September 2008, the applicant prosecutors filed amended motions to update their fee requests.

117 Originally, the fees charged by the applicant attorneys represented 0.45% of the Nortel I and Nortel II settlement funds, and totalled approximately US$9.9 million in cash and shares. They now amount to approximately US$6 million, which represents US$6,719,400 in Canadian dollars.

118 In the case of the APEIQ (Nortel I) Belleau Lapointe and Unterberg, Labelle, Lebeau jointly claim fees of US$3,117,244.34, or $3,491,001.94 in Canadian dollars.

119 In the case of SKARSTEDT(Nortel II), Trudel & Johnston are asking for a fee of US$2,864,440.17, or US$3,207,886.55 in Canadian dollars.

120 OP TRUST was named lead plaintiff in the Nortel I cases in the United States. She was granted intervener status in the APEIQ file and the Tribunal granted her permission to make representations on the applicant prosecutors' request for extrajudicial fees.

121 TEACHERS and the NEW JERSEY DEPARTMENT OF THE TREASURY are the principal plaintiffs in the Nortel II cases in the United States. They were granted intervening status in the SKARSTEDT case and the Tribunal granted them permission to make representations on the applicant prosecutors' request for extrajudicial fees.

122 They argue, in essence, that the out-of-court fees charged by the prosecutor-applicants should not be approved by the Court because they are unreasonable.

123 The following paragraphs of their written challenge summarize their claims:

> 1. These submissions are filed in opposition to Quebec Class Counsels' ("QCC") Fee Application that has been brought by three independent firms of solicitors namely Belleau Lapointe S.A. and Unterberg, Labelle, Lebeau, class counsel in the Quebec Nortel I Action and Trudel & Johnston class counsel in the Quebec Nortel II Action;
>
> [. . .]
>
> > 3. In their Fee Application, QCC summarily identify their base fees and then seek Court approval of a gargantuan fee award, without establishing any nexus between the two sets of sums;
> >
> > 4. OP Trust, Ontario Teachers and New Jersey opposes QCC'S Fee Application on the ground that the fee award sought [. . .] grossly exceed any conceivable limit of fair and reasonable compensation in the circumstances;
>
> [. . .]

II. OVERVIEW OF THE INTERVENORS' SUBMISSIONS

6. The Fee Application owes its existence to the achievement and announcement on February 8, 2006 of an historic, global settlement on behalf of the classes of investors in Nortel Networks Corporation ("Nortel") (the"Global Settlement") which, if approved, will completely resolve the claims asserted in the U.S. Nortel I Class Action, the U.S. Nortel II Class Action, the Quebec Nortel Class Actions, as well as class actions brought in Ontario and Bristish Columbia. All material terms of the Global Settlement were negotiated as part of the U.S. Nortel Class Actions by March, 2006;

7. The Global Settlement was achieved, virtually entirely, as a result of the work of the U.S. Nortel I Lead Plaintiff and the U.S. Nortel II Lead Plaintiffs, together with their counsel. Moreover, the U.S. Nortel I Lead Plaintiff and U.S. Nortel II Lead Plaintiffs [. . .] together with their counsel, negotiated terms of the Global Settlement which ensured that Canadian investors, including all class members in the Quebec Nortel Class Actions, will receive identical treatment to the investors in the United States. QCC had no influence over, involvement with or participation in the negotiations that led to the Global Settlement;

8. The Global Settlement required, as one of its terms, that all parallel litigation against Nortel be included in the settlement, including class proceedings that had been commenced in Ontario. British Columbia, and Quebec;

9. Following the announcement of the Global Settlement on February 8, 2006, the services performed by QCC related to evaluation of the settlement terms and, following acceptance of its terms by the representative Plaintiffs in the Quebec Nortel Class Actions, implementation of the settlement, including participation in the settlement approval process.

10. Such services primarily included evaluation and formal acceptance of the terms of the Global Settlement, participation in the drafting of documents required to formalize and implement the settlement, obtaining certification of the Quebec Nortel Class Petitions and preparation of the Qubec settlement approval motion materials;

[. . .]

14. The Quebec Nortel Class Petitions were instituted following the commencement of the U.S. Nortel Class Actions and were quasi reproductions thereof. By the time the Global Settlement was announced on February 8, 2006, there had been little or no advancement of the Quebec Nortel Class Petitions. Indeed, the Quebec Nortel I Class Petition remained uncertified five years after its commencement on February 22, 2001. QCC took no depositions, reviewed no document productions, and did not participate in any of the negotiations leading to the agreements in principle announced in February and March 2006. The Nortel Class Petitions were never adjudicated and were certified solely for settlement purposes on June 27, 2006, [. . .];

15. After the conclusion of the settlements in principle, the risk of an adverse judgment against class members was very significantly reduced, if not entirely eliminated. More time was expended by QCC following annoucement of the Global Settlement. In fact, most of the time actually worked by QCC in these files was well after the milestone date of February 8, 2006, the day on which the annoucement of the U.S. settlement was made;

16. Therefore, when the Court considers the appropriateness of applying a multiplier to the proper base fee, the fact that the majority of the services for which fee approval is claimed were rendered following the Global Settlement, in circumstances where there was no risk of a negative outcome for the class, militates against approval of a significant multiplier;

17. Further, the Quebec Nortel Class Actions had virtually no influence on the terms of the Global Settlement. The same settlement would have been achieved whether or not the Quebec Nortel Class Actions had been commenced. In point of fact, the Quebec classes are subsets of the worlwide classes certified by the U.S. District Court. Quebec class members would thus have participated in the settlement in the same manner, and to the same extent, if the Quebec actions had never been brought;

> 18. The Quebec Class Petitions were instituted on the heels of the previously commenced U.S.class actions, which from the outset mitigated the inherent risk of an adverse outcome. Moreover, the Quebec Class Petitions were not veritably prosecuted before announcement of the Global Settlement and played no part in securing this very successful outcome. Thereafter, the risk of non-recovery by the class was at best negligible. [. . .]; » [25]

124 They point out that, in both cases, the proceedings were filed in the wake of the class actions brought in the United States and that the allegations contained therein are more or less the same as those contained in the proceedings brought in the United States.

125 They observe that there have been few procedural developments in those cases and they note that the exercise of those class actions was still not authorised when an agreement was finally concluded with NORTEL in February 2006, more than five (5) years after the filing of the motion for authorisation in the APEIQfile, and almost a year after the introduction of the proceedings in the SKARSTEDT file.

126 They insist that the applicant prosecutors did not participate in the mediation sessions that took place in the United States and that they were not involved in the negotiations that led to the agreement in principle that gave rise to the settlement in the Nortel I and Nortel II cases and state that they are not attributable to the results obtained.

127 They note that most of the hours devoted to the files were worked after February 8, 2006. They submit that the risk assumed by the applicant attorneys, when they took the proceedings, became significantly less important after an agreement was reached with Nortel to settle all the cases.

128 After that agreement, the services they were required to provide for the benefit of the members consisted primarily of reviewing the terms of the proposed settlements, participating in the drafting of the documents required to confirm their terms and facilitate their application, obtaining authorization to bring the class actions for settlement purposes and, generally speaking, , to prepare the procedures and take the steps to obtain the approval of the regulations before the Superior Court.

129 They suggest that the Court apply a multiplier of 2.5 to hours worked before 8 February 2006, and that it adopt a factor of 1.5 for hours worked between 8 February and 19 October 2006. Additional hours worked after October 19 should be recorded at a single rate.

130 In the case of counsel Trudel & Johnston, they add that the number of hours they feel they have devoted to the case is clearly exaggerated and that they should be reduced by at least 25% before applying a multiplier.

131 In light of the foregoing, the interveners argue that the out-of-court fees awarded to the applicant counsel in these two cases should not exceed C$1,073,572 in the APEIQ file and $949$937 in the Skarstedt case, plus the value of the hours worked since October 19, 2006 at a single rate.

APPLICABLE LAW

132 Article 2134 C.c.Q. mentions that remuneration for services rendered in the performance of a mandate may be determined by contract, usage, law or the value of the services rendered.

133 Article 1025 C.P.C specifies that in the case of class actions *"the transaction, the acceptance of real offers or acquiescence, unless it is made without reservation to the entire application, are valid only if they are approved by the court"*.

134 Section 32 of the *Class Actions Act* [26] and section 69 of the *By-law of the Superior Court of Quebec* [27] are residual provisions that recognize the power of the Superior Court to determine costs and to determine the extrajudicial fees of attorneys acting in application and, generally, to approve a transaction relating in particular to the costs or extrajudicial fees of counsel in a class action.

135 In exercising this power of approval, the Tribunal must determine whether the out-of-court fees charged by counsel are reasonable in the circumstances of the case.

136 Section 126 of the *Law Society Act* [28] specifies the nature of the services that may give rise to an extrajudicial fee:

> 126. (1) Services justifying out-of-court fees include, but are not included, vacations, travel, notices, written and oral consultations, examination, preparation, drafting, sending, delivery of any document, proceeding or record and generally any other service required of a lawyer.
>
> (2) (Subsection repealed)
>
> (3) In the absence of an express agreement between the lawyer and his client, a lawyer is entitled to his out-of-court costs on the basis of the value of the services rendered.

137 Since *Nault v. Jarmark et al*, [29] it is accepted by the debate that a fee agreement may be binding on all the members of the group even if it has been signed exclusively by the representative.

138 The out-of-court fees payable to counsel may therefore be payable to class members out of the sums collected for their benefit under a judgment or settlement. They may also be drawn from a settlement fund, if necessary. This is a rule of equity based on the theory of unjust enrichment:

> [. . .] According to the Common Fund Doctrine, a prosecutor who, through his work and skill, has succeeded in obtaining the creation of a fund for the benefit of the members of the group, has the right to deduct fees from this fund in addition to the fees unpaid by his client. This rule of fairness is based on the theory of unjust enrichment. Members of a group who benefit from a class judgment participate in the payment of the fees of the representative's attorney.
>
> In Quebec, this issue has not been a subject of controversy. Since the 1985 decision of Mr. Justice Melvin L. Rothman in the Nault case, the courts have, in all cases, allowed the agreement between the representative and his attorney to be binding on all members of the class. » [30]

139 In accordance with the rules on the relative effect of contracts codified in Article 1440 C.c.Q., an agreement of fees signed exclusively by the representative nevertheless remains without effect vis-à-vis third parties, and in particular the defendant, unless the latter undertakes to do so by agreeing to include the terms of the agreement in a transaction for which it seeks approval.

140 In that case, the parties will be bound by the fee agreement that was signed for the benefit of the attorneys who acted in application. This situation occurs quite frequently. It is then for the Tribunal to assess the fairness and reasonableness of the fee agreement sought to be applied. It is not bound by the terms of this agreement, but it must take it seriously because it demonstrates the will of the parties.

141 If no fee agreement has been signed or if the fees charged by the solicitors in demand are different from those provided for in a fee agreement they have signed, the Tribunal must determine whether the remuneration claimed is reasonable in the circumstances.

142 In Quebec, class action cases are almost invariably taken on the basis of fee agreements ranging from 15% to 25%.

143 The validity of percentage fee agreements is fairly widely recognized in the field of class actions, provided that the percentage set is fair and reasonable.

144 Although the courts have already expressed some reservations or concerns in the past with regard to this type of agreement, in general they have considered it reasonable to compensate the person who bears the risks of prosecution by agreeing in advance to allocate to him a share of the benefits that will be generated by his efforts. , if he is successful.

145 It is also considered that agreements of this nature generally promote access to justice because they allow a large number of citizens to assert their rights in cases where, despite real harm, several of them would not have the financial resources to initiate legal proceedings.

146 In 1994, Cory J. of the Supreme Court wrote the following:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. For many years it has been rightly observed that only the very rich and those who qualify for Legal Aid can afford to go to Court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. There he noted that the total legal bills of all parties in an average General Division lawsuit (including those that settle before trial) may easily amount to between $40,000 and $50,000. Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the court's facilities in civil matters for the wealthy and powerful. »[31]

147 The Court is not bound by the terms of a percentage fee agreement even if it is included in a transaction intended to settle a dispute amicably. [32]

148 It must, however, show some flexibility and give effect to the will of the parties unless the remuneration established for the benefit of counsel is unreasonable because it is out of all proportion to the services rendered or the results obtained.

149 In all cases, the Tribunal must consider the proportionality of the fees charged in relation to the importance of the case and the usefulness of the services rendered, taking into account the factors listed in sections 3.08.01, 3.08.02 and 3.08.03 of the *Code of Ethics for Lawyers:*

> 3.08.01 A lawyer shall charge and accept fair and reasonable fees.
>
> 3.08.02. Fees are just and reasonable if they are justified by the circumstances and proportionate to the professional services rendered. In particular, a lawyer must take into account the following factors when setting his fees:
>
> Experience;
>
> The time spent on the case;
>
> The difficulty of the problem submitted;
>
> The importance of the case;
>
> The responsibility assumed;
>
> The provision of professional services that are unusual or require exceptional skill or speed;
>
> The result obtained;
>
> The judicial and extrajudicial fees provided for in the tariffs.
>
> 3.08.03 A lawyer shall avoid all methods and attitudes likely to give his profession a profit-making and commercial character. »[33]

150 Two other criteria are decisive. This is the purpose of the class action itself and the risk that is assumed by the prosecutors in demand. On this point, the Tribunal defers to the comments made by Chaput J. in *Guilbert v. Sony BMG Musique (Canada) Inc. et al.* [34:]

> Purpose
>
> The purpose of the collective redress procedure means that it is an instrument of access to justice through the pooling of the interests of individual litigants who are practically unable to bring a legal action mainly because of costs.
>
> In this regard, McLachlin C.J. wrote in *Western Canadian Shopping Centres Inc.c. Dutton:*
>
> > *27. Class actions provide three important advantages over a multiplicity of individual lawsuits. First, by consolidating similar individual actions, class*

actions save money at the judicial level by avoiding unnecessary duplication of assessment of facts and analysis of the law. The efficiencies thus achieved free up judicial resources that can be allocated to the resolution of other disputes, and can also reduce the cost of litigation for both plaintiffs (who can share the costs) and defendants (who challenge the lawsuits only once): . . .)

> 28. *Second, because fixed costs can be divided among a large number of plaintiffs, class actions provide better access to justice by making economic proceedings that would have been too costly to be brought individually. Without class actions, justice is not available to some claimants, even for well-founded claims. Cost-sharing ensures that certain damages are not left without recourse: (. . .)*
>
> 29. *Third, class actions serve efficiency and justice by preventing potential evildoers from ignoring their obligations to the public. Without class actions, individuals who cause minor but widespread individual harm could overlook the full cost of their conduct, knowing that, for a plaintiff, the costs of a lawsuit would far exceed the likely remedy. Cost-sharing reduces the cost of litigation and thus deters potential defendants who might otherwise assume that small misdeeds would not give rise to litigation: . . .*

In *Dumoulin*, supra, the Court of Appeal reversed the judgment granting the defendant the special fees after the motion for leave to a class action had been dismissed. Forget J.A. wrote:

> *24.1. While it is true that a defendant who contests a class action must incur significant costs, the social role attributed to the Fund cannot be distorted by granting it the mission of also providing assistance to the defendant, which is contrary to the letter and spirit of the Class Proceedings Act;*
>
> *[. . .]*
>
> *[27] Finally, the conviction of the unsuccessful applicant to pay special fees seems to me to be in direct contradiction with the aim pursued by the class action procedure, introduced by the legislature as a social measure to facilitate access to justice for citizens who, in several cases, would not dare to apply to the courts because of the meagreness of their individual claim. In this case, we must not lose sight of the need to ensure that François Dumoulin claimed only $66 for his benefit.*
>
> Risk
>
> Because of the limited value of his or her interest, a litigant is reluctant to take the initiative to go to court. This is even more true in class actions. Hence the practice for lawyers to accept class action mandates by assuming the costs themselves during the proceedings. This practice is common and should not be discouraged, since it does not commercialize the practice of law by turning it solely in search of profit. » [35]

151 This comprehensive approach assesses the importance and value of the services provided by prosecutors. The use of a multiplier factor can also be useful to verify or corroborate the results obtained from the analysis of the criteria identified above.

ANALYSIS AND DISCUSSION

152 The fee agreement signed between the APEIQ and Belleau Lapointe in February 2001 provided that the latter would be entitled to an extrajudicial fee of 20% on the sums they would receive in the performance of their mandate and to the reimbursement of their disbursements. [36]

153 The fee agreement signed between SKARSTEDT and Trudel & Johnston in February 2005 provided that the latter would be entitled to an extrajudicial fee of 25% of the sums recovered for the benefit of the members of the group. [37]

154 In both cases, the solicitors-applicants waived the application of those fee agreements and agreed to limit their fee claims to 0.45% of the Nortel I and Nortel II settlement funds.

155 This is not a stipulation under which the parties acknowledge that they are entitled to receive collective fees equal to 0.45% of the settlement funds, but rather a limit that they have agreed to impose on themselves in their claims.

156 In determining whether the fees charged by the applicant prosecutors are reasonable, the Tribunal must consider their experience, the number of hours they devoted to the files, the difficulty of the problems submitted to them, the importance of each case, the extent of their responsibility in managing those cases, the unusual or exceptional nature of the services they rendered , and the results they have achieved.

157 The purpose of the class action and the importance of the risks that were taken by the prosecutors when they agreed to take charge of these cases are elements that should not be overlooked.

The APEIQ file (Nortel I)

158 The experience of Belleau Lapointe's lawyers in class actions is not in dispute. Nor is that of the lawyers of the law firm Unterberg, Labelle and Lebeau.

159 Daniel Belleau has been a member of the Bar since 1989. He has been a partner and co-director of Belleau Lapointe since its founding in 2001. He represents various associations, including APEIQ and OPTION CONSOMMATEURS. He has acted as counsel in several class actions in application and defence. He has written numerous articles on the subject and is regularly invited as a speaker at conferences organized by the Permanent Education Department of the Barreau du Québec, Insight, the Canadian Institute and the Université du Québec à Montréal. He has served on the Law Society's Class Actions Committee since January 2007.

160 Me Maxime Nasr joined Belleau Lapointe in January 2001. He has been called upon to work in about thirty class action cases in application or defense. Belleau Lapointe currently holds an application in at least ten class actions filed before the Superior Court of Quebec.

161 Lawyers Unterberg, Labelle and Lebeau devote the most important part of their professional activities to class actions. Since 1979, this firm has acted as solicitor in demand or in defence in a hundred class actions that have been brought in various fields. Paul Unterberg has been a member of the Bar since 1960. He has litigated numerous class actions at the authorization and merit stages.

162 Me François Lebeau has been a member of the Bar since 1979. Since 1980, he has specialized in consumer law, class action and travel law. He is a member of the Executive of the Class Action Section of the Canadian Bar Association - Quebec Division. He has contributed to the writing of various popular books and has been invited many times as a speaker to discuss the evolution of the law in the field of class actions.

163 There is no doubt that the applicant attorneys have developed particular experience and expertise in the field of class actions.

164 The work-in-progress records and billing summaries that were produced indicate that they spent 1,840.14 hours of work on this file, equivalent to a time investment of $602,250.50. [38]

165 Of these, the 1,234.94 hours worked between February 19, 2001 and October 19, 2006, represent billable fees of $395,412.90 [39] and the 605.20 hours that were worked between October 20, 2006 and August 26, 2008, represent billable fees of $206,837.60. [40]

166 A total of 652.5 hours were spent on the file before February 8, 2006, and 1,187.5 hours have been spent on the file since then. [41] In addition, disbursements amounted to $42,139.69 on August 26, 2008. [42]

167 The value of hours worked was estimated based on the hourly rates that were in effect when the services were rendered and not those in effect in 2008 except for hours worked after October 20, 2006.

168 The summary of billable fees submitted by Belleau Lapointe does not include the hours worked in preparing an application for a lump sum award to the representative,

nor those worked in connection with the claim for fees. In total, the hours worked for which Belleau Lapointe does not claim any remuneration amount to $222,571.90. [43]

169 The work-in-progress statements and billing summaries filed by Unterberg, Labelle and Lebeau indicate that they spent 774.44 hours on this file, equivalent to an investment in billable fees of $278,885.25.

170 Of these, the 589.62 hours worked between February 22, 2001 and October 19, 2006 represent fees of $204,957.25,44 and the 184.82 hours worked between October 20, 2006 and June 25, 2008, represent a fee value of $73,928.00. [45]

171 A total of 176.4 hours were spent on the file before February 8, 2006, and 598 hours have been spent on the file since then. [46] In addition, there were disbursements totalling $11,623.28 as at June 25, 2008. [47]

172 The value of hours worked was calculated on the basis of the hourly rates that were in effect at the time the services were rendered rather than the hourly rates in effect in 2008, except for billable hours after October 20, 2006. On the other hand, the hours worked for which Unterberg, Labelle and Lebeau do not require any remuneration amount to $20,755.

173 In total, therefore, the complainants will have devoted 2,614.58 hours to this case between 21 February 2001 and 26 August 2008. This represents an investment of $881,135.75.

174 It should be noted that in the APEIQfile, Belleau Lapointe and Unterberg, Labelle and Lebeau are asking for fees of US$3,117,244.34. This represents US$3,491,001.94 in Canadian dollars.

175 The out-of-court fees claimed are therefore approximately 4 times the value of the hours worked in the file.

176 Counsel for the interveners argues that this request is unreasonable given the nature and value of the services rendered by the solicitor-applicants. He submits that a multiple of 2.5 should be applied to hours worked before February 8, 2006 and that a multiple of 1.5 should be applied to hours worked between February 8 and October 19, 2006.

177 The remuneration that would be granted to the solicitor-applicants if the Tribunal were to adopt this assumption would amount to $1,073,572.53, excluding the billable fees for the hours worked since October 19 at a single rate.

178 The Court is of the opinion that the fees charged by the solicitors-applicants are exaggerated but that those proposed by the interveners do not adequately reflect the value of the services they rendered.

179 The motion for leave which was signed in February 2001 was brought in the wake of numerous other actions of a similar nature which were brought against NORTEL in the United States at the same time.

180 Few developments occurred in this matter between 2001 and 2006. When an agreement in principle was reached between OP TRUST and NORTEL on February 8, 2006, to settle all the disputes, the motion for leave had not yet been heard on the merits and the bringing of a class action had not yet been authorized.

181 They did not participate in the mediation and negotiations that led to the agreement-in-principle that was reached with NORTEL in February 2006. However, they examined the terms *"a posteriori"* and made the checks they considered useful and necessary with the experts of NORTEL and OP TRUST before recommending their acceptance to the APEIQ. They are not the main authors of the settlement agreement, but they participated in its drafting and prepared the necessary procedures to give effect to it and obtain its approval.

182 It is also important to consider that the members of the class covered by the class action brought by the APEIQ were already included in the group covered by the proceedings brought by OP TRUST in the United States and that they could be compensated under the Nortel I settlement agreement even if no class action had been brought in Quebec.

183 The situation of Quebec prosecutors is, in this respect, quite similar to that of counsel who brought an action in the *Jeffery* case in British Columbia:

> Both the "worlwide" action in the U.S. District Court and the Canada-wide action in Ontario's Superior Court of Justice could potentially have included the class represented in the current action. Nonetheless, both because of concerns over the possibility that the other actions would not be certified, and to ensure that the British Columbia plaintiffs had recourse to an action in the event that they were dissatisfied with any arrangements made in other jurisdictions, the plaintiffs decided to initiate and continue the current action. The work of plaintiff's counsel in Bristish Columbia, however, has been much less than it would have been had the U.S. and Ontario actions not been extant. While there has been work of considerable value done by counsel locally, the bulk of counsel work has been performed elsewhere. »[48]

184 That said, even though the terms of the comprehensive settlement were negotiated by other prosecutors, the risks that the prosecutor-applicants took when they brought the action and the usefulness of the services they rendered are not negligible. For these reasons, they are entitled to receive remuneration higher than the value of the hours worked.

185 When they agreed to act as solicitors in this case, no class action had been or was about to be allowed. The prosecutor-applicants had no guarantee that their class action would be allowed or that when it was exercised, they would obtain a favourable judgment. The issues were complex, the potential individuals involved were very numerous, and the amounts involved and the financial consequences for NORTEL,if successful, were considerable.

186 It was reasonable to foresee, in such circumstances, that NORTEL would be represented by experienced prosecutors who would have significant resources and means at their disposal and that they would have to devote many hours of work to this case in order to bring it to a conclusion, with no guarantee of success.

187 There was also, and this constituted a significant risk, the possibility that, despite a favourable judgment, NORTEL would be unable to satisfy the sentence against it, and that it would be impossible to collect the sums to which the members were entitled.

188 The problem before us was relatively complex and the burden of proof was quite difficult to meet.

189 In order to succeed, the APEIQ had to show that the investors had been influenced by NORTEL'serroneous financial forecasts, prove that the representations made had a decisive effect on the investors' decision to buy, sell or retain securities, and demonstrate the price variations that might have resulted from those representations in order to determine the value of the losses incurred by the investors.

190 Proof of misrepresentation, the quantum of damages and the causal link between the alleged fault and the damage suffered presented several challenges. The case also presented a difficulty related to the probable challenge to the jurisdiction of the Superior Court of Quebec given the existence of connecting factors with the American and Ontario courts.

191 Once the tentative agreement was announced, discussions were initiated with prosecutors who had initiated appeals in other jurisdictions to obtain their adherence to the proposed settlement.

192 The solicitor-applicants had to examine the terms of the agreement and go to the United States to meet with the experts retained by the parties in order to verify the basis of the proposed regulation and to know the methods used to assess the magnitude of the losses incurred and nortel'sfinancial capacity.

193 Finally, they were responsible for ensuring that the by-law complied with the requirements of Quebec law and that the documentation intended for the members would be drafted in correct French so that the transaction could be approved by the Superior Court. They have also drafted the procedures necessary to obtain this approval.

194 The applicant prosecutors devoted 2,614.5 hours to this case between February 2001 and September 2008. This represents an investment of $881,135.75. They took

some risks in accepting this mandate and have not received any remuneration since 2001.

195 The results obtained must also be considered. The approximate value of the Nortel I and Nortel II settlement funds was estimated at approximately $2.3 billion. As for the Quebec claimants, it was estimated that they would receive compensation totalling approximately $101,000,000.

196 In light of the foregoing, the Tribunal finds that it is reasonable to grant the applicant-counsel remuneration of $1,750,000, or approximately 2 times the value of the hours they devoted to the case, without distinction as to the period during which the hours were worked.

The SKARSTEDT file (Nortel II)

197 The class action experience of lawyers Trudel & Johnston is acknowledged. Since the firm's founding in 1998, Philippe Trudel and Bruce Johnston have acted on numerous occasions in class action cases and have developed particular experience in this field in recent years. There is no doubt that lawyers Trudel & Johnston have experience in the field of class actions.

198 They do not have detailed records of hours worked in this file because they did not consider it useful to write timesheets given the fee agreement that was signed when they accepted this mandate. They estimate that they spent approximately 2,390 hours on this file between 12 January 2005 and 25 August 2008. Of these, 1,809 hours were reportedly worked between January 12, 2005 and October 19, 2006, and 581 hours were worked between October 19, 2006 and August 25, 2008. A total of 724 hours were reportedly worked before 8 February 2006 and 1,666 hours have been worked since then. This represents a fee investment of $885,970.

199 They are asking for a fee of US$2,864,440.17, i.e. C$3,207,886.55, which is approximately 4 times the value of the hours they estimate they spent on the file. In addition, disbursements totalled $25,571.31 as of August 25, 2008. [49]

200 According to the affidavit filed in the record by Mr. Trudel, billable fees do not include the time spent preparing the application for fees or the hours worked in connection with the solicitor-client privilege debate. The Tribunal notes, however, that no details were provided on the number of hours that would have been devoted to this work and its value.

201 Counsel for the interveners argues that the number of hours that the complainants would have devoted to the case, according to their estimates, is abnormally high in view of the work done in the case between February 2005 and September 2008.

202 He also points out that the absence of time records and billing summaries that reflect the work done in the file in a contemporary manner at the time the services are rendered, deprives members of the faculty of knowing the nature and value of the services that were rendered in that file and adversely affects the quality of the evidence offered to the Tribunal on an important element.

203 It proposes to reduce the number of hours worked before 8 February 2006 by 25% before applying any multiplier factor to acceptable basic fees. This is reasonable in the circumstances.

204 Then, as in the APEIQ (Nortel I) file, he suggests remunerating the prosecutor-applicants by applying a multiple of 2.5 on the hours worked before February 8, 2006, and 1.5 on the hours worked between February 8 and October 19, 2006. The remuneration that would be paid to the requesting counsel if the Tribunal were to adopt this assumption would amount to C$949,937.50. Hours worked since October 19, 2006 would be paid at a single rate according to the applicable hourly rate.

205 The Court is of the opinion that the number of hours devoted to this case and the basic fees estimated by the prosecutor-applicants are abnormally high in view of the state of the case.

206 Several hours were spent challenging the interveners' right to make representations on their application for fees and preparing their application for fees. Members have not benefited from this work.

207 When the motion for leave was filed in February 2005, numerous similar actions had already been brought against NORTEL in the United States and Ontario.

208 Although it is true that the applicant prosecutors took a risk by agreeing to act as an application in this case, that risk was less significant because other proceedings of the same nature already existed.

209 Nevertheless, it was reasonable to foresee, at the time, that NORTEL would be represented by experienced prosecutors who would have significant resources and means at their disposal and that they would have to devote many hours of work to this case in order to bring it to a conclusion, with no guarantee of success.

210 There was also a very real possibility that, despite a favourable judgment, NORTEL would be unable to satisfy the conviction against it, and that it would be impossible for them to collect the sums to which the members were entitled.

211 The issue before us was complex and the burden of proof was quite difficult to meet. In order to succeed, SKARSTEDT had to show that fraud had been committed and that the price of the shares had been artificially inflated in order to induce investors to buy, sell or keep them.

212 Evidence of the existence of fraud and of the consequences of that fraud on investors presented several difficulties. It was also reasonable to foresee that the jurisdiction of the Superior Court of Quebec would be challenged given the existence of connecting factors with the American and Ontario courts.

213 Few developments occurred in this case after the application for leave was filed in February 2005. A motion for a declinatory objection was served by NORTEL, but this motion was not heard because an agreement was reached to settle all nortel II claims.

214 Once the tentative agreement was announced, discussions were initiated with prosecutors who had initiated appeals in other jurisdictions to obtain their support for the proposed settlement.

215 In April 2006, the hearing of the motion for leave was postponed to allow for the continuation of settlement discussions that had begun in February 2006. In June 2006, the motion for leave was granted for settlement.

216 The solicitors-applicants did not participate in the mediation and negotiations that led to the agreement in principle that gave rise to this settlement, but they examined its terms and conducted verifications with the prosecutors-applicants in the APEIQ file with the experts of NORTEL and TEACHERS before recommending its acceptance to SKARSTEDT.

217 They also participated in the drafting of the settlement agreement and assumed responsibility for settling that the settlement could be approved by the court. They have prepared the procedures required to give effect to it.

218 They ensured that the by-law complied with the requirements of Quebec law and that the documentation intended for the members would be drafted in correct French so that the transaction could be approved by the Superior Court. They have also drafted the procedures necessary to obtain this approval.

219 Taking into account the risks taken by the applicant attorneys, the work accomplished in this case and the results obtained, the Court considers that a fee of $1,250,000 must be awarded to them for the services rendered in this case. It will also be ordered that their disbursements be reimbursed up to a maximum of $$25,571.31.

220 *FOR THOSE REASONS, THE COURT OF FIRST INSTANCE:*

221 *DECLARES* that the solicitor-applicants in the APEIQ file are entitled to receive out-of-court fees of $1,750$000 and to be reimbursed for the disbursements they incurred in carrying out their mandates up to a maximum of $53,762.97;

222 *DECLARES* that the solicitors-applicants in SKARSTEDT's case are entitled to receive out-of-court fees of $1$250$000 and to be reimbursed for the disbursements they incurred in carrying out their mandates up to a maximum of $25,571.31;

223 *ORDERS* that the above amounts be taken out of the Nortel I settlement fund in respect of the amounts unpaid to the solicitor-applicants who acted in the APEIQ file and that they be paid to them as soon as possible;

224 *ORDERS* that the above sums be drawn from the Nortel II settlement fund in respect of the sums due to the solicitor-applicants who acted in the SKARSTEDT case and that they be paid to them as soon as possible;

225 *THE WHOLE*, free of charge.

Footnotes

1 Exhibit R-4 pp. 15-17;

2 *Affidavit of Mr. Stephen Cirami, Vice-President of Garden City Group,*February 20, 2008;

3 *Affidavit of Mr. Stephen Cirami, Vice-President of Garden City Group,*February 20, 2008, Exhibit C-1 *"Nortel I "Timely Authorized Claimants" (EXCERPTS) (Volume III);*

4 *Affidavit of Mr. Stephen Cirami, Vice-President of Garden City Group,*February 19, 2008;

5 *Affidavit of Mr. Stephen Cirami, Vice-President of Garden City Group,*19 February 2008, Exhibit C-2

6 *Motion for authorization to bring a class action,* dated February 22, 2001;

7 *Leslie Frohlinger v. Nortel Networks Corporation & al, Ontario Superior Court of Justice, Court File No. 02-CL-4605;*

8 *Janie Jeffery et al v. Nortel Networks Corporation & al, Supreme Court of British Columbia, Court File No. S015159;*

9 *Peter Gallardi v. Nortel Networks Corporation;*

10 *Nortel:NEWS RELEASE: "Nortel reaches an agreement in principle for proposed global settlement of shareholder class action litigation; Proposed settlement to include US $575 Million cash payment and issuance of common shares representing 14.5% of current equity"* (February 08, 2006) (Exhibit R-8);

11 *Nortel:NEWS RELEASE:"Nortel provides update on agreement in principle for proposed global settlement of shareholder class action litigation; Agreement reached with lead plaintiffs on insurance and corporate governance matters.* (March 17, 2006), (Exhibit R-9);

12 *Leslie Frohlinger v. Nortel Networks Corporation & al, Ontario Superior Court of Justice, Court File No. 02-CL-4605, Peter Gallardi v. Nortel Networks Corporation & al, Ontario Superior Court of Justice, Court File No. 05-CV-285606CP, Reasons,* January, 18, 2007, (J. Winkler);

13 *In Re Nortel Networks Corp. Securities Litigation, U.S. District Court Southern District of New York, Civil Action No. 01-CV-1855 (RMB), Stipulation and agreement of settlement (Nortel I),* dated June 20, 2006;

14 *Association de protection des épargnants et investisseurs du Québec (APEIQ) and al v. Corporation Nortel Networks, Settlement Agreement and Confirmation of Stipulation and Agreement of Settlement ("The Settlement Agreement"),* dated as of June 20, 2006, S.C.M. No. 500-06-000126-017;

15 *In Re Nortel Networks Corp. Securities Litigation, U.S. District Court Southern District of New York, Civil Action No. 05-MD-1659 (LAP), Stipulation and Agreement of Settlement (Nortel II*), dated June 20, 2006;

16 *Clifford W. Skarstedt v. Corporation Nortel Networks and al, Settlement Agreement and Confirmation of Stipulation and Agreement of Settlement ("The Settlement Agreement"),* dated as of June 20, 2006, S.C.M. No. 500-06-000277-059;

17 *In Re Nortel Networks Corp. Securities Litigation, (Nortel I,) Decision and Order approving Nortel I Settlement, U.S. District Court Southern*

District of New York, Civil Action No. 01-CV-1855, December *26, 2006 (J. Berman); In Re Nortel Networks Corp. Securities Litigation, (Nortel II), Order and Final Judgment, U.S. District Court Southern District of New York, Civil Action, No. 05-MD-1659,* December 26, 2006, (J. Preska);

18 *Leslie Frohlinger v. Nortel Networks Corporation and Peter Gallardi v. Nortel Networks Corporation, Reasons for Judgment, Ontario Superior Court of Justice,* January 18, 2007 (J. Winkler);

19 *Janie Jeffery and Ronald Mensing v. Nortel Networks Corporation, Reasons for Judgment*, Supreme Court of British *Columbia,* January 19, 2007 (J. Groberman);

20 *Association de protection des épargnants et investisseurs du Québec (APEIQ) et al v. Corporation Nortel Networks et al C.S.M. No 500-06-000126-017,Judgment, January 31, 2007 (M.Monast j.c.s.) and Clifford Skarstedt v. Corporation Nortel Networks et al C.S.M. No. 500-06-000277-059,Judgment,* January 31, 2007, (M.Monast, j.c.s.);

21 *In Re Nortel Networks Corp Securities Litigation (Nortel I) Civil Action No. 01-CV-1855, Order and Final Judgment,* January 29, 2007 (J. Berman);

22 *In Re Nortel Networks Corp Securities Litigation, (Nortel II) Civil Action No. 05-MD-1659, Order and Final Judgment,* December 26, 2006 (J. Preska);

23 *Leslie Frohlinger v. Nortel Networks Corporation and Peter Gallardi v. Nortel Networks Corporation, Reasons for Judgment, Ontarion Superior Court of Justice,* January 18, 2007 (J. Winkler);

24 *Janie Jeffery and Ronald Mensing v. Nortel Networks Corporation, Reasons fot Judgment, Supreme Court of British Columbia,* January 19, 2007 (J. Groberman);

25 *Interveners' submissions in support of their contestation of Quebec Class Counsels' Fee Application;*

26 R.S.Q., v. R-2.1;

27 R.R.Q., 1981, c.C-25, r.8;

28 R.S.Q., v. B-1;

29 [1985] R.D.J., 180;

30 *Ducharme, Louise: " Les honoraires judiciaires et extrajudicials en matière de recours collectif " in Développements récents sur les recours collectifs,* Éditions Yvon Blais, Cowansville, 1999, p. 115;

31 *Coronation Insurance Co.c. Florence, unreported Supreme Court decision dated August 8, 1994, cited in Nantes v. Telectronics Proprietary (Canada) Ltd.* [1996] O.J. No. 5386, 19 March 1996;

32 *Québec (Curateur Public) v. Syndicat national des employés de l'hôpital Saint-Ferdinand,* [1996] 3 S.C.R. 211;

33 R.R.Q., 1981, c.B-1, r.1;

34 [2007] R.J.Q. 983;

35 *Philippe Guilbert v. Sony BMG Musique (Canada) Inc.* , [2007] R.J.Q. 983, at paras. 37-40;

36 *Out-of-Court Fees Agreement and Professional Mandate,*February 22, 2001 , (Exhibit R-20);

37 *Agreement on extrajudicial fees & professional mandate,* February 10, 2005, (Exhibit R-22);

38 *Total billing, by lawyer and by stage as of August 26, 2008 (2008 rate),* Belleau Lapointe

39 *Billing by lawyers and in stages as of October 19, 2006 inclusively,* Belleau Lapointe

40 *Invoicing by lawyers: Categories D, E, G, J between 20 October 2006 and 26 August 2008 (2008 rate),* Belleau Lapointe

41 *Total billing, by lawyers and in stages as of August 26, 2008 (Rate 2008), Belleau Lapointe*;

42 *Total judicial and extra-judicial disbursements, categories D, E, G and J as of August 26, 2008,* Belleau Lapointe

43 *Billing by lawyers and in stages as of October 19, 2006 inclusively,* Belleau Lapointe *and Total Billing, by Lawyers and in Stages as of August 26, 2008 (2008 Rate),* Belleau Lapointe;

44 *Billing by lawyer and by stage as of October 19, 2006,* Unterberg, Labelle, Lebeau*;*

45 *Billing by lawyer and by stage between October 20, 2006 and June 25, 2008 (2008 rate), Unterberg,* Labelle, Lebeau;

46 *Total billing, by lawyers and in stages as of August 26, 2008 (Rate 2008), Belleau* Lapointe*;*

47 *Affidavit of Mr. Lebeau,* September 4, 2008;

48 *Jeffery et al vs Nortel Networks Corporation et al, 2007 BCSC 69, Reasons for Judgment* (J. Groberman), January 19, 2007;

49 *Judicial and extrajudicial disbursements (Exhibits* R-31 and R-31A);

End of document

Tab 3

Baker (Estate) v. Sony BMG Music (Canada)

CITATION: *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105
COURT FILE NO.: CV-080036065100 CP
DATE: 20111130

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **The Estate of Chesney Henry "Chet" Baker et al**., Plaintiffs/Moving Parties

AND:

Sony BMG Music (Canada) Inc. et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Paul Bates and Jonathan Foreman,* for the Plaintiffs/Moving Parties

Danielle Royal for the Defendant/Respondent Universal Music Canada Inc.

Timothy Pinos and Casey M. Chisick, for the Defendants/Respondents CMRRA and SODRAC

HEARD: November 22, 2011

ENDORSEMENT (CLASS COUNSEL FEE APPROVAL)

I get along without you very well,
of course I do.
Except when soft rains fall
and drip from leaves, that I recall
the thrill of being sheltered in your arms.
Of course I do,
but I get along without you very well.

Chet Baker, *I Get Along Without You Very Well (Except Sometimes)*

[1] Chet Baker was an American trumpeter and jazz singer. He was born in 1929 and died in Amsterdam in 1988 in tragic circumstances, after a troubled and turbulent life. He left behind an impressive, if occasionally melancholic, legacy of music.

[2] Unfortunately, Mr. Baker and his heirs, like many musicians and their families, did not receive full compensation for the use of his works by others. This was the result of a royalty and licensing system in Canada that permitted third parties, such as the defendants, Sony BMG Music (Canada) Inc. ("Sony"), EMI Music Canada Inc. ("EMI"), Universal Music Canada Inc. ("Universal") and Warner Music Canada Co. ("Warner") (collectively, the "Record Labels"), to reproduce and distribute copyrighted musical works owned or controlled by musicians or their rights holders, without having a licence to do so or without paying the royalties due to the rights holders.

[3] The issue was well known by the defendants Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA") and Society for Reproduction Rights of Authors, Composers and Publisher (SODRAC) Inc. ("SODRAC"), (referred to as the "Collectives"). They had been aware of the problem for years and had apparently been unwilling or unable to resolve it. CMRRA represents the reproduction rights of the vast majority of music publishers whose repertoires are in use in Canada. SODRAC is a copyright collective that administers the reproduction rights in musical works and collects royalties on behalf of its clients. Due to a combination of factors, including the Collectives' lack of resources and the absence of motivation on the part of the Record Labels, nothing significant was done. The problem simply festered and grew worse – until this proceeding was commenced.

[4] This class action was brought in 2008 on behalf of artists and rights holders who had not received full compensation for the use of their works. It was initially commenced by Mr. Baker's widow, Carol Baker. Mrs. Baker saw it through almost to completion before she was required to withdraw as a result of a dispute concerning the administration of her husband's estate. Craig Northey, a Canadian singer/songwriter, agreed to step into the role of representative plaintiff to complete the work commenced by Mrs. Baker, ultimately finalizing a settlement with the defendants and establishing a structure not only to resolve past injustices, but to establish a mechanism to ensure that they did not recur.

[5] On May 30, 2011, I approved the settlement of this class proceeding. It will result in the payment of $46,688,805.91 into a settlement trust for the benefit of the class. In addition, the Record Labels will pay $600,000.00 as a contribution to the costs incurred by the Class.

[6] Class Counsel subsequently moved for approval of a request for payment of fees, taxes and disbursements in the amount of $7,647,583.85. The fee portion is $6,950,000.00, taxes are $610,805.19 and disbursements are $86,778.66. After the deduction of the $600,000.00 paid by the Record Labels, the sum of $7,047,583.85 would be paid out of the settlement fund. The fee portion of the account of Class Counsel represents a payment of approximately 15% of the settlement fund.

[7] On October 27, 2011, when this motion came on for hearing, some of the objecting parties requested an adjournment to consider the filing of additional material. As a condition of the adjournment, I approved an interim payment of $2,200,000.00 plus taxes and disbursements. All objectors acknowledged that Class Counsel was entitled to a fee of at least that amount.

[8] Class Counsel also ask for permission to pay an honorarium of $3,000, to each of Mr. Northey and Mrs. Baker.

Background

[9] This action was brought under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") on behalf of owners of copyright in certain musical works in relation to a systemic practice by the Record Labels whereby musical works were exploited without securing the necessary licences and/or without payment of the applicable mechanical royalties. The representative plaintiffs alleged that these parties were liable for infringing copyright in musical works, by reproducing those works in sound recordings released or distributed in physical

formats in Canada without securing licences from the owners of the copyright to reproduce those works and/or by failing to pay the required royalties. The claim made further allegations against the Collectives in their capacity as intermediaries between copyright owners and the Record Labels.

[10] A brief description of the problem will be sufficient for the purposes of this motion.

[11] Prior to 1988, the *Copyright Act*, R.S.C. 1985, c. C-42 contained a compulsory statutory licence for mechanical reproduction of musical works, which set royalties at two cents per playing surface. Because the licence was mandatory, and the royalty was fixed, the practice developed that record companies would release new records without applying for a licence in advance. This was an efficient method of operation, but it meant that the owner of the copyright in the work had to be located and paid. That was often a problem. The Record Labels began to develop what was referred to as the "Pending Lists", to record their use of musical works for which the owners of the copyright had not been paid.

[12] The statutory licence was repealed in 1988. This meant that it was now necessary to negotiate a licence in the case of each musical work. It fell to CMRRA to negotiate the terms of the licences. Unfortunately, in practice, there were serious problems, largely administrative.

[13] The practice of the record companies of "breach copyright now, pay later" continued under the new copyright regime, except that in some cases the "pay later" was not happening. Due to ongoing difficulties in identifying owners of copyright, and other administrative problems, the size and value of the items on the Pending Lists continued to grow. By the time this action was commenced, the list contained more than 250,000 items, with an estimated value in excess of $50,000,000.

[14] CMRRA had attempted, over the years, to address the issue of the Pending Lists. Although some progress was made from time to time, it is my impression that both CMRRA and the Record Labels had more pressing current issues to deal with and there were neither the resources, nor the will, to treat the Pending Lists as a priority.

This Action

[15] This action was commenced on the instructions of Carol Baker in the name of the Estate of Chesney Henry "Chet" Baker Junior and Chet Baker Enterprises LLC, by Statement of Claim issued on August 14, 2008. It was brought against the Record Labels and the Collectives.

[16] On September 3, 2008, a Fresh as Amended Statement of Claim was issued and on October 6, 2008, an Amended Fresh as Amended Statement of Claim was filed. Class Counsel filed a Certification Motion Record on January 26, 2009.

[17] The action was, in a sense, welcomed by the Collectives because it got the urgent attention of the Record Labels and it provided a potential framework for the resolution of the Pending Lists problem. On October 2, 2008, Class Counsel concluded a cooperation and settlement agreement with the Collectives. On March 31, 2009, Class Counsel moved for approval of the settlement agreement with the Collectives.

[18] The decision by Class Counsel to sue the Collectives and to negotiate a settlement agreement with them provided to be a shrewd tactical move. It isolated the Record Labels and it took advantage of the expertise and resources of the Collectives in prosecuting the action against the Record Labels. There is no question that the assistance of the Collectives, and their Lawyers, has contributed to the successful resolution of this matter and the establishment of a workable system going forward.

[19] The plaintiffs served a motion record for certification in January, 2009.

[20] I was appointed to case manage this proceeding in the fall of 2009. I have presided over about ten in-person case conferences and an equal number of teleconferences with counsel. There have also been several court appearances. I will describe my observations concerning these attendances, and of the dynamics of the litigation, in due course.

[21] Settlement discussions between the parties began in earnest in March of 2010. The parties attended before Justice Colin L. Campbell, acting as a mediator, over several dates. These discussions continued on a vigorous and adversarial basis until settlement agreements were reached with each of the Record Labels.

[22] Settlement terms were reached first with Sony, followed by Warner and then EMI in close succession in June 2010. Settlement documentation was executed with those labels throughout July and August of 2010. Minor amendments were made to the Sony settlement agreement and a final version was signed in December of 2010.

[23] Negotiations with Universal did not initially bear fruit. A revised schedule for the certification motion against Universal was established through a series of case management conferences. Class Counsel, the Collectives, and Universal conducted cross-examinations of all witnesses who had sworn affidavits in connection with the certification motion, including Mrs. Baker, who was examined in the U.K. This examination involved no small expense and confirms my impression that Universal was prepared to take a serious run at contesting certification.

[24] Settlement discussions continued with Universal concurrently with the certification schedule. Further mediation sessions were held with Justice Campbell. In or about December, 2010, settlement terms were finally reached with Universal and settlement documentation was executed shortly thereafter.

[25] In January of 2011, the Collectives advised that they had identified certain “held royalties” which had been paid to the Collectives by the Record Labels but could not be distributed. They stated that they wished to contribute these to the settlement fund. A second amended settlement agreement was therefore executed with the Collectives on January 31, 2011.

[26] On or about February 9, 2011, EMI advised that it would be submitting video royalty amounts into the settlement fund as contemplated by its settlement agreement. As a result, the parties agreed to a revised class definition reflecting EMI’s participation in the video aspect of the settlement.

[27] In February of 2011, the Record Labels advised Class Counsel and the Collectives of their position that a portion of the "held royalties" which had been paid to the Collectives by the Record Labels, and were proposed to be paid into the settlement trust, should be credited to the payments to be made by the Record Labels into the settlement trust. This reflects the ongoing adversarial nature of the proceedings.

[28] All parties engaged in negotiations aimed at ascertaining the nature and veracity of the Record Labels' claims to a credit in respect of those held royalties. Those negotiations culminated in an agreement whereby the Record Labels have been provided with a credit of $1.25 million against payments to be made by them into the settlement trust.

[29] Prior to the execution of the agreement to provide a credit to the Record Labels in respect of "held royalties", correspondence was sent to the Court from Paul Baker, Chet Baker's son, challenging the authority of Carol Baker to act on behalf of the estate of Chet Baker in commencing this action and in pursuing the settlement.

[30] Carol Baker and Class Counsel disagreed with the objections made by Paul Baker. Notwithstanding that view, the Record Labels continued to have concerns about the ability of Carol Baker and Chet Baker Enterprises LLC to act as Representative Plaintiffs. It was ultimately agreed by all parties, and approved by me, that it would be most expeditious, efficient and desirable for Mrs. Baker and Chet Baker Enterprises LLC to withdraw as the proposed representative plaintiffs in favour of an appropriate substitute.

[31] Class Counsel were then retained by Craig Northey, an accomplished Canadian songwriter and musician, who has a claim for unpaid mechanical royalties on one of Record Label's pending lists. Mr. Northey was prepared to step into the role of representative plaintiff and to prosecute the action to a conclusion.

[32] The settlement agreements reached between Carol Baker and the defendants were terminated and Mr. Northey executed new settlement agreements with each of the defendants on substantially the same terms as the agreements signed by Mrs. Baker. In addition, Mr. Northey executed a copy of the agreement providing the Record Labels with a credit with respect to the "held royalties".

[33] As a result of the time and effort required to address the issue of the substitution of a new class representative, the Record Labels demanded a reduction to the costs payments provided for in each Label's settlement agreement in the aggregate amount of $150,000, to be divided as agreed amongst the Record Labels as a condition of entering into the new agreements with Mr. Northey. Once again, the Record Labels pressed for every concession they could get. The plaintiff agreed to this demand, recognizing, among other things, the desirability of concluding the settlement in a timely way.

[34] It is likely that additional work will be required of Class Counsel in the administration of the settlement. Class Counsel request compensation for such work on an hourly rate basis out of the settlement fund.

The Settlement

[35] Under the terms of the settlement, as ultimately implemented, a total of $46,688,805.91 is to be paid into a settlement trust for the benefit of Class members. After payment of Class Counsel's fees and other expenses, these funds will be administered and distributed by an entity ("CSI") jointly created by the Collectives. The Record Labels will contribute a total of $42,761,023.94 of this amount and CMRRA and SODRAC will pay $3,927,781.97 in "held royalties". The objective of the settlement administration will be to identify, and pay, the accrued royalties to as many rights holders as possible. It will be necessary to prioritize the efforts of the administration in both temporal and financial terms. Priority will be given to high value amounts (items on the Pending Lists with a value of $2,500 or more) and medium value amounts ($1,000-$2,500) which will be identified on a claims website which can be accessed by potential class members. Efforts will be made to locate rights holders in respect of low value items (less than $1,000).

[36] As well, as part of the settlement, a system of licensing and royalty administration has been established, on a going-forward basis, to ensure that the problem does not recur. This is a very important feature of the settlement and a significant accomplishment.

[37] After the administration period has been completed with respect to high value and medium value amounts, any residue will be distributed *cy-pres* to the universe of rights holders with market share in Canada, according to analysis that will be carried out by CSI. A similar distribution will be made with respect to the low value items.

[38] It is the stated goal of Class Counsel, and CSI to compensate rights holders to the greatest extent possible. As noted, Class counsel propose to remain involved, on a fee-for-service basis, in the administration of the settlement, as required.

Settlement Approval

[39] On May 30, 2011, I approved the settlement, finding that it was fair, reasonable and in the best interests of the class. My reasons indicated that I was satisfied that this action meets the requirements of section 5 of the *C.P.A,*: there is an identifiable class, represented by a suitable and qualified plaintiff, with tenable causes of action under the *Copyright Act* and for unjust enrichment, which give rise to issues that can be resolved on a common basis. I found that certification, and the settlement it implements, would achieve the goals of the *C.P.A.* by giving access to justice to many individuals with relatively modest claims that could not, as a practical matter, have been economically pursued on an individual basis. I found that the action and the settlement achieved judicial economy by consolidating the claims of several thousand class members into one proceeding and achieved behaviour modification by resolving a long-standing problem in the music industry and by putting a process in place to address the problem going forward.

The Position of Class Counsel

[40] As stated above, Class Counsel seeks approval of a fee of $6,950,000 plus taxes and disbursements.

[41] Both representative plaintiffs executed contingent fee agreements that stipulated a maximum counsel fee of 30% of the amount recovered. The fee request made by Class Counsel is approximately 15% of the gross settlement value and therefore represents a significant discount of the fee to which Class Counsel is contractually entitled. The fee request is supported by both Mrs. Baker and Mr. Northey.

[42] In summary, the submissions of Class Counsel are as follows:

(a) this was complex intellectual property litigation, involving multiple defendants and a seemingly intractable problem that has finally been resolved in a way that not only provides direct benefits to the Class, but also addresses the issue on an ongoing basis;

(b) the settlement was an extremely good one, resulting in a high rate of recovery of the unpaid amounts;

(c) Class Counsel carried all the disbursements in the litigation and agreed to indemnify the representative plaintiff against an adverse costs award – this avoided the need to seek assistance from the Class Proceedings Fund, which would have charged a 10% levy on any settlement or recovery;

(d) it has taken over four years to bring this matter to completion, during which time Class Counsel received no fees; and

(e) Class Counsel were at risk for a variety of reasons, including the risk that the action would not be certified or, if certified, would not ultimately be successful.

[43] I will address other points made by Class Counsel in the course of my reasons.

Objections

[44] There were no substantive objections to the settlement itself and there have been only two opt-outs. The fee request is opposed by the Collectives, by Universal and by Warner/Chappell Music Canada Ltd. ("WCMC"). I will review their objections.

The Objection of WCMC

[45] WCMC takes the position that the fee is excessive in light of the services rendered by Class Counsel, when balanced against the complexity of the matter, the importance of the matter to the Class, the expectations of the Class and the effect that the fee will have on the recovery achieved by the Class. That being said, WCMC acknowledges the contribution made by Class Counsel to the successful resolution of this matter and asks that a fair fee be awarded, having regard to the time and expenses invested by Class Counsel. It submits that the fee should be based on the time actually spent and the hourly rates of Class Counsel.

[46] WCMC submits that the litigation was not complex, liability was not seriously disputed and the action was settled at a relatively early stage. It says that Class members should be entitled to receive the royalties that are due to them, and should not be required to accept a

discount in order to allow Class Counsel to benefit from a fee that far exceeds the time spent on the matter.

[47] WCMC makes the point that songwriters rely on royalties to earn their livelihood and that without songwriters and their songs, the world would be decidedly bleak. Its letter of objection points out:

> Songwriters rely on royalties as their means of making a living. Take away a songwriter's income and a songwriter will be forced to pursue a different livelihood. The result will be detrimental to us all. Songs are used in television, movies, commercials and for personal enjoyment. Songs are used to tell stories, to create moods, to quiet the mind, generate enthusiasm, to energize the body, to uplift spirits. Music is used to celebrate and to mourn. Music can be educational and can be therapeutic. The world benefits from the fruits of the songwriter's labor.

[48] This is a fair point, elegantly made. No sensible person would suggest, however, that a songwriter should be compensated based on the time spent writing the song, which is the way in which WCMC submits Class Counsel should be compensated, in spite of the terms on which they took on the brief.

[49] WCMC's letter continues:

> The songwriters and publishers were punished by the failure of the record Companies to pay royalties in the first instance. They are being punished a second time by being made to accept less than the full royalties they are entitled; and, will be punished a third time if Class Counsel is awarded the contingent fee requested, which will further reduce the royalties payable to the Class Members.

[50] WCMC concludes by asking that the Court fix Class Counsel's fee in an amount that corresponds with the time actually spent, so that the royalties payable to class members will more closely correspond to the amounts actually owing to them.

The Objection of Universal

[51] Universal is both a defendant and, through its publishing arm, is a member of the Class. It acknowledges that Class Counsel are entitled to fair compensation, but it says that the fee requested is excessive having regard to the nature of the dispute, the settlement and the expectations of the class. It also says that there was unnecessary duplication of work and over-lawyering by Class Counsel.

[52] Universal's position is similar to the position of WCMC. It says that the issues in the action were straightforward, the problem was notorious and long-standing and the matter settled prior to certification and before significant time was expended in preparation for discovery and trial.

[53] Universal also notes that the net amount that class members will receive will already be diluted by the 10% commission that will be paid to CSI for the administration of the settlement.

[54] Finally, Universal says that a review of Class Counsel's docket summary suggests that the involvement of three counsel firms in the action resulted in duplication of effort and "over-lawyering." It refers to *Andersen v. St Jude Medical Inc.*, [2004] O.J. No. 3102 (S.C.J.) at para. 11, in which Cullity J. expressed concern about the risk of duplication of work and overhead when there are multiple counsel involved in the brief. As has been noted by Universal, that was a contested costs award and not a fee request. That distinction reflects the philosophy of costs awards that what may be reasonable billing as between a lawyer and his or her own client may not be within the reasonable expectations of the opposing party when it comes to a costs award. Universal submits, however, that the same principles should apply to shield class members from being required to pay excessive fee requests by Class Counsel.

The Objection of the Collectives

[55] The Collectives say that the fees claimed are not fair and reasonable. They say that a "multiplier" approach should be used, using a multiplier of 1.3, resulting in a Class Counsel fee of around $2,725,000.

[56] The objections of the Collectives are, essentially, that this was relatively risk-free litigation that was handed to Class Counsel on a platter, that liability was not seriously in issue, that most of the heavy lifting was done by the Collectives and that the resulting settlement, while decent, was not exceptional. They make the following submissions, in summary:

(a) after being named as defendants in this action, the Collectives and their lawyers made significant efforts to resolve the issues, thereby taking a considerable burden off the shoulders of Class Counsel – their lawyers spent a total of 2,200 billable hours on the matter, reflecting the time and effort involved;

(b) the Collectives, and their lawyers, have been significantly involved in moving the action forward, in fact, at times they were pressing Class Counsel to move the matter forward;

(c) the future licensing proposal was developed by the Collectives, which have also helped to develop the proposal and documentation for the resolution of the litigation;

(d) the Collectives were actively involved in pushing for settlement, participating in the mediation, negotiating with the Record Labels and developing the settlement documentation and protocols;

(e) the Collectives identified the existence of the held royalties, which were added to the settlement trust and this recovery was not the result of the efforts of Class Counsel;

(f) there was time and money wasted due to the issues surrounding the authority of Carol Baker to represent the Baker estate, ultimately resulting in a reduction of $150,000 of the amount paid by the Record Labels by way of costs – this issue could have been foreseen and avoided;

(g) the net benefit of the settlement is approximately $38.5 million, after deduction of the 10% commission that will be payable to the Collectives for the administration of the settlement and

(h) the held royalties were not contributed to the settlement by the Collectives as a result of any efforts made by Class Counsel and they should be excluded from the settlement fund for the purposes of calculating the fee.

Discussion

Approval of Class Counsel's Retainer

[57] The first issue is the consideration of the agreement made between Class Counsel and the representative plaintiffs with respect to fees and disbursements.

[58] Section 33 of the *C.P.A.* recognizes that Class Counsel may enter into a contingent fee arrangement with the representative plaintiff. Section 32(2) provides that an agreement respecting fees and disbursements between Counsel and the Class representative is not enforceable unless approved by the Court. The agreement must be in writing, must state the terms under which the fees and disbursements are to be paid and must give an estimated fee. It must also state the method by which payment is to be made, whether by lump sum, salary or otherwise. Where the Court does not approve the agreement, it may nevertheless determine the amount of fees and disbursements owing to counsel.

[59] As I have noted, the fee agreement between Class Counsel and the representative plaintiffs called for a contingent fee of 30%. Class Counsel voluntarily agreed to reduce their fee to approximately 15%.

[60] I find that the fee agreements meet the requirements of the *C.P.A.* I turn now to the question of whether Class Counsel's fee request should be approved.

Fee Approval

[61] My responsibility in this motion is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) at paras. 13 and 56.

[62] The factors to be considered in the application of this test are well-known and I will turn to them in a moment. I will begin with a few preliminary textual comments.

[63] First, a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years. As Class

Counsel has pointed out, there have been a number of instances in recent years in which this Court has approved fees that fall within that range. These include:

- *Abdulrahim v. Air France,* [2011] O.J. No. 326: 30%
- *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302: 19.4%
- *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013 24%
- *Osmun v. Cadbury Adams Canada Inc*., [2010] O.J. No. 2093: 25%
- *Pichette v. Toronto Hydro,* [2010] O.J. No. 3185: 28.5%
- *Robertson v. Thompson Canada Ltd.,* [2009] O.J. No. 2650: 36%
- *Cassano v. Toronto- Dominion Bank* (2009), 98 O.R. (3d) 542: 20%
- *Martin v. Barrett,* [2009] O.J. No. 2015: 29%

[64] There should be nothing shocking about a fee in this range. Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.

[65] My second observation reflects the reality of class action litigation. Defendants tend to be well-resourced and represented by larger law firms. This is a case in point. There were four defendants. EMI and Universal were represented by national and international law firms, each with over 500 lawyers. Sony and Warner were represented by a smaller litigation firm (about 50 lawyers) which focuses exclusively on complex litigation. The Collectives were represented by a 200 lawyer firm. These were some of the best law firms in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.

[66] Due to the nature of the work, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Without wanting to paint all with the same brush, defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one.

[67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee: *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49

O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61. If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?

[68] My third comment, which is not original, is that this is one area where the Court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services.

[69] Finally, flowing from this, it seems to me that one should consider the proposed fee from the perspective of the class member, both prospectively and retrospectively. Had it been possible for Class Counsel and the class members to discuss the issue from the outset, would the class have considered the fee arrangement reasonable? If so, in light of the ultimate resolution, does the fee remain reasonable? In the context of this case, if Class Counsel had proposed a fee of 15 cents per dollar of gross recovery, would that have appeared fair and reasonable at the outset? With the benefit of hindsight, does it appear fair and reasonable?

[70] I now turn to the factors that have traditionally been considered in determining the fees of Class Counsel. In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized those factors:

> (a) the factual and legal complexities of the matters dealt with;
>
> (b) the risk undertaken, including the risk that the matter might not be certified;
>
> (c) the degree of responsibility assumed by Class Counsel;
>
> (d) the monetary value of the matters in issue;
>
> (e) the importance of the matter to the class;
>
> (f) the degree of skill and competence demonstrated by Class Counsel;
>
> (g) the results achieved;
>
> (h) the ability of the class to pay;
>
> (i) the expectations of the class as to the amount of fees; and
>
> (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement.

See also: *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33; *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321, 2011 ONCA 233 (C.A.).

[71] The weight to be given to a particular factor will vary from case to case. In *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302, 2010 ONSC 4294, I observed that one of the most important factors on a fee approval motion must be the result achieved in relation to the amount at issue and the complexity of the case. Some assessment must be made of what the plaintiff was able to obtain, in relation to what the case was really "worth". Other important facts are the time spent and the risks incurred by the lawyers, the agreement between Class Counsel and the representative plaintiff and the level of fees awarded in other proceedings of a similar nature. I stated, at para. 44:

> After examining all these factors, it is important to ask whether the work of Class Counsel has fulfilled the goals of the *C.P.A.* by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers. It is also important to recognize that the achievement of these goals demands that there is an available pool of experienced and skilled lawyers of high repute, who are prepared to take on the onerous and risky responsibility of Class Counsel. Where counsel achieve successful results, they render a service not just to the class but to the legal system itself, by providing access to justice and by achieving judicial economy. Their fees should not be assessed simply on the basis of *quantum meruit* - they should be enhanced in appropriate cases to recognize and reward successful performance and to serve as an incentive to counsel to take on class action litigation

[72] The *results achieved* in this case were, in my view, excellent. The Collectives and Universal agree that the result was a good one, although they point out that there has been no recovery of interest or statutory damages.

[73] The gross recovery under the settlement is almost the full amount owing to class members. The net recovery, after the deduction of fees, will be in the range of 80% to 85% of the amount owing. It is true that substantial statutory damages were potentially recoverable under the *Copyright Act*, but the availability of such damages is not absolute and the entitlement to such damages was speculative in the circumstances. It is also true that the settlement does not include recovery of interest over the long period that payment was withheld, but a party will frequently agree to forebear a claim for interest in return for a settlement. The results achieved must also be considered in the context that there were serious defences available to the defendants, including, in particular, limitations defences.

[74] While the defendants say that the percentage fee should not be applied to the commission of some $4 million payable to CSI for the administration of the settlement, that money is necessarily spent in order to put the settlement into the hands of the class in an equitable and expedited manner. It was obtained through the efforts of counsel. While the "held royalties" are somewhat in the nature of a windfall, we should not lose track of the fact that Class Counsel have actually agreed to reduce their fee to a percentage that is half as much as the amount to which they were entitled under their retainer agreements.

[75] The matter was *important to the class.* As the submission of WCMC points out, intellectual property rights and the entitlement to royalties for their use are vitally important to songwriters and musicians. The breach of those rights was real and long-standing. The recovery of wrongfully withheld past royalties, and the creation of a structure to ensure that the problem will not recur, must be regarded as an extremely important achievement for the benefit of the Class.

[76] The *monetary value of the matter* was significant, some $50 million. This will be real cash in the hands of the Class – not coupons, discounts or forgiveness of debt having only notional value.

[77] The *degree of responsibility assumed by counsel* was also significant, in light of the size of the Class and the amount at issue. It is fair to note that Class Counsel was assisted by the Collectives, but Class Counsel was ultimately responsible for, and accountable for, the prosecution of the litigation.

[78] The *factual and legal complexities* of the matter were not at the highest end of the scale, but they were significant. The issues in the action were essentially unique and unprecedented and required thorough investigation. There were multiple parties. The settlement itself was extremely complicated, involved multiple parties and multiple documents and a complex structure for resolution.

[79] In my view, the *skill and competence demonstrated by Class Counsel* was exceptional. They developed and executed an aggressive strategy designed to bring this action forward for certification and their determination to do so, and their credibility as counsel, brought the defendants, one by one, to the bargaining table and ultimately to settlement. The objectors do not take issue with the skill and competence of Counsel, other than to point out that the difficulties that arose with respect to Mrs. Baker resulted in increased costs and delayed the resolution. In my view, the unfortunate and possibly unmeritorious concerns raised by Paul Baker, at the eleventh hour, cannot be laid at the doorstep of Class Counsel. It was one of those things that can go wrong in litigation. Class Counsel responded to the challenge in a timely and practical manner.

[80] The *risk undertaken by Class Counsel*, and the *opportunity cost* was sizeable. The action took four years to bring to conclusion. In comparison to some substantial class actions, this is commendable expedition. At the same time, during those years Class Counsel received not a penny for their efforts. They incurred and paid disbursements on behalf of the class. They spent some 6,000 hours on the file without compensation. Their docketed time has a face value of about $2.2 million. They bore the risk of an adverse costs award if the action was not successful. They, not the Class, were at risk.

[81] The *expectation of the class as to the amount of the fee* and *the ability of the class to pay* would not detract from the fee proposed by Class Counsel. There has been minimal opposition to the fee request in spite of quite extensive notice of this hearing. The class members are clearly able to pay the fee and it will not significantly dilute their recovery.

[82] Turning to the dynamics of the litigation, having case managed this action for over two years, and having conducted a number of case conferences as this proceeding worked its way to resolution, it is my view that this was a difficult, hard-fought piece of litigation in which the outcome was by no means assured. While the plaintiffs were successful in securing the early cooperation of the Collectives, this itself was no small accomplishment. Nor were the initial settlements with Sony, Warner and EMI. Universal remained a tenacious hold-out and there were very serious questions as to whether a resolution would be achieved.

[83] From my observations, the positions taken by Universal from time to time were highly adversarial and its position was aggressively and effectively advanced. I reject any suggestion that the settlement was a cake walk for Class Counsel. It was hard work and the risk of failure of the resolution strategy was always present. So was the risk that the action would not be certified for any one of the reasons advanced by Universal.

[84] Class Counsel were insistent that if the matter was not resolved, they would proceed to a certification hearing and counsel for Universal was equally insistent that certification would be vigorously opposed and that there were flaws in the plaintiff's case that made it unsuitable for certification. This was not posturing. The very satisfactory result in the proceeding was due to the preparedness of Class Counsel to go to the wall if a satisfactory settlement could not be achieved. I am convinced that this resolve was demonstrated to the defendants throughout and it resulted in a better and more effective settlement for the class.

[85] Having supervised the proceeding and having reviewed counsel's time records, it is my view that the assertion that this case was over-lawyered is unfair and erroneous. Class Counsel were a consortium consisting of Bates Barristers, Harrison Pensa and the Canadian Internet Policy and Public Interest Clinic, a legal clinic representing consumers and public interests in intellectual property and other matters. Most of the work was done by Mr. Bates, the more senior of the lawyers (1983 call), and by Mr. Foreman (2002 call). Mr. Foreman spent at least 1,670 hours on the file. Mr. Bates spent about 800 hours. The total time spent on the matter, by all personnel in the Class Counsel consortium, was around 6,000 hours, having a face value of $2.2 million. Although there were various juniors, paralegals and others involved in the file, I have no sense at all that this is a case in which everyone from the most senior partner to the most junior clerk was thrown at the file in order to pump up the fee. Nor do I have the sense, at all, that any of the lawyers involved was engaging in unnecessary or redundant work. On the contrary, my observation is that Class Counsel conducted themselves efficiently throughout.

[86] I think one should resist the temptation to engage in armchair quarterbacking when assessing the value of Class Counsel's time. The objecting defendants and WCMC make the argument that this was an easy piece of litigation. I disagree. The problem festered for many years before Class Counsel got involved. None of the defendants was able to resolve it. It took over four years to resolve once this action was commenced. Even after it had been resolved with some of the defendants, there were constant frictions and new problems cropped up, such as the "held royalties" and the substitution of a new class representative.

[87] WCMC suggests that Class members are being "punished" by having to pay over a percentage of the royalties to which they are entitled in order to pay the lawyers. This submission overlooks the fact that Class members would likely still be waiting for their royalties had Class

Counsel not agreed to invest their own blood, sweat and tears in the issue and to take on the Record Labels in what has proven to be an arduous battle.

[88] In this case, the proposed fee is about 15% of the net settlement. Had Class Counsel proposed a fee of this size to the Class, as a condition of taking on a battle that had sat unresolved for years, there is no question in my mind that the vote would have been overwhelmingly positive. Looking back on the time and effort displayed by Class Counsel and considering the result and the other factors I have referred to, it seems to me that it was a fair bargain and the result is, in general, fair.

[89] I would say that the "held royalties" do not stand on quite the same footing and there should be a modest reflection of the fee to reflect this. In all the circumstances, a fee of $6,250,000 would be fair and reasonable, plus taxes. In addition, Class Counsel shall be entitled to render invoices to CSI on an hourly rate basis, for any services rendered in the implementation of the settlement. All such invoices shall be approved by me or by the judge case-managing this proceeding in the future.

Compensation for Representative Plaintiffs

[90] Class Counsel have requested payment of an "honorarium" of $3,000 to each of Mrs. Baker and Mr. Northey, out of the fees received by Class Counsel.

[91] The retainer agreements signed by Mrs. Baker and Mr. Northey allowed for the possibility of a *quantum meruit* compensation of the class representative, if approved by the Court:

> If the action is successful, the consortium shall make a request to the Court for an award of compensation for the plaintiff on a *quantum meruit* basis for the time spent acting as a representative for the class. It is acknowledged that such compensation is entirely within the discretion of the court.

[92] Mrs. Baker and Mr. Northey have sworn affidavits stating that, while they have no expectation of receiving such compensation or honorarium, they would be grateful for any payment the Court may see fit to make. Their affidavits indicate that they were extensively involved in settlement discussions, correspondence, telephone conversations and meetings, and review of settlement documentation. Mrs. Baker, who lives in England, was required to travel from her home in Cornwall to London for cross-examination on her affidavits.

[93] The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.*[2008] O.J. No. 5241 (S.C.J.) at para. 12. That said,

where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.

[94] The Court of Appeal has recently indicated in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 at paras. 134-135 that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of Class Counsel's fee, to avoid concerns with respect to fee-splitting.

[95] It is interesting to note that on certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere "bench-warmer" or a "straw man" recruited by Class Counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private client would in supervising his or her own litigation. A private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not. That being said, these are contributions the Court expects a representative plaintiff to make and I respectfully agree with the observation of Hoy J. in *Bellaire v. Daya*, above, at para. 71 that compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases, like *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.) where the contribution of the representative plaintiff has gone well above and beyond the call of duty.

[96] I have decided that this is not one of those rare and exceptional cases that calls for payment of compensation to the class representative. I do not wish to minimize, in any way, the efforts of Mrs. Baker and Mr. Northey. They have acted as exemplary representatives. They can be proud of their contributions to the prosecution and resolution of this matter and they have earned the gratitude of the Class. The Court could ask no more of them. I hope they will appreciate that my decision not to award compensation is no reflection on their most commendable efforts on behalf of the Class.

Summary and Order

[97] An order will therefore issue:

(a) approving the retainer agreements entered into between the representative plaintiffs and Class Counsel;

(b) approving the fees of Class Counsel in the amount of $6,250,000 plus taxes and directing that such amount be paid out of the Settlement Trust; and

(c) providing that future services rendered by Class Counsel shall be invoiced on a time and hourly rate basis, subject to Court approval.

G.R. Strathy J.

Date: November 30, 2011

Tab 4

Becker v. Pettkus

Lothar Pettkus (*Defendant*) *Appellant*;

and

Rosa Becker (*Plaintiff*) *Respondent.*

1980: June 23; 1980: December 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees — Constructive trust or resulting trust — Long standing common law relationship — "Wife" first supported "husband" while he accumulated capital and later helped in construction of home and development of business — Whether or not women entitled to portion of property and assets held exclusively in man's name — Applicability of constructive and resulting trusts to common law relationship.

Appellant, through toil and thrift, developed over the years a successful beekeeping business. He owned two rural Ontario properties, where the business was conducted, and had the proceeds from the sale in 1974 of a third property located in Quebec. Respondent through her labour and earnings, too, contributed substantially to the good fortune of the common enterprise. Although unmarried, appellant and respondent lived as husband and wife from 1955 to 1974, save for a three-month separation in 1972. When the relationship terminated in late 1974, respondent commenced this action seeking a declaration of entitlement to one-half interest in the lands and a share in the beekeeping business.

The trial judge awarded respondent forty beehives without bees, together with $1,500 representing earnings from those hives for 1973 and 1974. The Ontario Court of Appeal varied the judgment at trial by awarding respondent one-half interest in the lands owned by appellant and in the beekeeping business.

Held: The appeal should be dismissed.

Per Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: In the absence of an express or implicit intention to create it, a resulting trust could not be found. Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. An intention that a wife should have an interest cannot be implied if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the agreement "altogether tenuous". Uncommitted

Lothar Pettkus (*Défendeur*) *Appelant*;

et

Rosa Becker (*Demanderesse*) *Intimée.*

1980: 23 juin; 1980: 18 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

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

Fiducies et fiduciaires — Fiducie par interprétation ou par déduction — Relation de fait bien établie — L'«épouse» subvient d'abord aux besoins du «mari» pendant qu'il accumule du capital et plus tard participe à la construction de la maison et à l'essor de l'entreprise — Les femmes ont-elles droit à une partie des biens et de l'actif mis exclusivement au nom de l'homme? — Applicabilité des fiducies par interprétation et par déduction aux relations de fait.

Par son labeur et son épargne, l'appelant a mis sur pied au cours des années une exploitation apicole prospère. Il possède deux propriétés rurales en Ontario, où il exploite son entreprise, et détient le produit de la vente, en 1974, d'une troisième propriété située au Québec. Par son labeur et ses gains, l'intimée a considérablement contribué à la réussite de l'entreprise commune. Non mariés, l'appelant et l'intimée ont vécu comme mari et femme de 1955 à 1974, sauf pendant une séparation de trois mois en 1972. Lors de leur séparation fin 1974, l'intimée a intenté cette action par laquelle elle cherche à se faire déclarer propriétaire de la moitié des terres et à obtenir une part dans l'exploitation apicole.

Le juge de première instance a accordé à l'intimée quarante ruches sans abeilles et un montant de $1,500 qui représente le produit de ces ruches pour les années 1973 et 1974. La Cour d'appel de l'Ontario a modifié le jugement de première instance et a accordé à l'intimée un droit de propriété de moitié sur les terres appartenant à l'appelant et sur l'exploitation apicole.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Laskin et les juges Dickson, Estey, McIntyre, Chouinard et Lamer: En l'absence d'une intention expresse ou implicite de créer une fiducie par déduction, on ne peut conclure à son existence. Il n'y avait aucune entente expresse entre M. Pettkus et M^lle^ Becker de partager les profits. On ne peut pas présumer que l'intention est que l'épouse ait un droit si sa conduite avant l'achat des biens ou après est «tout à fait ambiguë», ou si sa participation à l'entente est «globalement

to marriage or to a permanent relationship, it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. While Miss Becker said they were to "save together", the truth was that Mr. Pettkus saved at her expense. In the face of the trial judge's explicit finding that common intention was not present and the appellate court's decision not to disturb that finding, this Court would not infer or presume otherwise.

The constructive trust could be applied in this case. The requirements needed to establish unjust enrichment, the principle lying at the heart of the constructive trust, were: an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. It was necessary not only to determine that one spouse had benefited at the expense of the other and order restitution but also to consider the retention of the benefit to be unjust in the circumstances of the case. The compelling inference from the facts was that Miss Becker believed she had some interest in the farm and that the expectation was reasonable in the circumstances. The first two requirements underlying unjust enrichment were satisfied: Mr. Pettkus had the benefit of 19 years, unpaid labour, while Miss Becker received little or nothing in return. As for the third requirement, where one person in a relationship tantamount to spousal, prejudiced herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it.

The causal connection between the acquisition of the property and corresponding enrichment, necessary for the application of the principle of unjust enrichment, was met in this case. The question of causal connection was really one of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized?

There was not basis for any distinction, in dividing property and assets, between marital relationships and those informal relationships which subsist for a lengthy period. The Court did not create a presumption of equal shares. There was a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth that she contributed over nineteen years. The fact that there was no statutory scheme directing equal division of assets acquired by common

minime». Comme M. Pettkus ne s'est pas marié ni engagé dans une relation permanente, il serait difficile de lui prêter une intention, expresse ou implicite, de partager ses économies. M^lle^ Becker a dit qu'ils devaient «épargner ensemble», mais en vérité M. Pettkus a épargné aux dépens de celle-ci. Vu la conclusion expresse du juge de première instance qu'une intention commune n'était pas présente et la décision de la Cour d'appel de ne pas modifier cette conclusion, cette Cour n'infère ni ne présume autre chose.

La fiducie par interprétation peut s'appliquer en l'espèce. Les conditions voulues pour établir l'enrichissement sans cause, le principe au cœur de la fiducie par interprétation, sont: un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique à l'enrichissement. Il était nécessaire non seulement de déterminer qu'un conjoint a tiré un avantage aux dépens de l'autre et d'ordonner la restitution, mais aussi de considérer que la rétention de l'avantage serait injuste dans les circonstances de l'affaire. Les faits commandent la conclusion que M^lle^ Becker croyait avoir un droit sur la ferme et que cette attente était raisonnable dans les circonstances. Les deux premières exigences qui appuient l'enrichissement sans cause ont été remplies: M. Pettkus a bénéficié pendant dix-neuf ans d'un labeur non rémunéré alors que M^lle^ Becker a reçu peu ou rien en retour. Quand à la troisième condition, lorsqu'une personne liée à une autre dans une relation qui équivaut à une union conjugale, se cause un préjudice dans l'expectative raisonnable de recevoir un droit de propriété et que l'autre personne accepte librement les avantages que lui procure la première, alors qu'elle connaît ou devrait connaître cette expectative, il serait injuste de permettre au bénéficiaire de conserver cet avantage.

Le lien causal entre l'acquisition des biens et l'enrichissement correspondant nécessaire à l'application du principe d'enrichissement sans cause a été satisfait en l'espèce. La question du lien causal est vraiment une question de fait: sa contribution était-elle suffisamment importante et directe pour lui donner droit à une partie des profits réalisés?

Rien ne justifie que l'on fasse une distinction lors du partage des biens et de l'actif, entre les personnes mariées et les personnes liées par une relation moins formelle qui dure depuis longtemps. La Cour n'a pas créé une présomption de parts égales. Il y a une grande différence entre ordonner le partage égal pour des conjoints de fait, et accorder à M^lle^ Becker une part équivalente à la contribution qu'elle a apportée, en argent ou en valeur monétaire, pendant environ dix-neuf ans. L'absence d'un régime légal prescrivant le partage égal

law spouses was no bar to the availability of an equitable remedy. The extent of interest was to be proportionate to the claimant's contribution, direct or indirect. Where the contributions were unequal, the shares would be unequal.

While the question of conflict of laws was not pleaded, addressed by the Court or counsel or alluded to in argument, it lurked in the background of the case. As the parties were domiciled in Quebec from 1955 until at least August 1971, it was arguable that the laws of Quebec, not Ontario, should govern the rights of the parties. While the Court takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada, even in cases where such statutes or laws may not have been proved in evidence in courts below, the Court does not take judicial notice of the law of another province unless that law has been pleaded in the first instance.

Per Martland and Beetz JJ.: The case was not concerned with the rights of a wife and so was not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment would have very wide implications and would involve judicial legislation that would extend substantially the existing law.

The scope of the doctrine of unjust enrichment in English law was somewhat nebulous. It was recognized in claims for the return of money — usually in areas where a fiduciary relationship existed — or in situations where a person, having knowledge of an existing trust acquired the legal title to the trust property.

The adoption of the concept of constructive trust involved an undesirable extension of the law, as so far determined in this Court, for it would clothe judges with a very wide power to apply "palm tree justice" without the benefit of any guidelines. The only test of what constituted unjust enrichment would be the judge's individual perception of what he considered to be unjust.

The determination of this appeal in respondent's favour could be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

Per Ritchie J.: The advances made by the plaintiff throughout the period of the relationship between the parties supported the existence of a resulting trust which

de l'actif acquis par les conjoints de fait ne s'oppose pas à l'utilisation d'un recours en *equity*. La part de propriété doit être proportionnelle à la contribution, directe ou indirecte, du requérant. Là où les contributions sont inégales, les parts seront inégales.

Bien que la question de droit international privé n'ait pas été plaidée, n'ait pas retenu l'attention des tribunaux ni des avocats et n'ait pas été mentionnée pendant les débats, elle se profile à l'arrière-plan de cette affaire. Comme les parties étaient domiciliées au Québec de 1955 au moins jusqu'au mois d'août 1971, on pourrait prétendre que les lois du Québec et non celles de l'Ontario devraient régir les droits des parties. Bien que la Cour prenne connaissance d'office des lois des autres provinces et territoires du Canada, même lorsqu'on n'en a pas fait la preuve devant les tribunaux d'instance inférieure, elle ne prend toutefois pas connaissance d'office de la loi d'une autre province si on ne l'a pas plaidée en première instance.

Les juges Martland et Beetz: Cette affaire ne porte pas sur les droits d'une épouse et elle ne vise donc pas les biens matrimoniaux. Toute reconnaissance par cette Cour du droit d'un tribunal d'imposer à une partie les obligations d'un fiduciaire relativement à ses biens pour le bénéfice d'une autre personne, en raison de l'enrichissement sans cause, a de vastes répercussions et met en jeu le droit prétorien puisqu'elle donne une portée beaucoup plus grande au droit existant.

La portée de la doctrine de l'enrichissement sans cause en droit anglais est quelque peu imprécise. Elle a été reconnue dans des réclamations en remboursement d'argent—généralement dans des situations de relations fiduciaires—ou dans des situations où une personne informée de l'existence d'une fiducie acquiert le titre de propriété du bien en fiducie.

L'adoption du concept de fiducie par interprétation comporte un élargissement non souhaitable du droit que cette Cour a déjà défini parce qu'il conférerait aux juges un très vaste pouvoir d'appliquer «la justice distributive» sans le bénéfice de quoi que ce soit pour les orienter. Le seul critère de ce qui constitue l'enrichissement sans cause serait la perception ce que le juge considère personnellement comme injuste.

Ce pourvoi peut être tranché en faveur de l'intimée selon la jurisprudence existante et sans recourir aux concepts de l'enrichissement sans cause et de la fiducie par interprétation.

Le juge Ritchie: Les contributions de la demanderesse au cours de sa vie commune avec le défendeur appuient l'existence d'une fiducie par déduction régie par les

was governed by the legal principles in *Murdoch v. Murdoch* and *Rathwell v. Rathwell.*

Contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household gave rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. When there was a conjugal relationship between the parties the presumption of a resulting trust arose for the benefit of the donor whenever there was evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persisted until the relationship was dissolved unless it was rebutted by "evidence showing some other intention".

The trial judge's opinion was that whatever respondent's motives may have been, her intention in making the contributions was to benefit the appellant and that those contributions were acquiesced in and freely accepted by him to be applied for and towards the maintenance and operation of a joint household. There was, accordingly, support for the existence of a common intention giving rise to a presumption of a resulting trust and certain pejorative remarks made by the trial judge could not be considered as evidence rebutting the presumption to which the contributions made by the respondent gave rise. Several facts recognized by the Court of Appeal — that the parties had lived together as husband and wife, although unmarried, for twenty years, during which time the respondent made possible the appellant's acquisition of the first property by exclusively supporting the household and by working with the appellant to build up the beekeeping business — constituted evidence that the properties and the beekeeping operation were subject to a resulting trust in favour of the respondent.

Rathwell v. Rathwell, [1978] 2 S.C.R. 436; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Pettitt v. Pettitt*, [1970] A.C. 777; *Gissing v. Gissing*, [1971] A.C. 886; *Fribance v. Fribance*, [1957] 1 All E.R. 357; *Moses v. Macferlan* (1760), 2 Burr. 1005; *The Ruabon Steamship Company, Limited v. The London Assurance*, [1900] A.C. 6; *Cooper v. Cooper* (1888), 13 A.C. 88; *Canadian National Steamship Co. Ltd. v. Watson*, [1939] S.C.R. 11; *Reading v. Attorney-General*, [1951] A.C. 507; *Cooke v. Head*, [1972] 2 All E.R. 38, referred to.

principes de droit énoncés dans les arrêts *Murdoch c. Murdoch* et *Rathwell c. Rathwell.*

Les contributions d'un conjoint, librement acceptées par l'autre pour servir à l'achat et à l'entretien d'un foyer commun, font naître une présomption réfutable qu'au moment des contributions et de leur acceptation, les deux parties avaient l'intention de créer, en faveur du donateur, une fiducie par déduction, équivalente à la valeur des contributions. Lorsque les parties sont mariées, il y a une présomption de fiducie par déduction en faveur du donateur si l'on démontre qu'un conjoint a fait une contribution financière, ou son équivalent, pour permettre à l'autre d'acquérir des biens. Cette présomption subsiste jusqu'à ce qu'il y ait rupture du mariage, à moins qu'elle ne soit réfutée par «une preuve établissant une autre intention».

L'opinion du juge de première instance est que, quels qu'aient pu être les motifs de l'intimée, son intention en faisant les contributions était de donner des avantages à l'appelant qui les a acceptées librement et a utilisées pour l'entretien et la vie courante de leur foyer commun. On trouve, par conséquent, un appui à l'existence d'une intention commune qui donne naissance à une présomption de fiducie par déduction et certaines remarques péjoratives faites par le juge de première instance ne peuvent être considérées comme une preuve réfutant la présomption à laquelle donnent naissance les contributions de l'intimée. Plusieurs faits reconnus par la Cour d'appel, savoir que les parties ont vécu ensemble comme mari et femme, sans être mariées, pendant vingt ans, période durant laquelle l'intimée a rendu possible l'acquisition de la première propriété par l'appelant en subvenant exclusivement aux besoins du foyer et en travaillant aux côtés de l'appelant afin de mettre sur pied l'exploitation apicole—constituent la preuve que les propriétés et l'exploitation apicole sont assujetties à une fiducie par déduction en faveur de l'intimée.

Jurisprudence: *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423; *Pettitt v. Pettitt*, [1970] A.C. 777; *Gissing v. Gissing*, [1971] A.C. 886; *Fribance v, Fribance*, [1957] 1 All E.R. 357; *Moses v. Macferlan* (1760), 2 Burr. 1005; *The Ruabon Steamship Company, Limited v. The London Assurance*, [1900] A.C. 6; *Cooper v. Cooper* (1888), 13 A.C. 88; *Canadian National Steamship Co. Ltd. c. Watson*, [1939] R.C.S. 11; *Reading v. Attorney General*, [1951] A.C. 507; *Cooke v. Head*, [1972] 2 All E.R. 38.

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Chartrand J. Appeal dismissed.

Barry B. Swadron, Q.C., and *Susan G. Himel*, for the defendant, appellant.

Sidney N. Lederman and *G.E. Langlois*, for the plaintiff, respondent.

The judgment of Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.—The appellant, Lothar Pettkus, through toil and thrift, developed over the years a successful beekeeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property, located in the Province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent, Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974, Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the beekeeping business.

I

The Facts

Mr. Pettkus and Miss Becker came to Canada from central Europe, separately, as immigrants, in 1954. He had $17 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was thirty years old and he was twenty-five. He was earning $75 per week; she was earning $25 to $28 per week, later increased to $67 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not

[1] (1978), 87 D.L.R. (3d) 101, (1978), 20 O.R. (2d) 105.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1], qui a modifié le jugement du juge Chartrand. Pourvoi rejeté.

Barry B. Swadron, c.r., et *Susan G. Himel*, pour le défendeur, appelant.

Sidney N. Lederman et *G. E. Langlois*, pour la demanderesse, intimée.

Version française du jugement du juge en chef Laskin et des juges Dickson, Estey, McIntyre, Chouinard et Lamer rendu par

LE JUGE DICKSON—Par son labeur et son épargne, l'appelant, Lothar Pettkus a mis sur pied au cours des années une exploitation apicole prospère. Il possède maintenant deux propriétés rurales en Ontario, où il exploite son entreprise, et détient le produit de la vente, en 1974, d'une troisième propriété située dans la province de Québec. Toutefois, ce succès n'est pas uniquement attribuable à ses seuls efforts. Par son labeur et ses gains, l'intimée, Rosa Becker, a considérablement contribué à la réussite de l'entreprise commune. Elle a vécu avec M. Pettkus de 1955 à 1974, sauf pendant une séparation en 1972. Ils ne se sont jamais mariés. Lors de leur séparation fin 1974, M^lle^ Becker a intenté cette action par laquelle elle cherche à se faire déclarer propriétaire de la moitié des terres et à obtenir une part dans l'exploitation apicole.

I

Les faits

M. Pettkus et M^lle^ Becker ont émigré, séparément, d'Europe centrale au Canada, en 1954. Il avait $17 en poche à son arrivée. Ils se sont rencontrés à Montréal en 1955. Peu après, M. Pettkus s'est installé chez M^lle^ Becker, à l'invitation de cette dernière. Elle était âgée de trente ans et lui de vingt-cinq ans. Il gagnait $75 par semaine, elle gagnait $25 à $28 par semaine et plus tard, $67 par semaine.

Peu après le début de leur cohabitation, M^lle^ Becker a exprimé le désir qu'ils se marient. M. Pettkus a répondu qu'il envisagerait peut-être le mariage lorsqu'ils se connaîtraient mieux. La question du mariage ne s'est plus posée par la suite

[1] (1978), 87 D.L.R. (3d) 101, (1978), 20 O.R. (2d) 105.

raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either monies or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious lifestyle, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

The two travelled to Western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a beekeeping business. They spent some time working at a beekeeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961, Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961, she fell sick and required hospitalization.

In April 1961, they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per

bien que, dans les années qui ont suivi, M. Pettkus ait commencé à présenter M^lle^ Becker comme son épouse et qu'il ait demandé une exemption à son égard aux fins de l'impôt sur le revenu.

De 1955 à 1960, ils étaient des salariés. M. Pettkus arrondissait son revenu en réparant ou en remettant en état des véhicules automobiles. Pendant cette période, M^lle^ Becker payait le loyer. Elle achetait la nourriture et les vêtements et s'occupait d'autres dépenses courantes. Cela permettait à M. Pettkus d'épargner tout son revenu qu'il déposait régulièrement dans un compte de banque à son nom. Ils n'ont jamais convenu de partager l'argent ou les biens placés à son nom. Les parties vivaient sobrement. En raison de leur bonne gestion et de leur mode de vie parcimonieux, un montant de $12,000 avait été économisé en 1960 et déposé dans le compte de banque de M. Pettkus.

Ils se sont tous les deux rendus dans l'Ouest canadien en juin 1960 en partageant les dépenses. Une des raisons du voyage était de trouver une ferme où ils pourraient installer une exploitation apicole. Ils ont travaillé pendant quelque temps dans une exploitation apicole.

Toutefois, ils sont revenus à Montréal au début de l'automne 1960. M^lle^ Becker a continué à payer le loyer à même son revenu jusqu'en octobre 1960. De ce moment jusqu'en mai 1961, M. Pettkus a payé le loyer et les dépenses du ménage puisque M^lle^ Becker n'avait pas de travail. En avril 1961, elle est tombée malade et a été hospitalisée.

En avril 1961, ils ont décidé d'acheter une ferme à Franklin Centre (Québec) pour $5,000. Le prix d'achat a été payé à même le compte de M. Pettkus. Le titre de propriété a été enregistré à son nom. Le plancher et le toit de la ferme avaient besoin de réparations. M^lle^ Becker a utilisé son argent pour acheter les matériaux pour le plancher et a aidé à refaire le plancher et à installer une salle de bain.

Pendant environ six mois au cours de l'année 1961, M^lle^ Becker a reçu des prestations d'assurance-chômage qu'elle a utilisées pour payer les dépenses du ménage. Pendant deux hivers successifs, elle a vécu à Montréal et a gagné environ

month as a babysitter. These earnings also went toward household expenses.

After purchasing the farm at Franklin Centre the parties established a beekeeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August, and the bees for winter storage in autumn. Receipts from sales of honey were handled by Mr. Pettkus; payments for purchases of bee hives and equipment were made from his bank account.

The physical participation by Miss Becker in the bee operation continued over a period of about fourteen years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some from door to door.

In August 1971, with a view to expanding the business a vacant property was purchased in East Hawkesbury, Ontario, at a price of $1,300. The purchase monies were derived from the Franklin Centre honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was $5,500. The purchase monies came from the Franklin Centre operation, together with a $1,900 contribution made by Miss Becker, to which I will again later refer. Nineteen seventy-three was a prosperous year, yielding some 65,000 pounds of honey, producing net revenue in excess of $30,000.

In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure, Mr. Pettkus threw $3,000 on the floor.

$100 par mois comme gardienne d'enfants. Ce revenu a également été utilisé pour les dépenses du ménage.

Après l'achat de la ferme à Franklin Centre, les parties ont établi une exploitation apicole. Tous deux y travaillaient: ils faisaient des cadres pour les ruches, transportaient les abeilles vers les vergers de fermes avoisinantes au printemps, vérifiaient les ruches pendant l'été, rapportaient les cadres pour l'extraction du miel pendant les mois de juillet et août, et les abeilles pour l'hivernage à l'automne. M. Pettkus s'occupait des recettes des ventes de miel; les fonds pour l'achat de ruches et d'équipement provenaient de son compte de banque.

M^lle^ Becker a participé matériellement à l'exploitation apicole pendant environ quatorze ans. Elle dirigeait l'opération d'extraction. Pendant un certain temps, elle a également élevé des poulets, faisans et oies. En 1968 et plus tard, les parties ont embauché des employés pour les aider à déplacer les abeilles et à récolter le miel. Presque tout le miel était vendu à des grossistes, bien que M^lle^ Becker en ait vendu de porte en porte.

En août 1971, dans le but d'agrandir l'entreprise, une propriété vacante a été achetée à East Hawkesbury (Ontario) au prix de $1,300. Les fonds qui ont servi à l'achat provenaient de l'exploitation apicole de Franklin Centre et du compte de banque de M. Pettkus. Le titre de la propriété nouvellement acquise a été enregistré à son nom.

En 1973 une autre propriété a été achetée à West Hawkesbury (Ontario) au nom de M. Pettkus. Le prix d'achat était de $5,500. Les fonds qui ont servi à l'achat provenaient de l'exploitation apicole de Franklin Centre et d'une contribution de $1,900 de M^lle^ Becker, dont je reparlerai plus tard. L'année 1973 a été prospère; une production de 65,000 livres de miel a rapporté un revenu net supérieur à $30,000.

Au début des années 1970, les rapports entre les parties ont commencé à se détériorer. En 1972, M^lle^ Becker a quitté M. Pettkus en raison, semble-t-il, de mauvais traitements. Elle a été partie trois mois. A son départ, M. Pettkus a jeté $3,000 sur le

He told her to take the money, a 1966 Volkswagon, forty beehives containing bees, and "get lost". The beehives represented less than ten percent of the total number of hives then in the business.

Soon thereafter, Mr. Pettkus asked Miss Becker to return. In January, 1973, she agreed, on condition he see a marriage counselor, make a will in her favor and provide her with $500 per year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned; she brought back the car and $1,900 remaining out of the $3,000 she had earlier received. The $1,900 was deposited in Mr. Pettkus' account. She also brought the forty bee hives but the bees had died in the interim.

In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

The relationship continued to deteriorate and on October 4, 1974 Miss Becker againt left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately $2,600 in cash, from honey sales. Shortly thereafter the present action was launched.

At trial, Miss Becker was awarded forty beehives, without bees, together with $1,500, representing earnings from those hives for 1973 and 1974.

The Ontario Court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the beekeeping business.

II

Resulting Trust

This appeal affords the Court an opportunity to clarify the equivocal state in which the law of

plancher. Il lui a dit de prendre l'argent, une Volkswagen de 1966, quarante ruches avec les abeilles et de [TRADUCTION] «disparaître». Les ruches représentaient moins de dix pour cent du nombre total des ruches de l'exploitation.

Peu après, M. Pettkus a demandé à M^lle^ Becker de revenir. En janvier 1973, elle a accepté à la condition qu'il rencontre un conseiller matrimonial, qu'il fasse un testament en sa faveur et qu'il lui verse $500 par année aussi longtemps qu'elle vivrait avec lui. Il a également été convenu que M. Pettkus ouvrirait un compte de banque conjoint pour les dépenses du ménage et que les recettes des ventes au détail du miel y seraient déposées. M^lle^ Becker est revenue; elle a rapporté la voiture et $1,900 qui lui restaient des $3,000 qu'elle avait reçus plus tôt. Le montant de $1,900 a été déposé dans le compte de M. Pettkus. Elle a également rapporté les quarante ruches, mais les abeilles étaient mortes entre temps.

En février 1974, les parties ont emménagé dans une maison sise sur leur propriété de West Hawkesbury, construite en partie par eux-mêmes et en partie par des entrepreneurs, L'argent nécessaire à la construction provenait de leur commerce de miel, et M^lle^ Becker a acheté quelques matériaux.

Leurs rapports ont continué à se détériorer et, le 4 octobre 1974, M^lle^ Becker est partie de nouveau, de façon permanente cette fois, après un incident au cours duquel elle prétend avoir été battue et maltraitée. Elle est partie avec l'automobile et environ $2,600 comptant provenant des ventes de miel. Peu après, la présente action a été introduite.

En première instance, on a accordé à M^lle^ Becker quarante ruches sans abeilles et un montant de $1,500 qui représentait le produit de ces ruches pour les années 1973 et 1974.

La Cour d'appel de l'Ontario a modifié le jugement de première instance et accordé à M^lle^ Becker un droit de propriété de moitié sur les terres appartenant à M. Pettkus et sur l'exploitation apicole.

II

La fiducie par déduction

Ce pourvoi permet à la Cour de dissiper une ambiguïté dans laquelle se trouve le droit des biens

matrimonial property was left, following *Rathwell v. Rathwell*[2].

Broadly speaking, it may be said that the principles which have guided development of recent Canadian case law are to be found in two decisions of the House of Lords: *Pettitt v. Pettitt*[3] and *Gissing v. Gissing*[4]. In neither judgment does a majority opinion emerge. Though it is not necessary to embark upon a detailed analysis of the two cases, the legacy of *Pettitt* and *Gissing* should be noted. First, the decisions upheld the judicial quest for that fugitive common intention which must be proved in order to establish beneficial entitlement to matrimonial property. Second, the Law Lords did not feel free to ascribe or impute an intention to the parties, not supported by evidence, in order to achieve "equity" in the division of assets of partners to a marriage. Third, in *Gissing* four of the Law Lords spoke of "implied, constructive or resulting trust" without distinction.

A majority of the Court in *Murdoch v. Murdoch*[5] adopted the "common intention" concept of Lord Diplock in *Gissing*:

> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. [p. 438]

In *Murdock*, it was held that there was no evidence of common intention. In *Rathwell, supra* common intention was held to exist. Although the notion of common intention was endorsed in *Murdoch* and in *Rathwell*, many difficulties, chronicled in the cases and in the legal literature on the

[2] [1978] 2 S.C.R. 436.
[3] [1970] A.C. 777.
[4] [1971] A.C. 886.
[5] [1975] 1 S.C.R. 423.

matrimoniaux depuis l'arrêt *Rathwell c. Rathwell*[2].

De façon générale, on peut dire que les principes qui ont guidé l'évolution de la jurisprudence canadienne récente se trouvent dans deux arrêts de la Chambre des lords: *Pettitt v. Pettitt*[3] et *Gissing v. Gissing*[4]. Une opinion majoritaire n'en émerge pas nettement. Bien qu'il ne soit pas nécessaire d'entreprendre une analyse détaillée de ces deux arrêts, il est bon de rappeler l'héritage qu'ont laissé les arrêts *Pettitt* et *Gissing*. Tout d'abord, ils ont appuyé la recherche judiciaire de cette intention commune fugitive qui doit être prouvée afin d'établir le droit de propriété véritable sur les biens matrimoniaux. Deuxièmement, les lords juges ne se sentaient pas libres d'attribuer ou d'imputer aux parties une intention non étayée par la preuve, afin de respecter l'«équité» dans le partage de l'actif des partenaires dans un mariage. Troisièmement, dans l'arrêt *Gissing*, quatre des lords juges ont parlé de [TRADUCTION] «fiducie implicite, par interprétation ou par déduction» sans faire de distinction.

Dans l'arrêt *Murdoch c. Murdoch*[5], la Cour, à la majorité, a adopté le concept de l'«intention commune» énoncé par lord Diplock dans *Gissing*:

> [TRADUCTION] Si difficiles qu'ils soient à résoudre, cependant, ces problèmes relatifs au montant de la part d'un conjoint dans la propriété véritable d'un foyer conjugal lorsque seul l'autre conjoint est investi de la propriété légale, ne se présentent que dans des cas où la cour est convaincue par les paroles ou la conduite des parties que leur intention commune était que la propriété véritable n'appartiendrait pas seulement au conjoint investi de la propriété légale mais serait partagée entre eux selon telle ou telle proportion. [à la p. 438]

Dans l'arrêt *Murdoch*, on a jugé qu'aucune preuve n'établissait l'intention commune. Dans l'arrêt *Rathwell*, précité, on a conclu à l'existence de l'intention commune. Bien que l'on ait acquiescé à la notion d'intention commune dans les arrêts *Murdoch* et *Rathwell*, de multiples difficul-

[2] [1978] 2 R.C.S. 436.
[3] [1970] A.C. 777.
[4] [1971] A.C. 886.
[5] [1975] 1 R.C.S. 423.

subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean 'phantom intent' from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property. Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, *Fribance v. Fribance*[6].

The artificiality of the common intention approach has been stressed. Professor Donovan Waters in a comment in (1975), 53 Can. Bar Rev. 366 stated:

> In other words, this "discovery" of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach. [at p. 368]

Professor Waters also observed, in a discussion of the resulting trust and constructive trust doctrines:

> After all, in few cases will the inferring of an agreement be impossible or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts. [at p. 377]

In *Murdoch v. Murdoch*, Laskin J., as he was then, introduced in a matrimonial property dispute the concept of constructive trust to prevent unjust enrichment. It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including

[6] [1957] 1 All E.R. 357.

tés, mentionnées dans la jurisprudence et les commentaires sur le sujet, sont inhérentes à l'application de la doctrine dans les litiges relatifs aux biens matrimoniaux. L'«intention commune» recherchée n'est pour ainsi dire jamais expresse; les cours doivent glaner l'«intention fantôme» dans la conduite des parties. La conduite la plus pertinente est celle qui a trait aux ententes financières pour l'achat de biens. A défaut de preuve de contribution directe d'un conjoint, il peut y avoir preuve d'avantages indirects: par exemple lorsqu'un partenaire assume les dépenses quotidiennes alors que l'autre rembourse le prêt hypothécaire pendant un certain nombre d'années, *Fribance v. Fribance*[6].

On a fait ressortir le caractère artificiel de la recherche de l'intention commune. Le professeur Donovan Waters a dit dans un commentaire (1975), 53 Rev. B. Can. 366:

> [TRADUCTION] En d'autres mots, cette «découverte» d'une intention commune implicite antérieure à l'achat est, dans bien des cas; un simple moyen ou formule pour donner à l'épouse une juste part dans l'actif en litige. C'est en fait une fiducie par interprétation qui se déguise en une fiducie par déduction. [à la p. 368]

Le professeur Waters fait également remarquer dans une analyse des doctrines de la fiducie par déduction et de la fiducie par interprétation:

> [TRADUCTION] Après tout, rares sont les cas où il sera impossible ou déraisonnable de conclure à l'existence d'une entente et, le cas échéant, la justice et l'équité peuvent bien conduire à la même conclusion que celle à laquelle on arrive par le droit des fiducies par déduction. Mais trop souvent, la théorie de la fiducie par déduction entraîne un résultat incompatible avec ce qui semblerait l'issue la plus souhaitable, ou alors il y a une mésentente entre les cours d'appel, et ce qui pourrait bien être une divergence d'opinions judiciaires sur les faits devient une divergence d'opinions sur les subtilités du droit des fiducies. [à la p. 377]

Dans *Murdoch c. Murdoch,* le juge Laskin, maintenant Juge en chef, a introduit dans un litige sur les biens matrimoniaux le concept de la fiducie par interprétation pour empêcher l'enrichissement sans cause. Il est imposé indépendamment de l'intention de créer une fiducie, et son but est de remédier à un résultat autrement injuste. C'est un outil général, souple et juste qui permet aux tribu-

[6] [1957] 1 All E.R. 357.

the respective contributions of the parties, and to determine beneficial entitlement. It was described this way in *Rathwell*, at p. 455:

The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.

Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Professor Waters points out, (at p. 374): "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an interest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

Turning then to the present case and common intention, the evidence is clear that Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. She conceded there was no specific arrangement with respect to the use of her money. She said "No, we just saved together. It was meant to be together, it was ours". The arrangement "was without saying anything ... there was nothing talked over ...". She testified she was not interested in the amount Mr. Pettkus had in the bank. In response to the question "but he never told that what he was saving was yours?" she replied: "I never asked".

naux d'apprécier toutes les circonstances de l'espèce, y compris les contributions respectives des parties, et de déterminer le droit de propriété véritable. Il est décrit comme suit dans *Rathwell*, à la p. 455:

La fiducie par l'interprétation, ainsi envisagée, comporte l'imposition par le tribunal du mécanisme fiduciaire pour atteindre un résultat conforme à ce que dicte la conscience. En principe, le tribunal ne permettra pas à quelqu'un de s'approprier injustement des biens acquis par le travail d'un autre. Le lien du mariage entre les parties ne met pas en échec ce principe; mais pour qu'il l'emporte, les faits doivent démontrer un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique—tel un contrat ou une disposition légale—à l'enrichissement.

Bien que la fiducie par déduction permette souvent à l'épouse d'obtenir le redressement qu'elle sollicite, elle ne s'applique pas, comme le fait remarquer le professeur Waters, (à la p. 374): [TRADUCTION] «lorsqu'il est impossible ou déraisonnable de supposer une intention». On ne peut pas présumer que l'intention est que l'épouse ait un droit si sa conduite avant l'achat des biens ou après est [TRADUCTION] «tout à fait ambiguë», ou si sa participation à la prétendue entente est [TRADUCTION] «globalement minime». Lorsque la preuve est incompatible avec la fiducie par déduction, la cour peut choisir de refuser le redressement ou d'accepter la fiducie par interprétation.

Si l'on examine la présente affaire et l'intention commune, il ressort clairement de la preuve qu'il n'y avait aucune entente expresse entre M. Pettkus et M^lle^ Becker de partager les profits. Elle a admis qu'il n'y avait aucune entente précise relativement à l'utilisation de son argent. Elle a dit [TRADUCTION] «Non, nous avons seulement épargné ensemble. Nous voulions le faire ensemble, c'était à nous». L'entente [TRADUCTION] «n'a pas été formulée en paroles ... rien n'a été discuté ...». Elle a témoigné qu'elle n'était pas intéressée au montant d'argent que M. Pettkus avait en banque. En réponse à la question [TRADUCTION] «mais il ne vous a jamais dit que ce qu'il épargnait vous appartenait?» Elle a répondu: [TRADUCTION] «Je ne lui ai jamais demandé».

It is apparent Mr. Pettkus took a negative view of Miss Becker's entitlement. His testimony makes it clear that he never regarded her as his wife. The finances of each were completely separate, except for the joint account opened for the retail sales of honey. Mr. Pettkus was asked in cross-examination: "you both saved together?", and replied: "I saved, she didn't". Uncommitted to marriage or to a permanent relationship it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. Miss Becker said they were to "save together" but the truth is that Mr. Pettkus saved at the expense of Miss Becker.

Il est évident que M. Pettkus a pris le contrepied de la revendication de M^lle^ Becker. Il ressort clairement de son témoignage qu'il ne l'a jamais considérée comme son épouse. Leurs finances étaient complètement séparées, sauf pour le compte conjoint destiné au produit de la vente du miel au détail. En contre-interrogatoire, on a posé la question suivante à M. Pettkus: [TRADUCTION] «vous épargniez ensemble?», et il a répondu: [TRADUCTION] «J'ai épargné, mais pas elle». Comme M. Pettkus ne s'est pas marié ni engagé dans une relation permanente, il serait difficile de lui prêter une intention, expresse ou implicite, de partager ses économies. M^lle^ Becker a dit qu'ils devaient [TRADUCTION] «épargner ensemble», mais en vérité M. Pettkus a épargné aux dépens de M^lle^ Becker.

With respect to the period from 1955 until the spring of 1961, the trial judge found:

> Now the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.
>
> Moreover, the evidence does not clearly show that from 1955 to May, 1961, the Plaintiff contributed more than the Defendant to the overall expenses of the household, so that I find that the $12,000 accumulated by the Defendant was due to his superior salary, his frugal living and his off job gains from repairs. It is to be noted that the Plaintiff made also some savings. [Emphasis added.]

Relativement à la période allant de 1955 au printemps 1961, le juge de première instance a conclu:

> [TRADUCTION] Maintenant la demanderesse réclame une part de la ferme parce qu'au début de leur relation, ils avaient convenu implicitement de mener une entreprise commune: la demanderesse devait payer les dépenses courantes et le défendeur épargner. Je suis certain que la demanderesse, qui tenait à se marier, n'aurait pas formulé expressément une telle proposition à l'époque, de crainte d'éloigner un mari éventuel. Je considère que sa contribution aux dépenses du ménage pendant les premières années de leur relation était de la nature d'un capital à risques investi dans l'espoir d'amener le défendeur, un homme plus jeune qu'elle au mariage.
>
> De plus, la preuve n'indique pas clairement que de 1955 à mai 1961, la demanderesse ait contribué plus que le défendeur aux dépenses générales du ménage, de sorte que je considère que c'est en raison de son salaire plus élevé, de son mode de vie modeste, et de l'argent qu'il gagnait en effectuant des réparations après l'ouvrage, que le défendeur a accumulé $12,000. Il faut souligner que la demanderesse a également fait quelques économies. [C'est moi qui souligne.]

Whatever the passage may lack in point of gallantry, the words underlined represent findings of fact by the trial judge, negating common intention.

Bien que cet extrait manque de galanterie, les mots soulignés représentent des conclusions de fait du juge de première instance qui nient l'intention commune.

As to the contribution by Miss Becker to the beekeeping business, the trial judge found:

Quant à la contribution de M^lle^ Becker à l'exploitation apicole, le juge de première instance a conclu:

As the honey business is a seasonal one, the Defendant continued his side line, repairs of German cars but both businesses were not enough sometimes to keep the household solvent so that the Plaintiff had to work outside a few times. I also find that during that period the Plaintiff helped the Defendant to a certain degree in the operation of the honey business, especially during the extracting period but such help was seasonal and marginal as the Defendant employed outside help in the peak periods.

The trial judge dealt with Miss Becker's claim to a part interest in the Ontario properties, for the 1971 to 1974 period, in the following manner:

The Plaintiff alleges that those sums came from the Franklin Centre honey operation and claims a part interest in those Ontario properties on account of her active participation in the honey business. Once again, it would never have occurred to the Plaintiff to make such a claim explicitly at the time because such a trust wasn't in the contemplation of either party, even implicitly. [Emphasis added.]

Again there is a rejection of the notion of implied intention and resulting trust. At trial, Mr. Pettkus testified:

Q. All right. Now did you ever have any discussions with her as to whether or not she had an interest in either your garage business or your bee business?

A. It was all mine. She had no interest in the business, no.

Q. Did she ever suggest that she did?

A. No.

With regard to the arrangement under which Miss Becker was to receive $500 per year, Mr. Pettkus testified:

A. Well, I knew the whole business is in my name and she has nothing so I figured it's only fair to give her a little bit of money and I figured the five hundred dollars, pay for all the expenses and she would have five hundred dollars every year as long as she stayed with me and if there's a good crop if there's no crop well of course I can't pay.

[TRADUCTION] Puisque l'exploitation apicole est saisonnière, le défendeur a continué son occupation secondaire, la réparation de voitures allemandes, mais les deux entreprises ne suffisaient pas toujours à couvrir les dépenses du ménage de sorte que la demanderesse a dû travailler à l'extérieur à quelques reprises. Je conclus également que pendant cette période la demanderesse a aidé le défendeur jusqu'à un certain point dans l'exploitation de l'entreprise apicole, en particulier au moment de la récolte, mais cette aide était saisonnière et marginale puisque le défendeur embauchait des employés pour l'aider pendant les périodes de pointe.

Le juge de première instance a traité comme suit de la réclamation de M^lle^ Becker à un droit sur une partie des propriétés situées en Ontario, pour les années 1971 à 1974:

[TRADUCTION] La demanderesse prétend que ces montants d'argent provenaient de l'exploitation apicole de Franklin Centre et réclame un droit sur une partie de ces propriétés situées en Ontario compte tenu de sa participation active à l'exploitation apicole. Encore une fois, la demanderesse n'aurait pas songé à formuler explicitement une telle réclamation à l'époque parce qu'aucune des parties n'avait envisagé une telle fiducie, même implicitement. [C'est moi qui souligne.]

De nouveau, la notion d'intention implicite et de fiducie par déduction est rejetée. En première instance M. Pettkus a témoigné comme suit:

[TRADUCTION] Q. Très bien. Maintenant avez-vous déjà examiné avec elle la question de savoir si elle avait un droit soit sur votre entreprise de garage soit sur votre exploitation apicole?

R. Tout m'appartenait. Elle n'avait aucun droit sur l'entreprise, aucun.

Q. A-t-elle déjà prétendu avoir un droit?

R. Non.

Voici le témoignage de M. Pettkus relativement à l'entente aux termes de laquelle M^lle^ Becker devait recevoir $500 par année:

[TRADUCTION] R. Bien, je savais que toute l'entreprise était à mon nom et qu'elle n'avait rien, aussi j'ai pensé qu'il serait juste de lui donner un petit peu d'argent; je me suis dit qu'un montant de cinq cents dollars suffirait à couvrir toutes les dépenses; elle devait recevoir $500 par année aussi longtemps qu'elle demeurerait avec moi si la récolte était bonne, si la récolte était mauvaise bien sûr je n'aurais pas pu payer.

In the view of the Ontario Court of Appeal, speaking through Madam Justice Wilson, the trial judge vastly underrated the contribution made by Miss Becker over the years. She had made possible the acquisition of the Franklin Centre property and she had worked side by side with him for fourteen years building up the beekeeping operation.

The trial judge held there was no common intention, either express or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding.

I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding. Accordingly, I am of the view that Miss Becker's claim grounded upon resulting trust must fail. If she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim.

III

Constructive Trust

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan*[7] put the matter in these words: " . . . the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, "Constructive Trusts", (1955), 71 L.Q.R. 39; Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", (1978), 16 Alberta Law Review 357). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so

[7] (1760), 2 Burr. 1005.

Au nom de la Cour d'appel de l'Ontario, Madame le juge Wilson a formulé l'avis que le juge de première instance a grandement sous-estimé la contribution de M^lle^ Becker au cours des années. Cette dernière a rendu possible l'achat de la propriété à Franklin Centre et a travaillé aux côtés de M. Pettkus pendant quatorze ans pour mettre sur pied l'exploitation apicole.

Le juge de première instance a décidé qu'il n'y avait pas d'intention commune, expresse ou implicite. Il est important de souligner que la Cour d'appel de l'Ontario n'a pas écarté cette conclusion.

Je ne suis pas disposé à inférer ni à présumer une intention commune alors que le juge de première instance est parvenu à une conclusion expresse contraire et que cette conclusion n'a pas été modifiée par la Cour d'appel. Par conséquent, je suis d'avis que la réclamation de M^lle^ Becker fondée sur la fiducie par déduction, doit échouer. Si elle doit avoir gain de cause, la fiducie par interprétation semble être le seul fondement juridique possible de sa réclamation.

III

La fiducie par interprétation

Le principe de l'enrichissement sans cause est au cœur de la fiducie par interprétation. «L'enrichissement sans cause» a joué un rôle dans la doctrine juridique anglo-américaine pendant des siècles. Dans l'arrêt *Moses v. Macferlan*[7] lord Mansfield s'est exprimé comme suit: [TRADUCTION] «. . . le motif principal de cette action est que le défendeur *est obligé en vertu des règles de justice naturelle et d'equity de rembourser l'argent*». Il ne conviendrait pas, et en fait il serait impossible, d'essayer de définir toutes les circonstances qui peuvent donner lieu à un enrichissement sans cause. (Voir A. W. Scott, «Constructive Trust», (1955), 71 L.Q.R. 39; Leonard Pollock, «Matrimonial Property and Trusts: The Situation from Murdock to Rathwell», (1978) 16 Alberta Law Review 357). Le grand avantage des principes anciens d'*equity* est leur souplesse: les tribunaux peuvent donc

[7] (1760), 2 Burr. 1005.

as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. See *Babrociak v. Babrociak*[8]; *Re Spears and Levy et al.*[9]; *Douglas v. Guaranty Trust Company of Canada*[10]; *Armstrong v. Armstrong*[11].

How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of *The Ruabon Steamship Company, Limited v. London Assurance*[12] with these words: " ... I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." (p. 10) Lord Macnaghten, in the same case, put it this way: "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it". (p. 15) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

[8] (1978), 1 R.F.L. (2d) 95 (Ont. C.A.).
[9] (1975), 52 D.L.R. (3d) 146 (N.S.C.A.).
[10] (1978), 8 R.F.L. (2d) 98 (Ont. H.C.).
[11] (1978), 93 D.L.R. (3d) 128 (Ont. H.C.).
[12] [1900] A.C. 6.

modeler ces principes malléables pour répondre aux nécessités et aux mœurs changeantes de la société, afin que justice soit rendue. La fiducie par interprétation s'est révélée utile dans l'arsenal judiciaire. Voir *Babrociak v. Babrociak*[8]; *Re Spears and Levy et al.*[9]; *Douglas v. Guaranty Trust Company of Canada*[10]; *Armstrong v. Armstrong*[11].

Sous quel angle faut-il aborder la question de l'enrichissement sans cause dans les affaires matrimoniales? Dans l'arrêt *Rathwell*, je me suis risqué à avancer qu'il y a trois conditions à respecter pour que l'on puisse dire qu'il y a enrichissement sans cause: un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique à l'enrichissement. Il me semble que cette façon de voir est appuyée par les principes généraux d'*equity* que les cours ont modelés pendant des siècles, bien que, de l'aveu général, cela n'ait pas été fait dans les litiges concernant les biens matrimoniaux.

La *common law* n'a jamais voulu indemniser un demandeur pour la seule raison qu'un tiers a tiré un avantage de ses actions. Lord Halsbury a mis fin à cette hérésie dans l'arrêt *The Ruabon Steamship Co., Ltd. v. London Assurance*[12] en ces termes: [TRADUCTION] « ... je ne peux comprendre comment l'on peut affirmer qu'en *common law*, lorsqu'une personne est avantagée par l'action d'une autre, cette dernière peut lui demander de contribuer aux frais que son action a occasionnés.» (à la p. 10). Dans la même affaire, lord Macnaghten s'exprime comme suit: [TRADUCTION] «Il n'existe aucun principe de droit selon lequel une personne devrait contribuer à une dépense simplement parce que cette dépense lui a procuré un avantage». (à la p. 15) Il ne suffit pas que le tribunal détermine simplement qu'un conjoint a procuré un avantage à l'autre et ordonne ensuite la restitution. Il doit être évident, en plus, que la rétention de l'avantage serait «injuste» dans les circonstances de l'affaire.

[8] (1978), 1 R.F.L. (2d) 95 (C.A. Ont.).
[9] (1975), 52 D.L.R. (3d) 146 (C.A. N.-E.).
[10] (1978), 8 R.F.L. (2d) 98 (H.C. Ont.).
[11] (1978), 93 D.L.R. (3d) 128 (H.C. Ont.).
[12] [1900] A.C. 6.

Miss Becker supported Mr. Pettkus for 5 years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believed she had some interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the nineteen years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.

On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Madam Justice Wilson noted, "the parties lived together as husband and wife, although unmarried for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre during the lean years, but worked side by side with him for fourteen years building up the beekeeping operation which was their main source of livelihood".

Madam Justice Wilson had no difficulty in finding that a constructive trust arose in favour of the respondent by virtue of "joint effort" and "teamwork", as a result of which Mr. Pettkus was able to acquire the Franklin Centre property, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of

M^lle^ Becker a subvenu aux besoins de M. Pettkus pendant 5 ans. Elle a ensuite travaillé à la ferme pendant environ 14 ans. Les faits commandent la conclusion qu'elle croyait avoir un droit sur la ferme et que cette attente était raisonnable dans les circonstances. M. Pettkus semble avoir reconnu un certain droit de propriété à M^lle^ Becker en lui payant une indemnité, si minime fût-elle. Aucune preuve n'indique qu'il l'ait jamais informée que tout le travail qu'elle avait effectué pendant dix-neuf ans l'avait été à titre gratuit. Il a accepté tranquillement les avantages que lui ont procurés son appui financier et son labeur.

Selon ces faits, les deux premières exigences énoncées dans l'arrêt *Rathwell* ont été bien remplies: M. Pettkus a bénéficié pendant dix-neuf ans d'un labeur non rémunéré alors que M^lle^ Becker a reçu peu ou rien en retour. Quant à la troisième condition, je suis d'avis que lorsqu'une personne, liée à une autre dans une relation qui équivaut à une union conjugale, se cause un préjudice dans l'expectative raisonnable de recevoir un droit de propriété et que l'autre personne accepte librement les avantages que lui procure la première, alors qu'elle connaît ou devrait connaître cette expectative raisonnable, il serait injuste de permettre au bénéficiaire de conserver cet avantage.

Je conclus, en accord avec l'arrêt de la Cour d'appel, que la fiducie par interprétation s'applique en l'espèce. Comme Madame le juge Wilson l'a fait remarquer, [TRADUCTION] «Les parties ont vécu ensemble comme mari et femme, sans être mariées, pendant presque vingt ans; au cours de cette période, elle a non seulement rendu possible l'acquisition de leur première propriété à Franklin Centre . . . pendant les années maigres, mais elle a travaillé à ses cotés pendant quatorze ans à mettre sur pied l'exploitation apicole, leur principale source de revenus».

Madame le juge Wilson n'a eu aucune difficulté à conclure qu'une fiducie par interprétation avait été créée en faveur de l'intimée en raison d'un [TRADUCTION] «effort conjoint» et d'un [TRADUCTION] «travail d'équipe», par suite desquels M. Pettkus a pu acquérir la propriété de Franklin Centre, puis les propriétés de East Hawkesbury et

Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same.

IV

The "Common Law" Relationship

One question which must be addressed is whether a constructive trust can be established having regard to what is frequently, and euphemistically, referred to as a "common law" relationship. The purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships. It is worth noting that counsel for Mr. Pettkus, and I think correctly, did not, in this Court, raise the common law relationship in defence of the claim of Miss Becker, otherwise than by reference to *The Family Law Reform Act, 1978,* 1978 (Ont.) c. 2.

Courts in other jurisdictions have not regarded the absence of a marital bond as any problem. See *Cooke v. Head*[13]; *Eves v. Eves*[14]; *Spears v. Levy, supra*; and in the United States, *Marvin v. Marvin*[15] and a comment thereon (1977), 90 Harv. L.R. 1708. In *Marvin* the Supreme Court of California stated that constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried co-habitants intend to deal fairly with each other.

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and

[13] [1972] 2 All E.R. 38.
[14] [1975] 3 All E.R. 768.
[15] (1976), 557 P.2d 106.

de West Hawkesbury. La Cour d'appel de l'Ontario a imposé l'application de la fiducie par interprétation afin que justice soit faite et, avec égards, je suis d'avis de l'appliquer également.

IV

La relation de «fait»

Il faut se demander si nous pouvons établir la fiducie par interprétation dans le contexte de ce que l'on appelle souvent et par euphémisme une relation «de fait». La fiducie par interprétation vise à rectifier des situations qui autrement entraîneraient un enrichissement sans cause. En principe, rien ne s'oppose à l'application de la doctrine aux relations de fait. Il convient de souligner qu'avec raison à mon avis, l'avocat de M. Pettkus n'a pas opposé, devant cette Cour, la relation de fait en défense à la réclamation de M^lle^ Becker, sauf par la référence à *La Loi de 1978 sur la réforme du droit familial*, 1978 (Ont.) chap. 2.

Les tribunaux d'autres pays n'ont pas considéré que l'absence de lien matrimonial créait des problèmes. Voir *Cooke v. Head*[13]; *Eves v. Eves*[14]; *Spears v. Levy*, précité; et, aux États-Unis, *Marvin v. Marvin*[15] et un commentaire de cet arrêt (1977), 90 Harv. L.R. 1708. Dans *Marvin*, la Cour suprême de la Californie a déclaré que l'on pouvait appliquer la fiducie par interprétation pour répondre aux expectatives raisonnables des parties et pour appuyer le concept que des personnes qui cohabitent sans être mariées ont l'intention d'être équitables l'une envers l'autre.

Rien ne justifie que l'on fasse une distinction, lors du partage des biens et de l'actif, entre les personnes mariées et les personnes liées par une relation moins formelle qui dure depuis longtemps. Il ne s'agissait pas d'une association économique, ni d'une simple relation d'affaire ni d'une rencontre fortuite. M. Pettkus et M^lle^ Becker ont vécu comme mari et femme pendant vingt ans. Leur vie et leur bien-être économique étaient entièrement intégrés. Le principe d'*equity* sur lequel repose le

[13] [1972] 2 All E.R. 38.
[14] [1975] 3 All E.R. 768.
[15] (1976) 557 P.2d 106.

general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

In recent years, there has been much statutory reform in the area of family law and matrimonial property. Counsel for Mr. Pettkus correctly points out that *The Family Law Reform Act, 1978*, of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is made that the courts should not develop equitable remedies that are 'contrary to current legislative intent'. The rejoinder is that legislation was unnecessary to cover these facts, for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets. The effect of the legislation is to divide 'family assets' equally, regardless of contribution, as a matter of course. The Court is not here creating a presumption of equal shares. There is a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth she contributed over some nineteen years. The fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances.

V

Settlement or Estoppel

Another question argued is whether acceptance by Miss Becker of $3,000, forty beehives and a car, upon temporary separation, and the imposition of terms on her return, estopped further claim. The trial judge answered this question in the affirmative. With respect, I think that he was wrong in so holding. A person is not estopped by accepting a sum of money, the amount of which is not negotiated, thrown at one's feet. There was no agreement by Miss Becker as to her interest in what I would regard as joint assets, nor can the conditions exacted by Miss Becker upon resumption of

recours à la fiducie par interprétation est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente.

Au cours des dernières années, le droit de la famille et des biens matrimoniaux a fait l'objet de nombreuses réformes législatives. L'avocat de M. Pettkus a correctement fait remarquer que la *Loi de 1978 sur la réforme du droit familial*, de l'Ontario, adoptée après l'introduction du présent litige, n'assujettit pas les conjoints de fait à la présomption de partage égal, qui s'applique maintenant aux personnes mariées. Il prétend que les cours ne doivent pas élaborer de recours en *equity* qui sont [TRADUCTION] «contraires à l'intention législative actuelle». La réplique est qu'il n'était pas nécessaire de légiférer à cet égard, puisqu'il existe toujours un recours en *equity* pour le partage des biens entre des personnes non mariées qui ont contribué à l'acquisition de l'actif. L'effet de cette loi est de partager également, d'office, l'«actif de famille» sans tenir compte de la contribution. La Cour ne crée pas ici une présomption de parts égales. Il y a une grande différence entre ordonner le partage égal pour des conjoints de fait, et accorder à M^lle^ Becker une part équivalente à la contribution qu'elle a apportée, en argent ou en valeur monétaire, pendant environ dix-neuf ans. L'absence d'un régime légal prescrivant le partage égal de l'actif acquis par les conjoints de fait ne s'oppose pas à l'utilisation d'un recours en *equity* dans les présentes circonstances.

V

Le règlement ou la fin de non-recevoir

Une autre question débattue est de savoir si l'acceptation par M^lle^ Becker de $3,000, de quarante ruches et d'une automobile lors de leur séparation temporaire, et l'imposition de conditions à son retour l'empêchent de réclamer davantage. Le juge de première instance a répondu affirmativement à cette question. Avec égards, je crois qu'il s'est trompé. On ne peut opposer une fin de non-recevoir à une personne qui accepte un montant d'argent jeté à ses pieds, et dont le montant n'est pas négocié. M^lle^ Becker n'a souscrit à aucune entente quant à son droit dans ce que je considère

cohabitation be any bar to her claim. The filing by Mrs. Rathwell in *Rathwell, supra*, of a caveat claiming a one-tenth interest was held to be no basis for rejecting her claim to share equally in assets accumulated by her and her husband.

VI

Causal Connection

The matter of "causal connection" was also raised in defence of Miss Becker's claim, but does not present any great difficulty. There is a clear link between the contribution and the disputed assets. The contribution of Miss Becker was such as enabled, or assisted in enabling, Mr. Pettkus to acquire the assets in contention. For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute. Miss Becker indirectly contributed to the acquisition of the Franklin Centre farm by making possible an accelerated rate of saving by Mr. Pettkus. The question is really an issue of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business? The Ontario Court of Appeal answered this question in the affirmative, and I would agree.

VII

Respective Proportions

Although equity is said to favour equality, as stated in *Rathwell* it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indi-

comme un avoir conjoint, et on ne peut dire que les conditions posées par M^lle^ Becker lors de la reprise de la vie commune s'opposent à sa réclamation. On a statué dans l'arrêt *Rathwell*, précité, que le dépôt par M^me^ Rathwell d'une opposition par laquelle elle réclamait un droit d'un dixième ne pouvait justifier le rejet de sa réclamation de partage égal des avoirs accumulés par son mari et elle.

VI

Le lien causal

La question du «lien causal» a également été opposée en défense à la réclamation de M^lle^ Becker, mais ne présente pas de difficultés sérieuses. Il y a un lien évident entre la contribution et les avoirs en cause. La contribution de M^lle^ Becker a été telle qu'elle a permis à M. Pettkus d'acquérir les avoirs en litige ou l'a aidé à les acquérir. Pour que le principe de l'enrichissement sans cause s'applique, il faut, bien sûr, établir un lien entre l'acquisition des biens et l'appauvrissement correspondant. Les faits de l'espèce indiquent que l'on a satisfait à ce critère. La contribution indirecte d'argent et la contribution directe de labeur sont clairement liées à l'acquisition des biens dont la propriété véritable est en litige. M^lle^ Becker a contribué indirectement à l'acquisition de la ferme de Franklin Centre en permettant à M. Pettkus d'épargner plus rapidement les fonds nécessaires. Il s'agit vraiment d'une question de fait: sa contribution était-elle suffisamment importante et directe pour lui donner droit à une partie des profits réalisés sur la vente de la propriété de Franklin Centre et lui donner un droit sur les propriétés de Hawkesbury et sur l'exploitation apicole? La Cour d'appel de l'Ontario a répondu par l'affirmative à cette question et je souscris à cette conclusion.

VII

Les parts respectives

Bien que l'on dise que l'*equity* favorise l'égalité, l'arrêt *Rathwell* dit que toute contribution ne donnera pas droit à l'époux à une moitié des biens. La part de propriété doit être proportionnelle à la contribution, directe ou indirecte, du requérant. Là

rect, of the claimant. Where the contributions are unequal, the shares will be unequal.

It could be argued that Mr. Pettkus contributed somewhat more to the material fortunes of the joint enterprise than Miss Becker but it must be recognized that each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort. Physically, Miss Becker pulled her fair share of the load; weighing only 87 pounds, she assisted in moving hives weighing 80 pounds. Any difference in quality or quantum of contribution was small. The Ontario Court of Appeal in its discretion favoured an even division and I would not alter that disposition, other than to note that in any accounting regard should be had to the $2,600, and the car, which Miss Becker received on separation in 1974.

VIII

I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties were domiciled in the Province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the Province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this Court.

The position in law would seem to me to be as stated by Professor Jean Castel, in *Droit international privé québécois* (Butterworths, 1980, pp. 803-4). Although, before an inferior court, the law of another province in Canada has to be proven in the same manner as the law of a foreign country, that rule does not have application in an appeal to this Court. This Court follows the rule drawn by the House of Lords in the case of *Cooper v. Cooper*[16] and takes judicial notice of the statutory

[16] (1888), 13 A.C. 88(H.L.).

où les contributions sont inégales, les parts seront inégales.

Bien que l'on puisse prétendre que M. Pettkus a contribué un peu plus que M^lle^ Becker à la réussite matérielle de l'entreprise conjointe, il faut reconnaître qu'ils sont tous deux partis de rien; chacun a travaillé continuellement, assidûment et diligemment à l'entreprise conjointe. Physiquement, M^lle^ Becker n'a pas craint de faire sa part; bien qu'elle ne pesât que 87 livres, elle a aidé à déplacer des ruches en pesant 80. S'il y a une différence dans la qualité ou la valeur de la contribution, elle est mince. Dans l'exercice de son pouvoir discrétionnaire la Cour d'appel de l'Ontario a favorisé un partage égal et je ne modifierais pas cette décision, sauf pour faire remarquer que dans le calcul, il faudrait tenir compte du montant de $2,600 et de l'automobile que M^lle^ Becker a reçus lors de la séparation en 1974.

VIII

Je ne peux terminer sans mentionner la question de droit international privé qui se profile à l'arrière-plan de cette affaire. La preuve révèle que les parties étaient domiciliées dans la province de Québec de 1955 au moins jusqu'au mois d'août 1971, au moment de l'achat de la propriété vacante de East Hawkesbury (Ontario). On pourrait prétendre que les lois de la province de Québec et non celles de l'Ontario devraient régir les droits des parties. Ce point n'a pas été plaidé et n'a pas retenu l'attention des tribunaux ni des avocats dans les procédures antérieures. Il n'a pas été mentionné pendant les débats devant cette Cour.

A mon avis, la situation juridique est celle énoncée par le professeur Jean Castel, dans *Droit international privé québécois* (Butterworths, 1980, aux pp. 803 et 804). Bien que devant un tribunal d'instance inférieure, il faille faire la preuve de la loi d'une autre province du Canada comme s'il s'agissait de la loi d'un pays étranger, cette règle ne s'applique pas à un pourvoi devant cette Cour. Cette Cour suit la règle énoncée par la Chambre des lords dans l'arrêt *Cooper v. Cooper*[16] et prend

[16] (1888), 13 A.C. 88 (C.L.).

or other laws prevailing in every province and territory in Canada even in cases where such statutes or laws may not have been proved in evidence in the courts below. This Court however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in *Canadian National Steamship Co. Ltd. v. Watson*[17] at p. 18 it would be unfair for this Court to take, *suo motu*, judicial notice of the statutory laws of another province, ignored in the pleadings.

I would dismiss the appeal with costs to the respondent.

The following are the reasons delivered by

MARTLAND J.—I am in agreement with the reasons of Mr. Justice Ritchie. I would like to outline my reasons for my concurrence with his opinion as to the application of the theory of a constructive trust in the circumstances of this case.

This is the third case to come before this Court in which a claim has been made for the recognition of an interest in what is claimed to be "family property". In the first two cases, the claim was made by a wife as against her husband. In the present case the claimant is not the wife of the defendant.

In *Murdoch v. Murdoch*[18] the wife claimed a partnership interest in three quarters sections of land and in all the other assets of her husband. The trial judge held that the parties were not partners and also held that no relationship existed which would give the plaintiff the right to claim as a joint owner in equity any of the farm assets. Before this Court, the wife's claim was placed, not on the basis of partnership, but on the existence of a resulting trust. In rejecting the wife's claim, the majority of the Court referred to the two leading English authorities, *Pettitt v. Pettitt*[19] and *Gissing v. Gissing*[20], and also pointed out that in those

[17] [1939] S.C.R. 11.
[18] [1975] 1 S.C.R. 423.
[19] [1970] A.C. 777.
[20] [1971] A.C. 886.

connaissance d'office des lois des autres provinces et territoires du Canada même lorsqu'on n'en a pas fait la preuve devant les tribunaux d'instance inférieure. Toutefois, cette Cour ne prend pas connaissance d'office de la loi d'une autre province si on ne l'a pas plaidée en première instance. Comme l'a décidé le juge Cannon dans *Canadian National Steamship Co. Ltd. c. Watson*[17] à la p. 18, il serait injuste que cette Cour prenne, de son propre chef, connaissance d'office des lois d'une autre province qui n'on pas été mentionnées dans les procédures écrites.

Je suis d'avis de rejeter le pourvoi avec dépens à l'intimée.

Version française des motifs rendu par

LE JUGE MARTLAND—Je souscris aux motifs de mon collègue le juge Ritchie. J'aimerais exposer brièvement les raisons pour lesquelles j'appuie son opinion quant à l'application de la théorie de la fiducie par interprétation dans les circonstances de l'espèce.

Il s'agit de la troisième affaire soumise à cette Cour dans laquelle on revendique la reconnaissance d'un droit sur ce que l'on prétend être des «biens familiaux». Dans les deux premières affaires, la réclamation a été présentée par l'épouse contre son mari. En l'espèce, la requérante n'est pas l'épouse du défendeur.

Dans l'arrêt *Murdoch c. Murdoch*[18] l'épouse réclamait un droit de sociétaire sur trois quarts-de-section de terrain ainsi que sur les autres biens de son mari. Le juge de première instance a conclu que les parties n'étaient pas associées et qu'aucun lien ne permettait à l'épouse de réclamer en qualité de propriétaire conjointe en *equity* un bien de ferme. Devant cette Cour, l'épouse a fait valoir l'existence d'une fiducie par déduction et non pas l'existence d'une société. En rejetant la réclamation de l'épouse, la majorité de la Cour a examiné deux arrêts anglais qui font autorité, *Pettitt v. Pettitt*[19] et *Gissing v. Gissing*[20] et a également fait

[17] [1939] R.C.S. 11.
[18] [1975] 1 R.C.S. 423.
[19] [1970] A.C. 777.
[20] [1971] A.C. 886.

cases the wife's claim related only to the matrimonial home. The following passages were cited with approval from the judgment of Lord Diplock in the latter case at pp. 905 and 909:

A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

. . .

Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

The conclusion reached was that in the light of the evidence in the case and the findings of the trial judge it could not be said that there was any intention that the beneficial interest in the property in issue did not belong solely to the husband.

The majority of the Court did not adopt the opinion expressed in the dissenting judgment that the court could find a constructive trust, not dependent upon evidence of intention.

In *Rathwell v. Rathwell*[21], this Court was again concerned with a claim by a wife to a beneficial

[21] [1978] 2 S.C.R. 436.

remarquer que, dans ces arrêts, la réclamation de l'épouse ne visait que le foyer conjugal. Les passages suivants des motifs de lord Diplock dans ce dernier arrêt, aux pp. 905 et 909, ont été cités et approuvés:

[TRADUCTION] Une fiducie résultante, implicite ou par détermination de la loi—et il n'est pas nécessaire aux fins du présent appel de faire une distinction entre ces trois catégories de fiducie—est créée lors d'une opération entre le fiduciaire et le bénéficiaire de la fiducie portant sur l'acquisition par le fiduciaire d'un droit de propriété légal dans un bien-fonds, toutes les fois que le fiduciaire s'est conduit d'une manière telle qu'il serait inéquitable de lui permettre de refuser au bénéficiaire de la fiducie une part de bénéficiaire de la propriété véritable du bien-fonds acquis. Et l'on conclura à une telle conduite si par ses paroles ou sa conduite le fiduciaire a incité le bénéficiaire d'une fiducie à agir contre son propre intérêt dans la croyance raisonnable qu'en agissant ainsi il faisait l'acquisition d'une part de la propriété véritable du bien-fonds en question.

. . .

Si difficiles qu'ils soient à résoudre, cependant, ces problèmes relatifs au montant de la part d'un conjoint dans la propriété véritable d'un foyer conjugal lorsque seul l'autre conjoint est investi de la propriété légale, ne se présentent que dans des cas où la cour est convaincue par les paroles ou la conduite des parties que leur intention commune était que la propriété véritable n'appartiendrait pas seulement au conjoint investi de la propriété légale mais serait partagée entre eux selon telle ou telle proportion.

On a conclu que, compte tenu de la preuve en l'espèce et des conclusions du juge de première instance, on ne pouvait pas affirmer qu'il existait une quelconque intention de ne pas restreindre au mari seulement la propriété véritable du bien en litige.

La majorité de la Cour ne s'est pas ralliée à l'opinion, formulée dans les motifs de dissidence, que la Cour pouvait conclure à une fiducie par interprétation qui ne dépend pas d'une preuve d'intention.

Dans *Rathwell c. Rathwell*[21], cette Cour était de nouveau saisie de la réclamation d'une épouse

[21] [1978] 2 R.C.S. 436.

interest in land, the legal ownership of which was in the husband and such interest was found, on the evidence, to exist. Three members of the Court were of the view that the claim could be supported on the basis of either a resulting trust, founded upon common intention, or a constructive trust, founded upon unjust enrichment. Two members of the Court decided that a resulting trust had been established and that a decision as to the application of the principles of unjust enrichment and constructive trust was unnecessary. Four members of the Court rejected the application, in cases of this kind, of the doctrine of a constructive trust as a means of preventing unjust enrichment. The reasons for so deciding are to be found at pages 471 to 474 of the report, and it is unnecessary to repeat them here.

As pointed out earlier, the present case is not concerned with the rights of a wife and so is not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment has very wide implications and involves judicial legislation in that it extends substantially the existing law.

The scope of the doctrine of unjust enrichment in English law is somewhat nebulous. The broad statement of Lord Mansfield in the case of *Moses v. Macferlan*[22] was made in relation to an action for money had and received to the plaintiff's use. It was in this context that he said: "The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money".

Later decisions did not support the generality of this statement but held that the action for money had and received had to be placed on a contractual basis founded upon an implied promise to pay. Scrutton L.J. in *Holt v. Markham*[23] at p. 513, referred to the "now discarded doctrine of Lord

[22] (1760), 2 Burr. 1005.
[23] [1923] 1 K.B. 504.

visant un droit de propriété véritable sur des terres dont le mari détenait le titre de propriété légale, et la preuve a permis de reconnaître l'existence de ce droit. Trois membres de la Cour ont exprimé l'avis que l'on pouvait appuyer la réclamation soit sur la fiducie par déduction, fondée sur l'intention commune, soit sur la fiducie par interprétation, fondée sur l'enrichissement sans cause. Deux membres de la Cour ont décidé que la fiducie par déduction avait été prouvée et qu'il n'était pas nécessaire de décider de l'application des principes de l'enrichissement sans cause et de la fiducie par interprétation. Quatre membres de la Cour ont rejeté l'application, dans des affaires de cette nature, de la doctrine de la fiducie par interprétation comme moyen de prévenir l'enrichissement sans cause. Les motifs en sont exposés aux pp. 471 à 474 du recueil et il n'est pas nécessaire de les répéter ici.

Comme on l'a souligné plus tôt, la présente affaire ne porte pas sur les droits d'une épouse et elle ne vise donc pas les biens matrimoniaux. Toute reconnaissance par cette Cour du droit d'un tribunal d'imposer à une partie les obligations d'un fiduciaire relativement à ses biens pour le bénéfice d'une autre personne, en raison de l'enrichissement sans cause, a de vastes répercussions et met en jeu le droit prétorien puisqu'elle donne une portée beaucoup plus grande au droit existant.

La portée de la doctrine de l'enrichissement sans cause dans le droit anglais est quelque peu imprécise. La déclaration générale de lord Mansfield dans l'arrêt *Moses v. Macferlan*[22] a été faite dans le cadre d'une action en répétition de l'indû que pouvait introduire le demandeur. C'est dans ce contexte qu'il a dit: [TRADUCTION] «le motif principal de cette action est que le défendeur est obligé en vertu des règles de justice naturelle et d'*equity* de rembourser l'argent.

Les décisions postérieures n'ont pas appuyé la généralité de cette déclaration; elles ont jugé que l'action en répétition de l'indû devait être examinée dans un cadre contractuel sur le fondement d'une promesse implicite de payer. Dans l'arrêt *Holt v. Markham*[23] à la p. 513, le lord juge

[22] (1760), 2 Burr. 1005.
[23] [1923] 1 K.B. 504.

Mansfield". Lord Greene in *Morgan v. Ashcroft*[24], at p. 62, said that: "Lord Mansfield's view upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim".

Although Lord Wright in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ld.*[25] at p. 62 expressed sympathy with Lord Mansfield's view, it may be noted that some years later in *Reading v. Attorney-General*[26] at pp. 513-14, Lord Porter said:

It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

In the *Pettitt (supra)* case, at p. 795, Lord Reid dealt with the theory of unjust enrichment as follows:

Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

He did not suggest that in that case recognition of the beneficial interest could be effected by means of a constructive trust.

[24] [1938] 1 K.B. 49.
[25] [1943] A.C. 32.
[26] [1951] A.C. 507.

Scrutton a fait mention de la [TRADUCTION] «doctrine de lord Mansfield maintenant abandonnée». Dans l'arrêt *Morgan v. Ashcroft*[24] à la p. 62, lord Greene a dit: [TRADUCTION] «L'opinion de lord Mansfield sur ces questions, aussi attrayante soit-elle, ne peut maintenant être acceptée comme étayant réellement la réclamation.»

Bien que dans l'arrêt *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ld.*[25] à la p. 62, lord Wright ait manifesté sa sympathie pour l'opinion de lord Mansfield, nous pouvons remarquer que quelques années plus tard dans l'arrêt *Reading v. Attorney-General*[26] aux pp. 513 et 514, lord Porter a dit:

[TRADUCTION] ... On a prétendu au cours des débats que le savant juge avait fondé sa décision uniquement sur la doctrine de l'enrichissement sans cause et que cette doctrine n'était pas reconnue en droit anglais. Vos Seigneuries, la situation réelle de l'enrichissement sans cause n'est pas encore certaine. Elle tient une place prédominante en droit écossais et américain, je crois, mais pour les fins de cette affaire je me limiterai à accepter l'opinion qu'elle ne fait pas partie du droit anglais et qu'un droit à la restitution ainsi décrit le serait trop largement.

Dans l'arrêt *Pettitt* (précité), à la p. 795, lord Reid a examiné la théorie de l'enrichissement sans cause comme suit:

[TRADUCTION] On a fait mention de la doctrine de l'enrichissement sans cause. A mon avis, cela n'est d'aucune utilité. On a appliqué l'expression à des situations où une personne qui a effectué des paiements en réclame le remboursement en justice. Mais il ne semble pas y avoir dans la jurisprudence anglaise de cas où l'on ait appliqué la doctrine à une personne qui a participé à l'amélioration des biens d'une autre. Et, quoi qu'il en soit, cela ne donnerait lieu qu'à une réclamation pécuniaire, alors qu'un conjoint qui participe à une amélioration revendique généralement un droit de propriétaire dans les biens ainsi améliorés.

Il n'a pas laissé entendre que dans ce cas la reconnaissance d'un droit de propriété véritable pourrait s'effectuer au moyen de la fiducie par interprétation.

[24] [1938] 1 K.B. 49.
[25] [1943] A.C. 32.
[26] [1951] A.C. 507.

It would appear that in English law the existence of an unjust enrichment has been recognized in claims for the return of money, which was the case in *Moses v. Macferlan (supra)* in which Lord Mansfield's statement was made.

I turn now to the nature of a constructive trust as so far recognized. The areas in which a constructive trust has been found to exist have usually been in cases where a fiduciary relationship exists, *e.g.* a trustee or fiduciary taking advantage of his position to make a profit for himself. Such a trust has also been found to exist where a person having knowledge of an existing trust acquires the legal title to the trust property. In relation to the matter of unjust enrichment, the following passage appears in Snell's *Principles of Equity*, 27th ed., at p. 186:

> In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and *cestui que trust*. Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.

The authority for the statement "the attitude of the courts may be changing" is given in the case of *Hussey v. Palmer*[27]. In that case, the plaintiff went to live with her daughter and son-in-law and paid the cost of adding an extra bedroom to their house. The arrangement did not work and the plaintiff left. She sued to recover the money she had expended. In the Court of Appeal, Lord Denning found there was a constructive trust. Phillimore L.J. regarded the matter as a resulting trust and

[27] [1972] 1 W.L.R. 1286.

Il semblerait qu'en droit anglais, l'existence d'un enrichissement sans cause a été reconnue dans des réclamations en remboursement d'argent, ce qui était le cas dans l'arrêt *Moses v. Macferlan* (précité) où lord Mansfield a fait sa déclaration.

J'examinerai maintenant la nature d'une fiducie par interprétation telle qu'on l'a reconnue jusqu'ici. C'est généralement dans des situations de relations fiduciaires que l'on a reconnu l'existence d'une fiducie par interprétation, par exemple, un fiduciaire qui profite de sa situation pour s'avantager. On a également reconnu l'existence d'une telle fiducie lorsqu'une personne informée de l'existence d'une fiducie acquiert le titre de propriété du bien en fiducie. Sur le sujet de l'enrichissement sans cause, on trouve le passage suivant dans Snell's *Principles of Equity*, 27e éd., à la p. 186:

> [TRADUCTION] Dans certains ressorts, on en est venu à considérer la fiducie par interprétation comme un moyen de remboursement pour de nombreux cas d'enrichissement sans cause; lorsqu'un tribunal est d'avis que le bien en question devrait être restitué, il impose simplement une fiducie par interprétation au bénéficiaire. En Angleterre, cependant, la fiducie par interprétation demeure essentiellement une institution indépendante; il ne faut pas confondre la propriété et les obligations, et il ne faut pas transformer la relation débiteur-créancier en une relation de fiduciaire-bénéficiaire de la fiducie. Toutefois, l'attitude des tribunaux est peut-être en voie de se modifier; et bien que la fiducie par interprétation ne soit sans doute pas confinée aux situations découlant d'une relation fiduciaire, on est loin de connaître avec certitude les autres circonstances qui suffisent à la faire jouer ou dans quelle mesure on peut l'utiliser comme moyen de redressement d'*equity* pour faire respecter des droits reconnus par la loi.

On trouve un appui à la déclaration que [TRADUCTION] «l'attitude des tribunaux est peut-être en voie de se modifier» dans l'arrêt *Hussey v. Palmer* [27]. Dans cette affaire, la demanderesse est allée vivre avec sa fille et son gendre et a payé les frais de l'addition d'une chambre à leur maison. Ils ne se sont pas entendus et la demanderesse est partie. Elle a intenté une action en recouvrement de l'argent qu'elle avait dépensé. En Cour d'appel, lord Denning a conclu à l'existence d'une fiducie

[27] [1972] 1 W.L.R. 1286.

Cairns L.J. dissented.

The validity of the judgment is questionable as indicated in the discussion of it in (1973), 89 L.Q.R. 2. Lord Denning, at p. 1290, referred to a constructive trust as a "trust imposed by law whenever justice and good conscience require it". Commenting on this generalization, the note in the *Law Quarterly Review* says, at p. 4:

> These large generalisations will be more familiar to American than English lawyers. This applies especially to the notion that resulting and constructive trusts run together and the amalgam is an equitable remedy: see *e.g.* A.W. Scott (1955) 71 L.Q.R. 39. Indeed, even those writers who have some sympathy with the notion do not suggest that it is already part of English law: see Hanbury's *Modern Equity* (9th ed. 1969) at pp. 222, 223; Goff & Jones, *Restitution* (1966) at p. 37.

In my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

As stated in the reasons of my brother Ritchie, the determination of this appeal in the respondent's favour can be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

The following are the reasons delivered by

RITCHIE J.—I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Dickson which contain an accurate account of the facts giving rise to this appeal.

I agree with the conclusion reached by Mr. Justice Dickson, but as my reasons for doing so are

par interprétation. Le lord juge Phillimore a considéré qu'il s'agissait d'une fiducie par déduction et le lord juge Cairns était dissident.

On peut s'interroger sur la validité de cet arrêt comme le fait ressortir le commentaire paru à (1973), 89 L.Q.R. 2. Lord Denning, à la p. 1290, a parlé de la fiducie par interprétation comme d'une [TRADUCTION] «fiducie imposée en droit lorsque la justice et la bonne conscience l'exigent». Voici le commentaire de cette généralisation dans le *Law Quarterly Review*, à la p. 4:

> [TRADUCTION] Ces grandes généralisations seront plus familières aux avocats américains qu'aux avocats anglais. Cela s'applique particulièrement à la notion que les fiducies par déduction et par interprétation vont de pair et que leur réunion fournit un redressement en *equity*: voir par exemple A.W. Scott (1955) 71 L.Q.R. 39. En réalité, même les auteurs qui ont quelque sympathie pour la notion ne prétendent pas qu'elle fait déjà partie du droit anglais: voir Hanbury's *Modern Equity* (9e éd. 1969) aux pp. 222 et 223; Goff & Jones, *Restitution* (1966) à la p. 37.

A mon avis, l'adoption de ce concept comporte un élargissement du droit que cette Cour a déjà défini. Un tel élargissement n'est pas souhaitable à mon avis. Il conférerait aux juges un très vaste pouvoir d'appliquer ce que l'on a appelé «la justice distributive» sans le bénéfice de quoi que ce soit pour les orienter. Quel critère doit appliquer le juge pour décider ce qui constitue l'enrichissement sans cause? Le seul critère serait sa perception personnelle de ce qu'il considère comme injuste.

Comme l'a dit mon collègue le juge Ritchie dans ses motifs, ce pourvoi peut être tranché en faveur de l'intimée selon la jurisprudence existante et sans recourir aux concepts de l'enrichissement sans cause et de la fiducie par interprétation.

Version française des motifs rendus par

LE JUGE RITCHIE:—J'ai eu l'avantage de lire les motifs de jugement de mon collègue le juge Dickson qui contiennent un exposé précis des faits qui ont donné lieu à ce pourvoi.

Je suis d'accord avec la conclusion de mon collègue le juge Dickson, mais puisque mes motifs

substantially different from those adopted by him, I find it necessary to express myself separately.

The difference between us stems from the fact that I find that the advances made by the plaintiff throughout the period of the relationship between the parties to be such as to support the existence of a resulting trust which is governed by the legal principles adopted by the majority of this Court in *Murdoch v. Murdoch*[28] and *Rathwell v. Rathwell*[29], whereas Mr. Justice Dickson, in applying the reasoning contained in the dissenting opinions in those cases to the evidence as he interpreted it, concluded that the circumstances disclosed the existence of a constructive trust arising out of and dependant upon the applicability of the doctrine of "unjust enrichment".

The leading cases of *Pettitt v. Pettitt*[30] and *Gissing v. Gissing*[31] afford a comprehensive though not entirely consistent review of the law respecting the disposition to be made of matrimonial property in the event of a marital break-up and it is made plain from the judgment of Lord Denning in *Cooke v. Head*[32] at p. 40 that the same considerations apply in the case of a man and his mistress who had been living in what is now frequently referred to as a "common law" relationship.

I should make it plain at the outset that in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. This opinion appears to me to be borne out in the following passage taken from the reasons for judgment of Lord Pearson in *Gissing v. Gissing, supra*, at p. 902 where he said:

If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by

[28] [1975] 1 S.C.R. 423.
[29] [1978] 2 S.C.R. 436.
[30] [1970] A.C. 777.
[31] [1971] A.C. 886.
[32] [1972] 2 All E.R. 38.

diffèrent considérablement des siens, j'estime nécessaire de rédiger un avis distinct.

La différence entre nos motifs découle de ma conclusion que les contributions de la demanderesse au cours de sa vie commune avec le défendeur appuient l'existence d'une fiducie par déduction régie par les principes de droit adoptés par la majorité de cette Cour dans les arrêts *Murdoch c. Murdoch*[28] et *Rathwell c. Rathwell*[29] alors qu'en appliquant les opinions dissidentes de ces arrêts à son interprétation de la preuve, mon collègue le juge Dickson a conclu que les circonstances révélaient l'existence d'une fiducie par interprétation qui découle et est tributaire de l'applicabilité de la doctrine de «l'enrichissement sans cause».

Les arrêts qui font autorité, *Pettitt v. Pettitt*[30] et *Gissing v. Gissing*[31] offrent un examen d'ensemble, bien qu'il ne soit pas entièrement cohérent, du droit relatif au partage des biens matrimoniaux lorsqu'il y a rupture du mariage. Il ressort clairement des motifs de lord Denning dans l'arrêt *Cooke v. Head*[32] à la p. 40, que les mêmes considérations s'appliquent dans le cas d'un homme et de sa concubine qui ont vécu ce que, de nos jours, on appelle souvent une relation «de fait».

Je dois dire clairement au départ qu'à mon avis, les contributions d'un conjoint, librement acceptées par l'autre pour servir à l'achat et à l'entretien d'un foyer commun, font naître une présomption réfutable qu'au moment des contributions et de leur acceptation, les deux parties avaient l'intention de créer, en faveur du donateur, une fiducie par déduction, équivalente à la valeur des contributions. Cette opinion me paraît confirmée par le passage suivant extrait des motifs de jugement de lord Pearson dans *Gissing v. Gissing*, précité, à la p. 902 où il dit:

[TRADUCTION] Pour être valide, la réclamation de l'intimée doit s'appuyer sur ce qu'en raison de ses contri-

[28] [1975] 1 R.C.S. 423.
[29] [1978] 2 R.C.S. 436.
[30] [1970] A.C. 777.
[31] [1971] A.C. 886.
[32] [1972] 2 All E.R. 38.

her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

The same proposition is elaborated in the reasons for judgment of Lord Reid, speaking for himself, in the case of *Pettitt v. Pettitt, supra*, where he said at p. 795:

But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.

Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to

butions à l'achat de la maison, il s'est créé une fiducie par déduction en sa faveur. Si ses contributions à l'achat de la maison sont importantes, il y aura de prime abord une fiducie par déduction en sa faveur. Il y aura une présomption quant à l'intention des parties à l'époque ou aux époques où elle a versé les contributions et où il les a acceptées. Cette présomption est réfutable: elle peut être réfutée par une preuve établissant une autre intention. La question de déterminer l'intention est une question de fait qui doit être laissée à l'appréciation du jury ou du juge agissant comme jury, le cas échéant.

La même proposition est élaborée dans les motifs de jugement de lord Reid, qui parlait pour lui-même, dans l'arrêt *Pettitt v. Pettitt,* précité; il a dit à la p. 795:

[TRADUCTION] Mais il convient, je crois, d'examiner si sans nous écarter des principes de *common law,* nous pouvons donner effet à l'opinion voulant que, même en l'absence d'une entente, on peut se demander à quel accord les conjoints, ou des personnes raisonnables placées dans leur situation, seraient parvenus s'ils avaient fait l'effort de déterminer les droits dont bénéficierait le conjoint qui a contribué à l'achat ou à l'amélioration des biens de l'autre conjoint. Il y a déjà une présomption qui s'applique, en l'absence de preuves, quant à l'argent versé par un conjoint pour permettre l'achat de biens par l'autre conjoint. Aussi, pourquoi une autre présomption semblable ne s'appliquerait-elle pas lorsque le conjoint a contribué à l'amélioration des biens de l'autre? Il n'est pas très convaincant de prétendre que si un étranger améliore les biens d'une autre personne sans que cette dernière le lui ait demandé ou n'y ait consenti, il n'acquiert aucun droit. L'amélioration est faite pour l'avantage commun des deux conjoints pendant le mariage. La situation serait certainement différente si l'un des conjoints apportait les améliorations alors que l'autre conjoint, qui détient le titre de propriété, est absent et qu'il n'est pas au courant ou n'a pas donné son consentement. Mais si le conjoint propriétaire consent à ce que l'autre apporte des améliorations dans des circonstances où il serait raisonnable de supposer que les parties auraient convenu qu'un certain droit en découlerait si elles s'étaient arrêtées à considérer la situation juridique, il n'y a, à mon avis, rien de contraire aux principes juridiques ordinaires à conclure que le conjoint qui apporte les améliorations a acquis un tel droit.

On a fait mention de la doctrine de l'enrichissement sans cause. A mon avis, cela n'est d'aucune utilité. On a appliqué l'expression à des situations où une personne qui a effectué des paiements en réclame le rembourse-

be any English case of the doctrine being applied where one person has improved the property of another.

It will be seen that in the case of *Gissing v. Gissing, supra,* four of the law Lords spoke of "implied constructive or resulting trusts" without any apparent distinction and this is to be found in other English authorities, but it is nevertheless noteworthy that when there is a conjugal relationship between the parties the presumption of a resulting trust arises for the benefit of the donor wherever there is evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persists until the relationship is dissolved unless it is rebutted by "evidence showing some other intention".

It is contended on behalf of the appellant that the five-year difference in age between the parties constituted evidence justifying the learned trial judge in making the following finding:

> Now, the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.

With the greatest respect for those who take a different view, I cannot but find that this gratuitously insulting conclusion is based upon the trial judge's opinion that, whatever her motives may have been, the respondent's intention in making the contributions was to benefit the appellant and it is clear that they were acquiesced in and indeed freely accepted by him to be applied for and towards the maintenance and operation of a joint household. Accordingly, the last quoted comments of the trial judge in my view support the existence of a common intention giving rise to a presumption of a resulting trust and nothing said by him in this

ment en justice. Mais il ne semble pas y avoir dans la jurisprudence anglaise de cas où l'on ait appliqué la doctrine à une personne qui a participé à l'amélioration des biens d'une autre.

Dans l'arrêt *Gissing v. Gissing,* précité, quatre des lords juges ont parlé de «fiducie par interprétation ou fiducie par déduction» sans faire de distinction évidente et cela se retrouve dans d'autres arrêts anglais. Il convient néanmoins de souligner que, lorsque les parties sont mariées, il y a une présomption de fiducie par déduction en faveur du donateur si l'on démontre qu'un conjoint a fait une contribution financière, ou son équivalent, pour permettre à l'autre d'acquérir des biens. Cette présomption subsiste jusqu'à ce qu'il y ait rupture du mariage, à moins qu'elle ne soit réfutée par [TRADUCTION] «une preuve établissant une autre intention».

On a prétendu au nom de l'appelant que la différence d'âge de cinq ans entre les parties était une preuve qui permettait au savant juge de première instance de parvenir à la conclusion suivante:

> [TRADUCTION] Maintenant la demanderesse réclame une part de la ferme parce qu'au début de leur relation, ils avaient convenu implicitement de mener une entreprise commune: le demanderesse devait payer les dépenses courantes et le défendeur épargner. Je suis certain que la demanderesse, qui tenait à se marier, n'aurait pas formulé expressément une telle proposition à l'époque, de crainte d'éloigner un mari éventuel. Je considère que sa contribution aux dépenses du ménage pendant les premières années de leur relation était de la nature d'un capital à risques investi dans l'espoir d'amener, le défendeur, un homme plus jeune qu'elle au mariage.

Avec égards pour ceux qui sont d'avis contraire, je suis obligé de reconnaître que cette conclusion insultante et gratuite s'appuie sur l'opinion du juge de première instance que, quels qu'aient pu être les motifs de l'intimée lorsqu'elle a fait ses contributions, son intention était de donner des avantages à l'appelant. Il est évident que ce dernier les a acceptées librement et qu'il les a utilisées pour l'entretien et la vie courante de leur foyer commun. Par conséquent, les derniers commentaires du juge de première instance que je viens de citer, appuient à mon avis l'existence d'une intention commune qui donne naissance à une présomp-

paragraph can be considered as evidence rebutting the presumption to which the contributions made by the respondent give rise.

In the latter part of his reasons for judgment the learned trial judge made a further finding to the effect that a trust entitling the respondent to a part interest in the Ontario farm properties "was not in the contemplation of either party even implicitly".

My brother Dickson has made a finding that "The trial judge held there was no common intention, either expressed or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding".

For my part, however, I would adopt the following paragraph from the judgment of Wilson J.A. in the Court of Appeal:

> With all due respect to the learned trial judge I think he vastly underrated the contribution the appellant made to the acquisition of the assets held in the respondent's name. The parties lived together as husband and wife, although unmarried, for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for fourteen years building up the bee-keeping operation which was their main source of livelihood. The respondent did not deny that she supported him for the first five or six years of their lives together while he put away all his earnings in the bank.

In my view these findings constitute evidence that the Hawkesbury properties and the beekeeping operation were subject to a resulting trust in favour of the respondent and I do not find it necessary to import the doctrine of "unjust enrichment" from the law of quasi contract in order to dispose of this appeal.

As to the share to which the respondent is entitled upon the dissolution of the relationship, I am, like my brother Dickson, in accord with the disposition made of the matter by the Court of Appeal.

tion de fiducie par déduction et rien de ce qu'il dit dans ce paragraphe ne peut être considéré comme une preuve réfutant la présomption à laquelle donnent naissance les contributions de l'intimée.

Dans la dernière partie de ses motifs, le juge de première instance conclu également [TRADUCTION] "qu'aucune des parties n'avait envisagé . . . , même implicitement," une fiducie donnant droit à une partie des fermes de l'Ontario à l'intimée.

Mon collègue le juge Dickson a conclu que "Le juge de première instance a décidé qu'il n'y avait pas d'intention commune, expresse ou implicite. Il est important de souligner que la Cour d'appel de l'Ontario n'a pas écarté cette conclusion".

Toutefois, pour ma part, je suis d'avis d'adopter le passage suivant des motifs de jugement de Madame le juge Wilson de la Cour d'appel:

> [TRADUCTION] Avec égards pour le savant juge de première instance, je crois qu'il a grandement sous-estimé la contribution de l'appelante à l'acquisition des avoirs dont l'intimé détient les titres de propriété. Les parties ont vécu ensemble comme mari et femme, sans être mariées, pendant presque vingt ans; au cours de cette période, elle a non seulement rendu possible l'acquisition de leur première propriété à Franklin Center en payant uniquement à même son revenu les dépenses d'entretien pendant "les années maigres", mais elle a travaillé à ses côtés pendant quatorze ans à mettre sur pied l'exploitation apicole, leur principale source de revenus. L'intimé n'a pas nié qu'elle a assuré sa subsistance pendant les cinq ou six premières années de leur vie commune alors qu'il mettait ses économies à la banque.

A mon avis ces conclusions constituent la preuve que les propriétés de Hawkesbury et l'exploitation apicole sont assujetties à une fiducie par déduction en faveur de l'intimée et je ne crois pas qu'il soit nécessaire d'emprunter la doctrine de "l'enrichissement sans cause" au droit des quasi-contrats pour trancher ce pourvoi.

Quant à la part à laquelle l'intimée a droit à la rupture de la relation, je suis, comme mon collègue le juge Dickson, en accord avec la décision de la Cour d'appel sur cette question.

As I reach the same conclusion as my brother Dickson, it may be thought that these reasons are somewhat superfluous but I find myself unable to subscribe to the application of the doctrine of constructive trusts under the circumstances here disclosed and I wish to disassociate myself with any suggestion in conformity with the trial judge's bitter criticism of the respondent.

In view of all the above, I would dismiss this appeal with costs to the respondent.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Barry B. Swadron and Susan G. Himel, Toronto.

Solicitors for the plaintiff, respondent: Langlois & Wilkins, Hawkesbury.

Puisque je parviens à la même conclusion que mon collègue le juge Dickson, on croira peut-être que ces motifs sont superflus, mais je me sens incapable de souscrire à l'application de la doctrine de la fiducie par interprétation dans les circonstances de l'espèce et je désire me dissocier de toute proposition qui suit la critique sévère que le juge de première instance a adressée à l'intimée.

Compte tenu de tout ce qui précède, je suis d'avis de rejeter ce pourvoi avec dépens à l'intimée.

Pourvoi rejeté avec dépens.

Procureurs du défendeur, appelant: Barry B. Swadron et Susan G. Himel, Toronto.

Procureurs de la demanderesse, intimée: Langlois & Wilkins, Hawkesbury.

Tab 5

Berry v. Pulley

Ontario Supreme Court
Berry v. Pulley
Date: 2001-03-13

Berry et al.

and

Pulley et al; Lynch, Third Party

Court File No. 97-CV-135179

Ontario Superior Court of Justice Camming J.

Heard: February 19 and 20, 2001

Judgment rendered: March 13, 2001

F.J.C. Newbould, Q.C., and T.O. Buckley, for plaintiffs.

Michael P Fitzgibbon and Dougald E. Brown, for defendants.

Brian Shell for third party.

CUMMING J.:—

THE MOTION

[1] This is an action brought under the *Class Proceedings Act, 1992,* S.O. 1992. c. 6 ("*CPA*"). The plaintiffs now move for certification under s. 2. They also seek a classing of defendants and the appointment of representative defendants under s. 4. This is a unique certification motion in Canada in that it is a *contested* motion to class both plaintiffs and defendants.

BACKGROUND

[2] The action was first commenced on November 4, 1997. The statement of claim was subsequently twice amended. A draft "Fresh Statement of Claim" was also before the court for the purpose of the certification motion ("the Claim"). The defendants were successful in a motion for summary judgment on June 4, 1999. Winkler J. dismissed the claims in contract of the plaintiffs but also dismissed the defendants' motion to dismiss the plaintiffs' claims in tort [reported 99 C.L.L.C. ¶220-052 (S.C.J.)]. On April 28, 2000, the Court of Appeal dismissed the plaintiffs' appeal, as well as the defendants' cross-appeal [reported 186 D.L.R. (4th) 311]. The Supreme Court of Canada granted the plaintiffs' leave to appeal on January 18, 2001 [reported 193 D.L.R. (4th) vi].

[3] The fresh statement of claim includes the cause of action pleaded in contract. The plaintiffs agree, of course, to the deletion of the cause of action for alleged breach of contract (but not the cause of action for damages caused by tort) if the plaintiffs are unsuccessful on their appeal before the Supreme Court of Canada.

[4] The Claim advances a cause of action in tort. The claims in tort were not impacted upon by the previous court decisions. It is only the torts claims which are under consideration in the certification motion at hand.

THE CLASS PROCEEDING

[5] The proposed plaintiff class numbers some 179 Air Ontario pilots who were members of the Canadian Air Line Pilots Association ("CALPA") on March 28, 1995.

[6] The proposed defendant class is comprised of some 1,682 Air Canada pilots, including pilots on furlough, who were members of CALPA on March 28, 1995. CALPA, a trade union, was at that time the certified bargaining agent for some 4,000 pilots in Canada, including the pilots employed by Air Canada and Air Ontario.

[7] A "Merger Policy" was contained in the CALPA Constitution and Policy Manual. The purpose of the Merger Policy was to resolve the problem of an airline merger and resulting "seniority" issues for the pilots of the merged airlines.

[8] Air Canada gained control of regional and connector airlines in the early 1990s, including Air Ontario in 1991. The President of CALPA declared a "merger" of the two employer airlines. The Claim emanates from a dispute between the Air Canada and Air Ontario pilots within CALPA over the period from 1991 to 1995 in respect of the integrated seniority list to apply to the pilots of the two airlines.

[9] Seniority is a fundamental matter of importance which affects the livelihood of pilots. For example, seniority governs pilots in respect of promotion, retention in case of a reduction of pilots and re-employment, and assignment in respect of types of planes, flight destinations and work schedules. The access of career opportunities for pilots employed by regional or connector airlines merged with Air Canada is dependent upon a resolution of the seniority issue.

[10] The Merger Policy contemplated that CALPA would prepare an integrated seniority list and it required the affected employee groups to negotiate an agreement toward achieving such list. In the event of failure to achieve an agreement, the Merger Policy provided for an arbitration with the decision of the arbitrator to be “final and binding on all parties to this arbitration”.

[11] An arbitration took place with respect to the Air Canada and Air Ontario pilots. Arbitrator Michel Picher released his decision on March 28, 1995 (the “Picher Award”). The Picher Award provided for seniority for some of the pilots to be achieved by a “dovetail” rather than an “endtail” approach. That is, the Picher Award provided that the least senior 15 per cent of the Air Canada pilots would be dovetailed with the most senior Air Ontario pilots, and the remaining regional airline pilots would then follow.

[12] The collective agreement between Air Canada and its own pilots expired April 1, 1995.

[13] Each member airline pilot group within CALPA had Local Executive Councils and was governed by its own Master Executive Council (“MEC”) for matters exclusively affecting the membership of the particular airline.

[14] Negotiations for a new collective agreement for the Air Canada pilots had begun some time before this date. Terms and conditions affecting the Air Canada pilots were being negotiated with representatives of the Air Canada MEC, together with representation from CALPA.

[15] The plaintiffs say that the defendant Chris Pulley, the Air Canada MEC chairperson at the time, reportedly advised that the Picher Award was unacceptable to the Air Canada pilots. Some 1,269 Air Canada pilots signed a “notarized Pilot Solidarity document”, rejecting the Picher Award. Some Air Canada Local Councils passed resolutions rejecting the Picher Award. In addition, 136 Air Canada pilots wrote to the CALPA President urging rejection of the Picher Award. Representatives of the Air Canada Special MEC Advisory Committee (“SMMAC”), formed by the Air Canada MEC, allegedly advised Air Canada that the Picher Award was not supported by the vast majority of the Air Canada pilots.

[16] The plaintiffs allege that the defendant Pulley, as directed by the Air Canada MEC, refused to complete the “integrated seniority list” contemplated by the Picher Award. The plaintiffs allege that the defendant Pulley and the Air Canada MEC prevented good faith

negotiations in respect of a new Air Canada collective agreement so as to accord with the dictates of the Picher Award. The plaintiffs allege the Air Canada pilots took steps to prevent the negotiation of an integrated seniority list with Air Canada.

[17] The Air Canada pilots decided to leave CALPA. On November 9, 1995, they voted in favour of certifying the new Air Canada Pilots Association ("ACPA") as their exclusive bargaining agent. ACPA was certified as the bargaining agent November 14, 1995. As of that date Air Canada pilots were no longer considered members of CALPA.

THE CERTIFICATION MOTION

[18] Section 5 of the *CPA* sets forth five criteria to be met as a prerequisite for certification.

Section 5(1)(a): Does the statement of claim disclose a cause of action?

[19] The Claim discloses a cause of action in tort. The plaintiffs allege an unlawful conspiracy, wrongful interference with economic relations and wrongful interference with contractual relations. The facts alleged in the claim are accepted as true for the purpose of this question. In my view, it is not plain and obvious that the facts alleged in the Claim do not disclose a reasonable cause of action in tort. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959 at 979-980, 74 D.L.R. (4th) 321. It is also noted that this was recognized in the decisions of Winkler J. and the Court of Appeal dismissing the plaintiffs' claim for alleged breach of contract.

[20] The Claim sets forth allegations and material facts sufficient, if proven, to arguably constitute tortious wrongdoings. See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.,* [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, for the elements of the tort of conspiracy. See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 (Gen. Div.); appeal allowed on other grounds, for the elements of the tort of unlawful interference with economic relations [reported 183 D.L.R. (4th) 488 (CA.)]. See *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), for the elements of the tort of intentional interference with contractual relations.

[21] As well, a pleading is not to be struck out where the law has not been fully settled or a novel cause of action is presented. *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.,* [2000] O.J. No. 4597 (QL) (S.C.J.), at para. 1 [reported 51 O.R. (3d) 603].

Section 5(l)(b): Is there an identifiable class of plaintiffs and defendants?

[22] The proposed classes are known and identifiable. Indeed, the specific individuals in the proposed classes are known. There are some 179 pilots employed by Air Ontario in the proposed plaintiff class.

[23] There are some 1,682 pilots employed by Air Canada, including pilots on furlough, who were in the Air Canada bargaining unit and were members of CALPA on March 28, 1995.

[24] The proposed defendant class consists of all of the Air Canada pilots who were members of CALPA on March 28, 1995. However because the factual involvement of the Air Canada pilots in the dispute at hand differed markedly, it is necessary to consider the putative overall defendant class as being made up of seven subclasses. Different groups may have different defences due to varying factual situations and involvement in the alleged wrongdoing. The proposed defendant subclasses and proposed representative defendants for each subclass are as follows.

Subclass 1: The defendants who were members of the Air Canada MEC between March 28, 1995 and November 14, 1995. The proposed representative defendants are Tom Fraser and Peter Wallace. The plaintiffs assert that the MEC selected the pilot Negotiating Committee and approved all proposals for negotiation with Air Canada.

Subclass 2: The merger representatives of the Air Canada Pilots. The proposed representative defendant Howard Malone was a merger representative of the Air Canada pilots together with the defendant Pulley. The plaintiffs submit that the merger representatives were required by the CALPA Merger Policy to act on behalf of the Air Canada pilots through negotiation, mediation and arbitration to compile an integrated seniority list.

Subclass 3: The defendants who were members of SMMAC. The proposed representative defendant Gary Dean was the chairman of SMMAC and a former chairman of the Air Canada MEC. The proposed representative defendant Yves Filion was a member of SMMAC. The plaintiffs alleged that SMMAC was formed by the Air Canada MEC after the Picher Award was issued and carried on secret negotiations with Air Canada seeking to replace the Picher Award. SMMAC was

an *ad hoc* committee not provided for as a named committee in the CALPA Constitution.

Subclass 4: The defendants who were members of the Negotiating Committee of Air Canada pilots. The plaintiffs say that the Negotiating Committee formulated collective bargaining contract demands for negotiation with Air Canada. The proposed representative defendants are Denis Belhumeur and Greg Mutchler.

Subclass 5: The defendants who were members of the Local Executive Councils of Local Councils 1, 7, 11 and 14 of Air Canada pilots. The proposed representative defendant is George Cockburn. The plaintiffs say that these Local Executive Councils were required to assist the LEC Chairmen to implement the CALPA Merger Policy but did not do so, and indeed, subverted the Merger Policy in respect of the Picher Award.

Subclass 6: The defendants who did not hold positions on the Air Canada MEC, Local Executive Councils, the Negotiating Committee of Air Canada pilots, the SMMAC or a position as a merger representative, but who allegedly acted to prevent implementation of the Picher Award by communicating directly or indirectly with representatives of Local Executive Councils, the Air Canada MEC, the Negotiating Committee or merger representatives to encourage or direct them to reject the Picher Award, to refuse to negotiate the Picher Award or to use any means to stop the implementation of the Picher Award or who communicated to Air Canada their opposition to the implementation of the Picher Award. The proposed representative defendants Lars T. Jensen and James Griffith were Air Canada pilots and Local Executive Council Members of CALPA until November 14, 1995.

Subclass 7: The defendants who took no steps to encourage implementation of the Picher Award in the face of the alleged clear intention of the defendant Pulley and the members of Subclasses 1 to 6 to reject the Picher Award and who do not fall in the other subclasses. There are no proposed representative defendants for this subclass.

The Claim alleges *intentional* torts in respect of the pilots in all subclasses. The allegation is that the pilots in this proposed subclass were passive and silent in the face of knowing others were taking actions to reject the Picher Award. The plaintiffs allege that this passivity constituted tortious conduct. This may be a problematical assertion; however, in my view this proposed subclass is to be included. A novel cause of action meets the s. 5(1)(*a*) test. It is also reasonable at this stage to include all 1,682 Air Canada pilots who were members of CALPA on March 28, 1995 as defendants in the overall class of defendants.

Section 5(1)(c): Do the claims or defences raise common issues?

[25] The defendants concede only one common issue: whether Air Canada would have agreed to a demand in collective bargaining *prior to the certification of ACPA* to include the integrated seniority list stipulated by Arbitrator Picher but for the defendants' actions. (Even on this proposed common issue the defendants would seek to add the limiting phrase in italicized words.) The plaintiffs put forward an extensive list of proposed common issues.

[26] The defendants submit that the tort claims involve intentional torts. They submit that every single Air Canada pilot necessarily will have a discrete individual position relevant to any determination of liability. Hence, the defendants submit that there cannot be any common issues (beyond the single, qualified one referred to above) suitable to a class proceeding. Therefore, they submit that the motion for certification is to be dismissed.

[27] Common issues need only be issues of fact or law that move the litigation forward. *Carom v. Bre-X Minerals Ltd.,* [2000] O.J. No. 4014 (QL) (C.A.) [reported 196 D.L.R. (4th) 344].

[28] I disagree with the defendants' submission that every single Air Canada pilot necessarily will have a discrete individual position relevant to the determination of liability. In my view, *prima facie* the proposed grouping of the 1,682 Air Canada pilots into the seven subclasses is logical and appropriate.

[29] The asserted causes of action in tort are that there was an unlawful conspiracy, wrongful interference with economic relations and wrongful interference with contractual relations. The material facts relevant to a determination of liability for these torts would appear to be the same for most, if not all, of the defendants within any particular subclass. That is, either none of the defendants within a subclass is liable or all will be proven to be liable.

[30] The *CPA* contemplates that there may be some individual issues of liability, as well as in respect of damages, which may have to be determined: s. 25. The *CPA* affords the flexibility to the court to amend the certification order, or to decertify if appropriate, as the case progresses: s. 10. Where there is a decertification, the court may permit the proceeding to continue as one or more proceedings between different parties: s. 10(2). An order for certification is a procedural step in a proceeding. It is not, of course, a determination of the merits: s. 5(5).

[31] If the plaintiffs are successful in their action and there is a finding of liability on the part of some or all of the defendants, a remedy may be difficult to fashion. However, the fact that the relief claimed includes a claim for damages that may require individual assessments after a determination of the common issues is not, in itself, a sufficient reason for refusing to certify the class proceeding: s.6.

[32] The *CPA* and, in particular, s. 24 provide for considerable flexibility. For example, there can be aggregate assessments of monetary relief, there can be the sharing of awards on an average or proportional basis, or there can be the determination of damages on an individual by individual basis. For the purpose of determining issues relating to the amount or distribution of a monetary award, the court is given some latitude on the admission of statistical evidence: s. 23. The court may direct any means of distribution of amounts awarded: s. 26.

[33] As well, if a defendant is liable for a loss to a plaintiff, it is not an answer to assert that the loss is difficult to quantify or calculate. The court will estimate the plaintiff's chance of obtaining a benefit forgone through the loss of the chance. *Fasken Campbell Godfrey v. Seven-Up Canada Inc.* (2000), 182 D.L.R. (4th) 315 (Ont. C.A.) at 328; *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. C.A.) at 48.

Section 5(1)(d): Is a class proceeding the preferable procedure for the resolution of the common issues?

[34] A class proceeding seems to be the only practical way by which to resolve the proposed common issues. Certification of the plaintiff class serves the policy objectives of the *CPA* of access to justice for claimants and judicial economy. *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at 471-72, 121 D.L.R. (4th) 496 (Div. Ct.); affirming (1993), 15 O.R.

(3d) 39 (Gen. Div.). A multiplicity of possibly 1,682 actions by the plaintiff class against each individual defendant makes no sense. If the plaintiffs' class did sue the individual defendants in separate actions, the costs to both plaintiffs and to each defendant would be horrendous. The financial burden could easily consume the proceeds of any judgments. As well, a single plaintiff class action with some 1,682 individual defendants would lead to excessive, burdensome costs and complications. Failure to certify as a practical matter may insulate the defendants from any determination of liability: *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 at 347, 129 D.L.R. (4th) 110 (Div. Ct.), refusing leave to appeal.

[35] Certification of a defendant class provides an efficient procedural mechanism for the determination of the common issues in a complex proceeding involving multiple parties. *Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 29 O.R. (3d) 549 at 568, 137 D.L.R. (4th) 239 (Gen. Div.). It meets the policy objectives of the *CPA*.

[36] A certified class proceeding will bind all interested parties (plaintiff class members and defendant class members) and avoids a potential multitude of costly lawsuits which may lead to inconsistent results.

[37] All putative plaintiff class members will be bound by the result, other than those who may opt out of the proceeding.

[38] The matter of defendants opting out raises an issue of first impression.

[39] Section 12 of the *CPA* provides that the court may make any order considered "appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". The plaintiffs submit that an order can be made under s. 12 whereby the defendants are prohibited from opting out of the defendants' class. I disagree.

[40] Section 9 says that "Any member of a class… may opt out of the proceeding in the manner and within the time specified in the certification order." In my view, the right to opt out cannot be removed. Section 8(1)(*f*) provides that the certification order shall "specify the manner in which class members may opt out of the class proceeding". Section 17 provides the court with discretion in respect of the manner of giving notice. Notice can even be dispensed with, where appropriate. However, no authority is conferred upon the court to order that a member of a class may not opt out.

[41] The above conclusion is reflective of the legislative intent behind s. 9 of the *CPA.* In its *Report on Class Actions,* the Ontario Law Reform Commission recommended that the *CPA* should be drafted to grant the court the discretion to determine whether class members should be allowed to opt out. See Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), at 491. However, the Attorney General's Advisory Committee chose not to adopt this recommendation and specifically drafted the precursor to s. 9 to provide for an "Opt-Out Entitlement". See Ministry of the Attorney General, Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, February 1990), at 33. The Advisory Committee's report immediately preceded the enactment of the *CPA* and its draft provision on opting out is almost identical to s. 9.

[42] The right to opt out is also implicit in the majority of U.S. class action proceedings. Under Rule 23 of the United States *Federal Rules of Civil Procedure,* class members are allowed to opt out of an action brought under subdivision (*b*)(3), which deals with class actions in which monetary damages are sought. This is the category under which most class actions are brought. The absolute right of exclusion under this subdivision is implicit in the language of subdivision (*c*)(2) which states that:

> (2) In any class maintained under subdivision (*b*)(3), the court shall direct to the members of the class the best notice practicable under the circumstances… The notice shall advise each member that (A) the court will exclude the member from class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion …

[43] The commentary by the United States Advisory Committee on Civil Rules, which accompanied the redrafting of Rule 23, justified the inclusion of the "opt out right" as being based on "the interest of the individuals in pursuing their own litigation" and concluded that "[e]ven when a class action is maintained under subdivision (*b*)(3) this individual interest is to be respected". See Advisory Committee on Civil Rules, "Proposed Amendments to the Rules of Civil Procedure for the United States District Courts", 39 F.R.D. 69 (1966) at 104-105.

[44] More recently, the Supreme Court of the United States has re-emphasized its position, previously articulated in its decision in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), whereby, except in very limited circumstances, due process requires that, at a minimum, a

class member should have the opportunity to remove him or herself from the class. See *Esteban Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999) at 849. The Court made this statement in the context of addressing the scope of subdivision (*b*)(1)(B) of Rule 23, which applies to very limited circumstances (where there is a limited fund for recovery by the plaintiff class) and which does not allow for an opt-out right. The only other exception to the opt-out right is under subdivision (*b*)(2) of Rule 23, which deals with situations where the plaintiffs seek final injunctive relief or corresponding declaratory relief for the entire class.

[45] In my view, and I so find, the *CPA* does not allow the court to order that members of a class (whether a plaintiffs' class or a defendants' class) may *not* opt out of the proceeding.

[46] The present defendants imply in their submissions that most, or all, of the putative, unnamed defendant class members will simply opt out. This may be so, but that will be a matter for each one of them, on the advice of counsel, to decide.

[47] It is apparent that individual defendants would achieve considerable economy in respect of costs by remaining in the class proceeding rather than being individual defendants in separate actions or being individual defendants in a single, plaintiffs' class action.

[48] The plaintiffs have said they will commence a new plaintiff class action shortly, naming each of the 1,682 Air Canada pilots as individual defendants in all events, to safeguard their position because of a possible limitation of actions period expiry. While s. 28 of the *CPA* suspends a limitation period on the commencement of a class proceeding, that provision would seem to operate only in favour of a plaintiff class against a *named* individual defendant(s). Where a limitation period has expired it is problematical for a plaintiff to later add defendants. See for example *Shachar v. Bailey* (1989), 67 OR. (2d) 726 (Master); affirmed *loc. cit.,* at p. 732*n*; 34 C.P.C. (2d) 195 (H.C.J.).

[49] There are other possibilities. Plaintiffs might seek an order under rule 6.01 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 (the "rules"), that the action to be initiated against individual defendants be consolidated or heard at the same time as the class action at hand. Alternatively, the plaintiffs might seek a joinder of the defendant Air Canada pilots in the new action who have opted out of the class action at hand upon a certification, as necessary parties to the action at hand under rules 5.03(1), (4) and (5). The underlying principle is that

everyone concerned with the same issues be before the court at one hearing, unless this results in prejudice to any of the parties.

[50] One should be mindful of the originating purpose underlying defendant class actions in the United States. In *Hansberry v. Lee,* 61 S. Ct. 115 (1940), Mr. Justice Stone of the United States Supreme Court stated (at 118):

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued debatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interest of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

Section 5(1)(e): Do the proposed representative plaintiffs and defendants meet the suitability criteria set forth?

[51] The proposed representative plaintiffs, Patrick Berry, James Deluce, Jeffrey Karelsen, Robert James Simerson and Ernest Zurkan are Captains employed by Air Ontario. In my view, all of the proposed representative plaintiffs meet the prerequisites of the *CPA.* The proposed representative plaintiffs would fairly and adequately represent the interests of the class and do not have any apparent conflicts of interest. The litigation plan is somewhat embryonic given the complexities of this litigation, but this can be fashioned more fully through a case conference(s) with counsel.

[52] The proposed representative defendants would appear to fairly and adequately represent the interests of the proposed subclasses of defendants. A defendant class action proceeding is not confined to willing or consensual representative defendants so long as their interests are the same as the members of the class and the representative defendant will vigorously defend those interests.

[53] Section 4 of the *CPA* is not worded so as to confine classes to situations where there are willing defendants. “Any party” may bring the motion to certify.

[54] Section 5(1)(*e*)(ii) requires as a prerequisite to certification that a proposed representative defendant produce a plan for the proceeding that sets out a workable method of advancing the proceeding. The defendants, in opposing the plaintiffs’ certification motion, have not produced a litigation plan. However, given that s. 4 empowers a plaintiff to bring a certification motion classing defendants, it follows that unwilling defendants cannot frustrate the certification by refusing to produce a litigation plan.

[55] The court has the comprehensive authority to make any order necessary and appropriate to ensure the “fair and expeditious determination” of a class proceeding: ss. 10 and 12. A court may order that a workable plan of litigation be produced by a representative defendant. *Chippewas of Sarnia Band v. Canada (Attorney General), supra,* at 571-72.

CONCLUSION

[56] If the prerequisite criteria of s. 5(1) and (2) of the *CPA* are met, an order certifying the proceeding as a class proceeding *shall* be made as required under s. 8(1) and (2).

[57] Section 8(1)(*a*) requires that the plaintiff class be described. The plaintiff class is all pilots who were employed by Air Ontario and who were members of CALPA on March 28, 1995.

[58] The defendant class is all pilots who were employed by Air Canada and who were members of CALPA on March 28, 1995. The defendant class consists of the seven subclasses set forth above in these Reasons for Decision.

[59] Section 8(1)(*b*) requires that the representative plaintiffs be named. They are the five named plaintiffs: Patrick Berry, James Deluce, Jeffrey Karelsen, Robert James Simerson and Ernest Zurkan.

[60] The representative defendants are: for subclass 1—Tom Fraser and Peter Wallace; for subclass 2—Howard Malone; for subclass 3—Gary Dean and Yves Filion; for subclass 4—Denis Belhumeur and Greg Mutchler; for subclass 5—George Cockburn; for subclass 6—the defendants Lars T. Jensen and James Griffith.

[61] The proposed subclass 7 is included in the overall defendant class. However, s. 5(2) requires that there be a representative defendant for this subclass prior to certification. Therefore, before there can be a certification order, a representative defendant will have to be named for this subclass.

[62] Section 8(1)(*c*) requires that the nature of the claims or defences asserted be stated. The nature of the claims of the plaintiff class are those tort claims asserted in the fresh statement of claim. The defences of the defendant class are those asserted in the statement of defence. The defendants submit that the CALPA constitution and Merger Policy did not allow for the implementation of the merged seniority list in the event that a majority of Air Canada pilots did not support such implementation.

[63] Section 8(1)(*d*) requires that the relief sought by the plaintiff class be stated. The sought relief is that set forth in the fresh statement of claim.

[64] Section 8(I)(*e*) requires that the common issues be set out. The common issues in this class proceeding are:

1. Common Issues related to Conspiracy

    (a) Did the defendant Pulley and members of the subclasses 1 to 6 enter into an agreement giving rise to an actionable conspiracy?

    (b) Did the members of subclass 7, by failing to take steps to prevent their representatives on the Master Executive Council, the Local Executive Councils, the Negotiating Committee, the merger representatives and the members of SMMAC refusing to implement the Picher Award, impliedly enter into the agreement giving rise to the conspiracy?

    (c) Was the conduct of the defendant Pulley and the subclasses unlawful?

    (d) Should the defendants have known that injury would result to members of the plaintiff class? and

    (e) Were actions taken pursuant to the conspiracy binding on the members of the subclasses?

2. Common Issues related to Unlawful Interference with Economic Interests

(a) Was the opportunity of the plaintiffs to have CALPA negotiate an Integrated Seniority List with Air Canada and Air Ontario in accordance with the Picher Award a valid business interest or expectancy protected by law?

(b) Did the actions of the defendant Pulley and members of any subclasses interfere with the plaintiffs' business interests or expectancy?

(c) Were the actions of the defendant Pulley and members of the defendant subclasses unlawful? and

(d) Are the defendant Pulley and members of the defendant subclasses responsible in law for the actions of the particular defendants who interfered with the plaintiffs' business interests or expectancy?

3. Common Issues related to Interference with Contractual Relations

(a) Did the actions of the members of subclasses 3, 5 and 6 interfere unlawfully and intentionally with the performance of duties under the CALPA Constitution by the Air Canada MEC members including its Chairman, the Air Canada merger representatives and the members of the Negotiating Committee? and

(b) Are the members of subclass 7 liable to the plaintiffs for failing to take steps to prevent their representatives from rejecting the Picher Award, refusing to negotiate on the basis of the Picher Award or using any and all means to stop the implementation of the Picher Award?

4. Common Issues related to all Claims

(a) Did the CALPA Constitution contain an implied term that a declaration of merger by the CALPA president had to be supported by a majority of the pilots in each bargaining unit covered by the declaration?

(b) If there was such an implied term did a majority of the Air Canada pilots support the declaration of merger made on March 1, 1991?

(c) Would Air Canada have agreed to a seniority list for the Air Canada and Air Ontario pilots in accordance with the Picher Award if the defendants had in good faith attempted to cause such seniority list to be negotiated with Air Canada?

(d) What is the measure of damages for the claims?

(e) What are the past attrition rates and anticipated future attrition rates of pilots on the Integrated Picher Senior List and how quickly would members of the plaintiff class have moved up that list?

(f) What is the percentage dollar amount of maximum income that pilots receive when income is impacted by lifestyle decisions?

(g) What equipment would have been available in the past and would have been available in the future to the pilots on the Integrated Seniority List in accordance with the Picher Award? and

(h) What are the future income prospects of pilots employed by Air Canada?

[65] Section 8(1)(*f*) requires that the manner in which class members may opt out of the class be specified. The plaintiff class members may opt out of the plaintiff class by mailing or faxing a written notice to so opt out to plaintiffs' counsel prior to the opt-out date, yet to be fixed. Notice of certification shall be given to the plaintiff class members by mail not later than 75 days before the opt-out date.

[66] The defendant class members may opt out of the defendant class by mailing or faxing a written notice to so opt out to both the present defendants' and the plaintiffs' counsel prior to the opt-out date, yet to be fixed. Notice of certification shall be given to the defendant class members by mail not later than 75 days before the opt-out date.

DISPOSITION

[67] For the reasons given, I allow the certification motion of the plaintiffs; provided however, there will not be a certification order until those outstanding matters that are a prerequisite to certification have been dealt with (as referred to in paragraphs 50, 51, 57, 61 and 62 of these Reasons for Decision). Case conferences can be held to complete matters leading to a certification order.

AMENDMENT OF THE FURTHER AMENDED STATEMENT OF CLAIM

[68] As mentioned above, a draft fresh statement of claim is part of the motion record at hand. This was done to give a clear picture of the plaintiffs' intended pleading and allegations in this complex matter. The plaintiffs now move to amend the further amended statement of claim in the form of the fresh statement of claim. As well, defendants have been added. Some 1300

pilots in the defendant subclasses have been served with the plaintiffs' motion record. The defendants do not oppose this approach. There is no prejudice to the defendants through this being done.

[69] It is ordered under rule 26.01 that the further amended statement of claim be amended to be in the form of the fresh statement of claim. This is best done by filing the fresh statement of claim and leave is given in this regard. The proposed representative defendants for the subclasses of defendants who are not already party defendants are added as party defendants, and are to be included as defendants in the fresh statement of claim to be filed.

Motion granted.

Tab 6

Brazeau v. Attorney General (Canada)

CITATION: *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721
COURT FILE NO.: CV-15-532625-00CP
DATE: 2019/08/09

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CHRISTOPHER BRAZEAU and DAVID KIFT	)	*James Sayce* and *Janetta Zurakowski* for the Plaintiffs
Plaintiffs	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	*Greg Tzemenakis, Stephen Kurelek, Sean Stynes,* and *Diya Bouchedid* for the Defendant
Defendant	)	
	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: August 9, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a fee approval motion in an action under the *Class Proceedings Act, 1992*.[1] Under s. 32 (1) of the Act, an agreement respecting fees and disbursements between a solicitor and representative plaintiff shall be in writing and pursuant to s. 32 (2) the fee must be approved by the court.

[2] Class Counsel, Koskie Minsky LLP, seek the following Order:

a. that the fee payable to Koskie Minsky LLP with respect to the common issues phase of this class proceeding is set at $**6,660,000** in respect of legal fees, plus **$865,800** in respect of HST;

b. that the Class Proceedings Fund (the "Fund") is entitled to a levy in the amount of 10% of the net monetary award to which one or more persons in the class is entitled plus $318,388.03 in respect of the disbursement funding provided by the Fund;

[1] S.O. 1992, c. 6.

c. that the levy payable to the Fund pursuant to section 10 of Regulation 771/92 of the *Law Society Act*[2] out of the Aggregate Damages Award shall be fixed at **$1,280,857.23**.

d. that the disbursements payable, in addition to the fees payable are **$435,627.66** (inclusive of all applicable taxes);

e. that the Defendant shall pay Class Counsel $530,973, plus HST of $69,027, for a total of $600,000 pursuant to the Costs Order of Perell J. of June 5, 2019;

f. that the remaining $6,129,027 in fees, plus $796,773 in HST, ($6,925,800 total), shall be payable out of the Aggregate Damages Award;

g. that $200,000 in disbursements are to be paid by the Defendant to the Fund pursuant to the Costs Order of Perell J dated June 5, 2019, and the remaining $235,627.66 in disbursements is to be distributed out of the Aggregate Damages Award as follows: (i) current disbursements and $100,000 in future disbursements payable to Koskie Minsky LLP;(ii) $117,239.63; and, (iii) disbursements payable to the Fund in the amount of $118,388.03; and,

h. that a $15,000 honorarium shall be payable to each of David Kift and Christopher Brazeau out of the Aggregate Damages Award.

B. Factual Background

[3] Through the Correctional Service of Canada, the Federal Government operates penitentiaries and related penal institutions across Canada.

[4] Pursuant to the *Class Proceedings Act, 1992*,[3] Messrs. Brazeau and Kift sued the Federal Government about the operation of those penitentiaries. On behalf of a class of inmates who are seriously mentally ill, Messrs. Brazeau and Kift alleged that by placing mentally ill inmates in administrative segregation, the Federal Government breached the Class Members' rights under the *Canadian Charter of Rights and Freedoms.*[4]

[5] In 2015, pursuant to a contingency fee agreement, Christopher Brazeau, later joined by David Kift, retained Class Counsel, Koskie Minsky LLP, to prosecute the action against the Federal Government.

[6] For present purposes, the pertinent portions of the retainer agreements state:

> 9. Except for any Costs paid to Class Counsel as provided in paragraph 13 below, Class Counsel shall be paid its fees, as set out herein, upon achieving Success in the action, whether by obtaining judgment on any of the common or individual issues in favour of some or all class members or by obtaining a settlement that benefits one or more class members. The fees shall be paid by a lump sum payment to the extent possible, or (if a lump sum payment is not possible) by periodic payments out of the proceeds of any judgment, order or settlement awarding or providing monetary relief, damages, interest or costs to the Class or any Class Member.

[2] R.S.O. 1990. c. L.8.
[3] S.O. 1992, c. 6.
[4] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

> 10. In the event of Success, Class Counsel shall be paid an amount equal to any disbursements not already paid to them by the Defendants as Costs, plus applicable taxes, plus interest thereon in accordance with section 33(7)(c) of the CPA, plus the greater of:
>
> […]
>
> (d) If the Action is settled after a successful trial of the Common Issues, with individual issues including, without limitation, causation and damages, to be determined on an individual basis thereafter, thirty-three and one third percent (33 1/3 %) of the Recovery, less the fee portion of any costs already paid to Class Counsel, plus HST.

[7] On behalf of the Plaintiffs, Class Counsel applied for litigation funding and an adverse cost indemnity from the Class Proceedings Fund. The Fund approved the action for funding and for the costs indemnity.

[8] The action was commenced by way of Statement of Claim on July 17, 2015. An Amended Statement of Claim was filed on November 11, 2015. A Second Amended Statement of Claim was filed on July 4, 2016. Further amendments to the pleading were made as the case progressed.

[9] Canada initially opposed certification, but after certification records were exchanged containing expert and Class Member affidavits and after length negotiations, in 2016, on consent, the action was certified as a class proceeding.[5]

[10] After the consent certification motion, Class Counsel brought a motion for summary judgment on the certified common issues. It took several years to prosecute the summary judgment motion.

[11] On February 10, 2017, Canada delivered its Statement of Defence denying any liability.

[12] In the spring of 2018, the Plaintiffs agreed to adjourn the summary judgment motion to conduct settlement discussions. The parties met for four mediation sessions, June 5, 2018 in Toronto, July 19, 2018 in Montreal, and September 7, 2018 and November 16, 2018 in Toronto. The settlement negotiations and the mediations were unsuccessful.

[13] The summary judgment motion was heard over five days in February 2019. The evidentiary record included eighteen expert reports from eleven experts. Not counting the compendiums prepared for the argument of the motion, the evidentiary record for the summary judgment motion was approximately 31,000 pages. Messrs. Brazeau and Kift proffered: a five-volume motion record of 3,512 pages, a three-volume reply motion record of 2,129 pages, and a ten-volume brief of answers to undertakings of 6,196 pages. The Federal Government proffered a responding motion record of thirty-eight volumes and 14,288 pages. The six-volume transcript brief of the cross-examinations was 4,981 pages long. Messrs. Brazeau and Kifts' facta were 177 pages. The Federal Government's facta were 290 pages. The Books of Authorities were approximately 8,000 pages.

[14] I granted the summary judgment motion - in part - and I dismissed it - in part.[6] I found a class-wide procedural breaches of section 7 of the *Charter* and found additional substantive section 7 and section 12 *Charter* breaches for two subclasses. I awarded the Class Members $20 million in aggregate damages for vindication and deterrence for the *Charter* breaches to be paid

[5] *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836.
[6] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888.

into a fund for mental health services (the "Aggregate Damages Award") and directed individual issues trials to determine compensatory damages for each Class Member.

[15] I subsequently awarded $600,000 for legal expenses, all inclusive, which along with the award for disbursements yielded an award of costs on a partial indemnity basis of $800,000, all inclusive.[7]

[16] An appeal (currently returnable on November 5, 2019) before the Court of Appeal for Ontario, with potential for leave applications to the Supreme Court of Canada remain to be determined. Two motions for the individual issues framework process and the damages distribution protocol are still to be heard.

[17] There is significant work left to be done, leaving aside the individual issues phase of this litigation. It is estimated that Class Counsel will be required to devote time with a value of approximately $400,000-$500,000 during the post-judgment phase to argue motions and appeals, to give notice to the Class Members, and to communicate with Class Members. This does not include time that will be incurred on the individual issues trials for compensation to Class Members.

[18] This action was novel, large, complex and aggressively defended. There has been four years of hard-fought litigation.

[19] In total, Class Counsel devoted 3,704.8 hours of lawyer and student time to this action from commencement to July 11, 2019. The summary judgment motion was argued by James Sayce, a 2010 call. In summary, approximately 3,700 hours with a time value of $1,582,922.50 was incurred in the prosecution of the action.

[20] A rough breakdown of Class Counsel's work is set out in the following chart:

Pleadings and Claim Investigation	99.7 hours
Litigation Funding Application and Communications with Class Proceedings Fund	58.1 hours
Certification	616.5
Notice of Certification	7.5 hours
Case Management Conferences	23.6 hours
Settlement Negotiations and Mediations	115.1 hours
Communications with Class Members	426.5 hours
Summary Judgment Motion	to prepare and respond to expert reports – 99.7 hours
	preparation and attending cross-examinations - 547.8 hours
	legal research and drafting facta - 411.2 hours
	preparation of summary judgment motion - 923.2 hours
	argument of the motion, 5 court days

[21] The outcome of the summary judgment motion was a substantial success for the class.

[7] *Brazeau et al. v. Attorney General (Canada)*, 2019 ONSC 3422.

The Brazeau and Kift Class Action is the first institutional abuse class action to proceed to a determination on the merits. It is the first class action about administrative segregation. It is the first class action where aggregate damages have been awarded pursuant to section 24(1) of the *Charter* and s. 24 of the *Class Proceedings Act, 1992*. The judgment will bring access to justice to approximately 2,000 current and former prisoners who suffer from serious mental illness and who were placed in administrative segregation, which I found to be a type of solitary confinement.

[22] Class Counsel faced very significant risk when the action was commenced on a contingency basis in 2015. All of the issues about the constitutionality of administrative segregation were open and contentious issues, yet to be litigated and resolved.

[23] Class Counsel seeks approval from the court of fees in the amount of $6,660,000 plus HST which amounts to a contingency fee percentage of 33.3%. The precise fee and disbursement request is set out above in the introduction to these Reasons for Decision.

[24] Class Counsel's fee request represents a 33.3% contingency fee. The fees sought are equivalent to a multiplier of approximately 3.3.

[25] Messrs. Brazeau and Kift support the fee approval motion. It goes without saying that the Class Action was of ultimate importance to the Class Members. Messrs. Brazeau and Kift deposed that: (a) they were aware of the percentage of compensation Class Counsel would seek, at various stages of the case, if successful; (b) they knew that Class Counsel spent millions of dollars in fees and disbursements prosecuting the case without promise of payment, unless successful; they believe the fees sought are fair in all of the circumstances, especially considering the risks presented and the length of time the action to conclude; and (d) they believe that had Class Counsel not taken on this action, the Class Members never would have received compensation and vindication of their *Charter* rights.

C. Fee Approval

[26] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[8]

[27] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[9]

[28] The court must consider all the factors and then ask, as a matter of judgment, whether the

[8] *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

[9] *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

fee fixed by the agreement is reasonable and maintains the integrity of the profession.[10]

[29] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved. Class Counsel brought Messrs. Brazeau and Kifts' extraordinary high-risk action to a very substantial and significant outcome. Class Counsel more than earned their fee and it should be and is approved.

D. Honorarium

[30] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.[11] However, the court should only rarely approve this award of compensation to the representative plaintiff.[12]

[31] Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[13]

[32] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[14]

[33] Class Counsel seeks approval of an honorarium in the amount of $15,000.00 for Messrs. Kift and Brazeau.

[34] I agree that these honorariums are appropriate given the extraordinary contribution made by Messrs. Kift and Brazeau and given the bravery of their leadership.

[35] Contacting and instructing counsel was challenging for Messrs. Brazeau and Kift especially given their personal health circumstances and their continuing time in prison. Notwithstanding these challenges and notwithstanding hardships and experiences that for present purposes I note but need not recount, Messrs. Kift and Brazeau were proactive and directly involved in every step in this litigation. They made an extraordinary contribution that was instrumental to the success of the class action, and they each deserve an honourarium.

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[10] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).
[11] *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).
[12] *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).
[13] *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.
[14] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

E. Conclusion

[36] For the above reasons, I approve the retainer agreement and I grant Class Counsel's fee requests and the associated orders.

_____

Perell, J.

Released: August 9, 2019

CITATION: Brazeau et al. v. Attorney General (Canada) 2019 ONSC 4721
COURT FILE NO.: CV-15-532625-00CP
DATE: 2019/08/09

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHRISTOPHER BRAZEAU and DAVID KIFT
Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA
Defendant

REASONS FOR DECISION

PERELL J.

Released: August 9, 2019

Tab 7

Burke v. Hudson's Bay Co.

Peter Christopher Burke, Richard Fallis and A. Douglas Ross, personally and in a representative capacity *Appellants*

v.

Governor and Company of Adventurers of England Trading into Hudson's Bay and Investors Group Trust Company Ltd. *Respondents*

Indexed as: Burke *v.* Hudson's Bay Co.

2010 SCC 34

File No.: 32789.

2010: May 18; 2010: October 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Surplus — Ongoing defined benefit pension plan — Sale of division of company resulting in employees being transferred to new company — Transferred employees removed from former employer's pension plan and incorporated into new pension plan — At time of transfer, former employer's pension plan had significant projected surplus — Former employer transferred enough pension funds to cover transferred employees defined benefits but no surplus funds transferred — Whether there was an obligation on former employer to transfer a pro rata portion of surplus on sale — Whether former employer's obligations to transferred employees were satisfied by assuring their defined benefits — Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions — Pension plans — Expenses — Whether pension plan documentation allowed employer to charge plan administration expenses to fund.

In 1961, the Hudson's Bay Company ("HBC") provided a contributory, defined benefits pension plan for

Peter Christopher Burke, Richard Fallis et A. Douglas Ross, agissant en leur qualité personnelle et en leur qualité de représentants *Appelants*

c.

Gouverneur et Compagnie des aventuriers d'Angleterre faisant le commerce dans la Baie d'Hudson et la Compagnie de Fiducie du Groupe Investors Ltée *Intimés*

Répertorié : Burke *c.* Cie de la Baie d'Hudson

2010 CSC 34

N° du greffe : 32789.

2010 : 18 mai; 2010 : 7 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

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

Pensions — Régimes de retraite — Excédent — Régime de retraite à prestations déterminées qui continue d'exister — La vente d'une division de la société ayant donné lieu à la mutation d'employés à une autre société — Les employés mutés ont été dissociés du régime de retraite de leur ancien employeur et ont intégré un nouveau régime — Lors du transfert, le régime de l'ancien employeur affichait un excédent projeté important — L'ancien employeur a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent — L'ancien employeur était-il tenu de transférer une portion de l'excédent, déterminée au prorata, lors de la vente? — L'ancien employeur a-t-il honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées? — Pension Benefits Act, 1987, S.O. 1987, ch. 35.

Pensions — Régimes de retraite — Frais — Les documents relatifs au régime de retraite autorisaient-ils l'employeur à imputer les frais d'administration du régime à la caisse de retraite?

En 1961, la Compagnie de la Baie d'Hudson (« HBC ») offrait à ses employés un régime de retraite contributif

its employees. Under this defined benefit pension plan members of the plan were guaranteed a specified benefit upon retirement. For the first twenty years of existence, the plan was in deficit and HBC made additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus and HBC began paying plan administration expenses out of the fund.

In 1987, HBC sold its Northern Stores Division to the North West Company ("NWC") and approximately 1,200 employees were transferred from HBC to NWC. The companies entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits at least equal to those provided under the HBC plan. HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. At the time of the transfer, HBC's pension plan had an actuarial surplus of about $94 million. The companies discussed whether a portion of the actuarial surplus should be transferred; however, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

The transferred employees allege that HBC, as plan administrator, breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the actuarial surplus to the successor plan and that HBC improperly charged pension plan administration expenses to the pension fund for approximately six years prior to their transfer. The trial judge found in favour of HBC on the issue of administration expenses, but held that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. The disparate treatment of the beneficiaries was found to be a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. HBC appealed the issue of surplus and the transferred employees cross-appealed on the issue of administration expenses. The Court of Appeal allowed the appeal and dismissed the cross-appeal.

Held: The appeal should be dismissed.

An employer is obligated to pay for administration expenses when such an obligation is imposed by statute or common law. In this case, there were no statutory or common law obligations on HBC to pay administration

à prestations déterminées. Par ce régime de retraite à prestations déterminées, les participants étaient assurés d'obtenir une prestation fixe à la retraite. Au cours de ses vingt premières années d'existence, le régime accusait un déficit et HBC a versé des cotisations supplémentaires afin d'en assurer la solvabilité. En 1982, le régime a affiché son premier excédent actuariel et HBC a commencé à imputer à la caisse les frais d'administration du régime.

En 1987, HBC a vendu sa division des Magasins du Nord à la Compagnie du Nord-Ouest (« CNO ») et environ 1 200 employés de HBC ont été mutés à CNO. Les sociétés ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations au moins égales à celles prévues par le régime HBC. HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés. Au moment du transfert, le régime de retraite de HBC affichait un excédent actuariel d'environ 94 millions de dollars. Les sociétés ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

Les employés mutés soutiennent que HBC, à titre d'administratrice du régime, a manqué à son devoir fiducial d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent actuariel au régime subséquent et elle a imputé à tort les frais d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert. Le juge du procès a donné gain de cause à HBC sur la question des frais d'administration, mais il a conclu que l'excédent du régime était assujetti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Il était d'avis que le traitement différent accordé aux bénéficiaires contrevenait à une fiducie régie par l'equity et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. HBC a interjeté appel à l'égard de la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. La Cour d'appel a accueilli l'appel et a rejeté l'appel incident.

Arrêt : Le pourvoi est rejeté.

L'employeur est obligé d'acquitter les frais d'un régime de retraite si une telle obligation est imposée par une source de nature législative ou jurisprudentielle. En l'espèce, aucune loi ni règle de common law n'imposait

expenses. The original trust agreement as well as the plan text do not expressly address plan administrative expenses. Subsequent trust agreements included a provision which expressly allowed HBC to charge plan administration expenses to the fund. The new trust agreements merely confirmed what was already implicitly provided for in the original trust agreement. HBC was therefore permitted to charge plan administration expenses to the pension fund.

The issue as to whether HBC was required to transfer a portion of the actuarial surplus when it sold its Northern Stores Division to NWC raises a novel question in pension law as the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan. In all cases the interests in the surplus of a pension plan have to be determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions. Each situation must be evaluated on a case-by-case basis.

Here, subject to the text of the plan, the terms of the trust agreement, and relevant statutes, HBC, as plan administrator, had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees and to which exercise of discretion the employees were vulnerable. Therefore, a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan.

Pensions legislation is not a complete code but rather it establishes minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of those entitled to receive them under private pension plans. Here, HBC complied with the 1987 *Pension Benefits Act* when it transferred the pension assets to NWC. The terms of the relevant plan and trust documentation may impose a higher standard. Thus, HBC's compliance with the 1987 *Pension Benefits Act* is not a complete answer to the transferred employees' claim. It is necessary to examine the common law and equitable principles that govern interpretation of the plan and trust documentation.

In a defined benefit pension governed by trust principles, as in this case, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees' defined benefits are held in trust on their behalf. As beneficiaries, the employees have

à HBC l'obligation de payer ces frais. La convention de fiducie originale, ainsi que le texte du régime, ne traitent pas expressément des frais d'administration du régime. Les conventions de fiducie subséquentes autorisaient expressément HBC à imputer à la caisse les frais d'administration du régime. Les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale. Par conséquent, HBC pouvait imputer les frais d'administration du régime à la caisse de retraite.

La question de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu sa division des Magasins du Nord à CNO soulève une question nouvelle intéressant le droit applicable aux régimes de retraite, car le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé. Dans toutes les affaires, le droit à l'excédent d'un régime de retraite doit être déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables. Chaque situation appelle un examen au cas par cas.

En l'espèce, sous réserve du texte du régime, de la convention de fiducie et des lois applicables, HBC, en qualité d'administratrice du régime, avait à l'égard du régime de retraite un vaste pouvoir discrétionnaire, qu'elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés et auquel ces derniers étaient vulnérables. Par conséquent, un lien fiducial unissait HBC, en tant qu'administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite.

La loi sur les régimes de retraite n'est pas un code exhaustif; elle établit des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des personnes qui y ont droit en vertu des régimes de retraite complémentaires. En l'espèce, HBC a respecté les dispositions de la *Pension Benefits Act* de 1987 lors du transfert des éléments d'actif de la caisse de retraite à CNO. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure. Par conséquent, le respect des dispositions de la *Pension Benefits Act* de 1987 par HBC ne suffit pas à réfuter l'argument des employés mutés. Il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

Dans le cadre d'un régime de retraite à prestations déterminées régi par les principes de la fiducie, comme en l'espèce, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés

an equitable interest in the funds needed to cover their defined benefits. A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits. Additionally, the pension plan documents (the pension plan text and trust agreement), having regard to the operative language of the plan as a whole, do not contain any of the language that would typically give employees an entitlement to surplus. Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination, and therefore no floating equity in the actuarial surplus during continuation of the plan.

The fact that HBC may have voluntarily chosen to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. Moreover, employees have no right to compel surplus funding to provide a cushion against insolvency. As a defined benefit plan, HBC's duty was to ensure that funds at all times meet the fixed benefits promised by the employer. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded. Just because HBC had fiduciary duties as plan administrator does not obligate it under any purported duty of evenhandedness to confer benefits upon one class of employees to which they have no right under the plan. Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Thus, there was no duty of evenhandedness applicable to the surplus.

Finally, a beneficiary of a trust has the right to compel its due administration even if it does not have an equitable interest in all of the assets of the trust. In this case, because the transferred employees had an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents. The circumstances of this case do not suggest that the actuarial surplus was abused by HBC or used for an improper purpose.

sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds. Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime. En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie), eu égard aux termes performatifs du régime dans son ensemble, ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l'excédent. Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime, et donc aucun droit flottant en equity dans l'excédent actuariel pendant l'existence du plan.

Le fait que HBC ait librement décidé d'augmenter les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciales de l'employeur à ses actes gratuits. En outre, les employés n'ont pas le droit d'exiger que l'excédent actuariel soit utilisé pour parer au risque d'insolvabilité. Dans le cadre d'un régime à prestations déterminées, le devoir de HBC consistait à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel. Le fait que HBC avait des obligations fiduciales, en qualité d'administratrice du régime, ne la contraint pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. Ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possédaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'appliquait à l'égard de l'excédent.

Enfin, le bénéficiaire d'une fiducie est en droit d'en exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme les employés mutés possédaient un intérêt en equity dans les prestations déterminées, ils avaient le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime. Les circonstances de l'espèce ne laissent pas croire que HBC a utilisé l'excédent actuariel d'une façon ou à une fin irrégulière.

What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction. In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan documentation, the employees' rights and interests were limited to their defined benefits. HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

Cases Cited

Applied: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; **distinguished:** *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973; **referred to:** *North West Co. v. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL); *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245.

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HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi. Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaux envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciale de transférer quelque portion que ce soit de l'excédent actuariel.

Jurisprudence

Arrêt appliqué : *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678; **distinction d'avec l'arrêt :** *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973; **arrêts mentionnés :** *North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL); *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Frame c. Smith*, [1987] 2 R.C.S. 99; *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245.

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Loi modifiant la Loi sur les régimes de retraite, L.O. 2010, ch. 9, art. 68.

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David C. Moore and *Kenneth G. G. Jones*, for the appellants.

J. Brett Ledger, *Christopher P. Naudie* and *Craig T. Lockwood*, for the respondents.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal arises out of the sale of a division of the Hudson's Bay Company ("HBC") to the North West Company ("NWC"). The employees of the division were retained, but transferred to NWC in the sale, and their pensions were assured. The transferred employees were removed from the HBC pension plan and incorporated into a new successor plan. At the time of the transfer, the HBC plan had a projected surplus. HBC transferred enough of the pension fund to cover the transferred employees' defined benefits but did not transfer any of the surplus funds.

[2] The transferred employees allege that the employer breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the projected surplus to the successor plan. They argue that the result was uneven treatment: the remaining HBC employees benefited from a plan in surplus but the transferred employees did not. As a subsidiary issue, the transferred employees also argue that HBC improperly charged pension plan administration expenses to the pension

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Weiler et Gillese), 2008 ONCA 394, 236 O.A.C. 140, 67 C.C.P.B. 1, 40 E.T.R. (3d) 157, [2008] O.J. No. 1945 (QL), 2008 CarswellOnt 2801, qui a infirmé en partie une décision du juge Campbell (2005), 51 C.C.P.B. 66, 25 E.T.R. (3d) 161, 2005 CanLII 47086, [2005] O.J. No. 5434 (QL), 2005 CarswellOnt 7334. Pourvoi rejeté.

David C. Moore et *Kenneth G. G. Jones*, pour les appelants.

J. Brett Ledger, *Christopher P. Naudie* et *Craig T. Lockwood*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le pourvoi découle de la vente d'une division de la Compagnie de la Baie d'Hudson (« HBC ») à la Compagnie du Nord-Ouest (« CNO »). Au moment de la vente, les employés de la division n'ont pas été mis à pied; ils ont été mutés à CNO, et leur régime de retraite a été garanti. Les employés mutés ont été dissociés du régime de retraite de HBC et ont intégré un régime subséquent, créé à ce moment. Lors du transfert, le régime de HBC affichait un excédent projeté. HBC a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent.

[2] Les employés mutés soutiennent que l'employeur a manqué à son devoir fiducial d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent projeté au régime subséquent et son défaut d'y procéder a donné lieu à un traitement inégal : les employés demeurés en poste chez HBC ont bénéficié d'un régime excédentaire, contrairement aux employés mutés. Subsidiairement, les employés mutés font valoir que HBC a imputé à tort les frais

fund for approximately six years prior to their transfer.

[3] In the reasons that follow, I conclude that the transferred employees' claims fail on both grounds. I conclude that the pension plan documentation allowed HBC to charge plan administration expenses to the fund. I also conclude that there was no obligation on HBC to transfer a pro rata portion of the surplus on the sale. HBC's obligations to the transferred employees were satisfied by assuring their defined benefits.

[4] At the outset, it might be useful to set out the pension terminology relevant to the facts of this case. HBC provided a defined benefit pension plan to its employees. This means that the members of the plan were guaranteed a specified benefit upon retirement. A defined benefit plan stands in contrast to a defined contribution plan, where retirement benefits are based on contributions and the earnings on the contributions set out in the pension plan. Under either type of plan, contributions may be made by both the employer and employees or just the employer. In order to fund the defined benefits in this case, both HBC and the employees made contributions to the pension plan. For employees who obtained five years seniority, pension plan participation was a mandatory condition of employment at HBC. Employees were required to contribute to their pensions. The basic employee contribution requirement was set at 5% of annual earnings. HBC contributed any additional amount needed to ensure coverage of the employees' defined benefits. HBC's contribution was based on the assessment of an actuary. The actuary's calculations rested on certain assumptions — inflation rates, investment returns, and future employees, amongst other things. This is an exercise in estimation that frequently results in deviation between the actuary's assessment and the real state of the pension fund.

[5] An ongoing pension fund may be said to have an actuarial surplus when the actuary's prediction is that the fund has more assets than liabilities (i.e. the

d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert.

[3] Dans les motifs qui suivent, je rejette les deux moyens d'appel soulevés par les employés mutés. Je conclus que les documents relatifs au régime de retraite autorisaient HBC à prélever les frais d'administration du régime sur la caisse de retraite. Je conclus également que HBC n'était pas tenue de transférer une portion de l'excédent, déterminée au prorata, lors de la vente. Elle a honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées.

[4] Pour commencer, il serait utile d'exposer la terminologie pertinente des régimes de retraite eu égard aux faits de l'espèce. HBC offrait à ses employés un régime de retraite à prestations déterminées. Ainsi, elle garantissait aux participants une prestation fixe à la retraite. Cette formule se distingue du régime à cotisations déterminées, où les prestations de retraite sont fonction des cotisations, établies par le régime, et des revenus générés par celles-ci. Dans l'un et l'autre cas, les cotisations peuvent être versées par l'employeur et l'employé, ou par l'employeur seul. En l'espèce, à la fois HBC et les employés cotisaient au régime. La participation au régime de retraite était une condition impérative d'emploi à HBC après une période d'emploi de cinq ans. Les employés étaient tenus d'y cotiser. La cotisation de base d'un employé correspondait à 5 p. 100 de son revenu annuel. HBC versait le reste de la somme requise pour financer les prestations déterminées des employés. Le montant des cotisations de HBC était fixé par un actuaire dont les calculs s'appuyaient sur certaines hypothèses — taux d'inflation, rendement du capital investi, employés à venir, etc. Un tel exercice d'estimation se traduit fréquemment par des écarts entre l'évaluation de l'actuaire et l'état réel de la caisse de retraite.

[5] On peut dire d'une caisse de retraite qu'elle enregistre un excédent actuariel lorsque l'actuaire conclut que l'actif du régime est supérieur à son

defined benefits). Where the prediction is that the liabilities are greater than the assets, the fund is said to be in deficit. Because of the nature of the actuarial predictions, it is sometimes said that an actuarial surplus or deficit only exists on paper. If the pension plan is terminated, or wound-up, the assets and liabilities can be tallied and whether a fund is *actually* in deficit or surplus can be determined. Therefore, it is sometimes said that an actual surplus only crystallizes on plan termination.

[6] The employer's and employees' respective rights and obligations with respect to the defined benefits, contributions and surplus are set out in the pension plan documentation. In the present case there are two types of pension plan documents: the pension plan text and the fund management agreement (also referred to as the trust agreement). Gillese J.A. succinctly described the role of each document in her reasons (2008 ONCA 394, 236 O.A.C. 140, at paras. 35-36). To paraphrase her reasons, the pension plan text is a contract between the employer and the employee. The plan text sets out the administration of the pension plan and addresses matters such as funding obligations of the employer and employees, defined benefits and the method by which the plan will be administered. The plan text is not a stand-alone document, however, as it is not a tool for accumulating funds. Therefore, a second document is required. In this case, there is a trust agreement between HBC and the trustees of the pension fund. This document established and requires the maintenance of the HBC pension trust fund. Certain provisions of the pension text and the trust agreement will be reviewed in more detail in the analysis that follows below.

II. Facts

[7] HBC provided a pension plan for its employees ("the plan"). It is a contributory, defined benefits pension plan.

[8] The plan was established in 1961. For the first twenty years of existence, the plan was in deficit — the fund did not contain enough assets to cover the defined benefits of the employees. HBC made

passif (c.-à-d. les prestations déterminées). Par contre, s'il conclut que le passif est supérieur à l'actif, la caisse est tenue pour déficitaire. À cause de la nature des avis actuariels, on dit parfois que l'excédent ou le déficit actuariel n'existe qu'en théorie. S'il est mis fin au régime de retraite, ou si le régime est liquidé, on peut comptabiliser l'actif et le passif et déterminer si la caisse est *réellement* déficitaire ou excédentaire. C'est pourquoi on dit parfois que l'excédent réel d'un régime ne se cristallise qu'à la date à laquelle on met fin au régime.

[6] Les droits et les obligations respectifs de l'employeur et des employés au regard des prestations déterminées, des cotisations et de l'excédent sont définis dans les documents relatifs au régime de retraite. En l'espèce, le régime est constitué par deux types de documents : le texte du régime et la convention de gestion de la caisse (aussi appelée la convention de fiducie). Dans ses motifs, la juge Gillese a décrit brièvement le rôle de chaque document (2008 ONCA 394, 236 O.A.C. 140, par. 35-36). Pour paraphraser ses propos, le texte du régime est un contrat entre l'employeur et l'employé. Il explique le fonctionnement du régime et traite de questions telles que l'obligation de cotiser de l'employeur et des employés, les prestations déterminées et le mode d'administration du régime. Or, il n'est pas un document autonome puisqu'il ne prévoit pas l'accumulation des fonds, d'où la nécessité d'un deuxième document qui, en l'espèce, consiste en une convention de fiducie entre HBC et les fiduciaires de la caisse de retraite. Ce document a constitué en fiducie la caisse de retraite de HBC et en prévoit la continuation. J'examinerai en détail certaines dispositions du texte du régime et de la convention de fiducie dans l'analyse qui suit.

II. Les faits

[7] HBC offrait à ses employés un régime de retraite contributif à prestations déterminées (« le régime »).

[8] Le régime a été constitué en 1961. Au cours de ses vingt premières années d'existence, il accusait un déficit — l'actif de la caisse ne suffisait pas à couvrir les prestations déterminées des employés.

additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus. In response to the surplus, HBC began taking contribution holidays — meaning that it did not have to continue contributing to cover the defined benefits. The actuarial surplus also allowed HBC to pay for plan administration expenses out of the fund without affecting the defined benefits. In 1986, HBC attempted to withdraw $35 million of the estimated $76 million surplus in the fund. It abandoned this process, at least in part, because of the employees' adverse reaction.

[9] Although the original 1961 plan documentation provided that HBC's contributions were "entirely voluntary" and that payment of defined benefits under the plan were not guaranteed, the documentation also states that HBC intended to contribute the amounts deemed necessary on the basis of actuarial computations to provide the retirement benefits under the plan (art. 4 and 11.01). As indicated, HBC did make the payments that were required to fund the defined benefits under the plan when it was in deficit.

[10] In 1965, *The Pension Benefits Act, 1965*, S.O. 1965, c. 96, came into force which required employers to pre-fund their defined benefit pension plans to maintain prescribed solvency levels (A. N. Kaplan, *Pension Law* (2006), at p. 43). In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 ("*1987 PBA*") (the Act in force at the time relevant to this appeal), s. 56(1) provided:

> A pension plan is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.

[11] In the 1985 plan that was amended and restated on January 1, 1985, art. 4.04 provided that HBC was obligated to make contributions sufficient

Afin d'assurer la solvabilité du régime, HBC a versé des cotisations supplémentaires. En 1982, le régime a affiché son premier excédent actuariel, ce qui a incité HBC à s'accorder des périodes d'exonération de cotisations, son apport n'étant plus nécessaire pour couvrir le montant des prestations déterminées. L'excédent actuariel lui permettait également de payer les frais d'administration du régime à même la caisse sans entamer les fonds réservés aux prestations déterminées. En 1986, HBC a voulu retirer 35 millions de dollars de l'excédent de la caisse estimé à 76 millions de dollars. Elle a abandonné l'idée, entre autres, en raison de la réaction négative des employés.

[9] Même si les documents initiaux relatifs au régime, qui datent de 1961, précisaient à propos des cotisations de HBC qu'elles seraient [TRADUCTION] « tout à fait volontaires » et que le versement des prestations déterminées par le régime n'était pas assuré, ils prévoyaient également que HBC entendait cotiser les fonds jugés nécessaires, suivant des calculs actuariels, au versement des prestations de retraite prévues au régime (art. 4 et 11.01). Comme il est indiqué précédemment, HBC a cotisé des sommes suffisantes pour financer le régime de prestations déterminées quand ce dernier était déficitaire.

[10] En 1965, la *Pension Benefits Act, 1965*, S.O. 1965, ch. 96, a exigé des employeurs la capitalisation anticipée de leurs régimes de retraite à prestations déterminées afin d'en assurer le degré de solvabilité prescrit (A. N. Kaplan, *Pension Law* (2006), p. 43). Le paragraphe 56(1) de la *Pension Benefits Act, 1987*, S.O. 1987, ch. 35 (« PBA de 1987 »), en vigueur à l'époque visée par le litige, dispose :

> [TRADUCTION] Un régime de retraite n'est pas admissible à l'enregistrement s'il ne prévoit pas de financement suffisant pour assurer les prestations de retraite, les prestations accessoires et les autres prestations aux termes du régime de retraite, conformément à la présente loi et aux règlements.

[11] Dans le texte du régime modifié en date du 1er janvier 1985, l'art. 4.04 prévoyait l'obligation pour HBC de cotiser des fonds suffisants pour financer

to cover the defined benefits under the plan. Article 4.04 provided in part:

> The company shall from time to time, but not less frequently than annually, contribute such amounts to the Plan as are necessary, in the opinion of the Actuary, to provide the pension benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the requirements of the Act, after taking into account the assets in the Trust Fund, the earnings thereon, the required contributions of Members during the year and all other relevant factors.

[12] Therefore, notwithstanding the apparent voluntary nature of HBC's contributions at the outset in 1961, HBC did make all contributions necessary to fund the defined benefits under the plan. In any event, HBC, pursuant to art. 4.04, expressly undertook and was required to satisfy the defined benefits prescribed under the plan.

[13] In 1987, HBC sold its Northern Stores Division to NWC. NWC agreed to retain the Northern Stores employees. This resulted in approximately 1,200 employees being transferred from HBC to NWC. As part of the sale, HBC and NWC entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits "at least equal to those presently provided under [the HBC plan]". HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. The actuarial report showed that HBC had to transfer approximately $12.6 million to cover the defined pension benefits of the transferred employees.

[14] At the time of the transfer, the HBC plan had a significant actuarial surplus estimated to be about $94 million. HBC and NWC discussed whether a portion of the actuarial surplus should be transferred. However, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

[15] NWC contested the transferred amount on the basis that it did not sufficiently account for early

les prestations déterminées prévues au régime. Suit un extrait de l'art. 4.04 :

> [TRADUCTION] Au moins une fois l'an, la société cotise au régime la somme nécessaire, selon l'actuaire, pour verser aux participants les prestations de retraite accumulées pendant l'année en cours et pour amortir tout déficit actuariel ou perte actuarielle conformément aux prescriptions de la loi, compte tenu des facteurs pertinents, notamment l'actif du fonds en fiducie, ses revenus et les cotisations que sont tenus de verser les participants au cours de l'année.

[12] Ainsi, en dépit du caractère apparemment volontaire de ses cotisations à l'époque de la constitution du régime, en 1961, HBC a versé tous les fonds nécessaires pour financer le régime de prestations déterminées. Du reste, à l'art. 4.04, HBC s'était engagée expressément à financer les prestations déterminées prévues au régime, et elle y était tenue.

[13] En 1987, HBC a vendu sa division des Magasins du Nord à CNO, qui a convenu de garder à son service les employés des Magasins du Nord. Environ 1 200 employés de HBC ont donc été mutés à CNO. Dans le cadre de la vente, HBC et CNO ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations [TRADUCTION] « au moins égales à celles prévues par [le régime HBC] ». HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés, soit environ 12,6 millions de dollars, selon le rapport de l'actuaire.

[14] Au moment du transfert, le régime de HBC affichait un excédent actuariel important estimé à quelque 94 millions de dollars. HBC et CNO ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

[15] CNO a contesté la somme transférée, faisant valoir qu'elle ne suffirait pas au versement des

retirement benefits. The matter was heard before the Superintendent of the Pension Commission of Ontario. The Superintendent agreed with NWC and found that the transferred amount did not account for early retirement benefits. However, the Superintendent found that he did not have the jurisdiction to order a transfer of further funds to cover the shortfall. NWC brought an application in court to determine its rights under the agreement. Gotlib J. of the Ontario Court of Justice agreed with NWC and ordered the transfer of an additional $1.27 million to cover early retirement benefits (*North West Co. v. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] The issue of transferring the actuarial surplus was presented to the Superintendent. He held that he did not have the jurisdiction to determine issues of surplus entitlement.

III. Lower Court Decisions

A. *Ontario Superior Court of Justice (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis and A. Douglas Ross were Northern Stores employees who were transferred to NWC. They were appointed representatives of all the pension plan beneficiaries who were transferred to NWC. In their personal and representative capacity they claimed to be entitled to a portion of the actuarial surplus that existed in the HBC pension at the time of the transfer. They also sought to recover plan administration expenses that HBC charged to the fund, as well as the actuarial surplus funds that HBC used to take contribution holidays.

[18] Campbell J. heard the transferred employees' claims at the Ontario Superior Court of Justice. He concluded that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. Campbell J. reasoned that the remaining employees stood to benefit from a greater pool of assets, because the entire actuarial surplus remained with HBC. Conversely, the transferred

prestations de retraite anticipée. L'affaire a été soumise au surintendant de la Commission des régimes de retraite de l'Ontario, qui a donné raison à CNO. Cependant, à son avis, il n'avait pas compétence pour ordonner le transfert de fonds supplémentaires pour combler la différence. CNO s'est alors adressée au tribunal afin que soient déterminés les droits que lui conférait l'entente. Le juge Gotlib de la Cour de justice de l'Ontario a souscrit à la thèse de CNO et a ordonné le transfert d'une somme additionnelle de 1,27 million de dollars qui servirait au versement des prestations de retraite anticipée (*North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] La question du transfert de l'excédent actuariel a été soumise au surintendant, qui s'est dit incompétent pour trancher les questions relatives au droit à l'excédent.

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis et A. Douglas Ross font partie des employés des Magasins du Nord qui ont été mutés à CNO. Ils ont été désignés à titre de représentants de l'ensemble des bénéficiaires du régime de retraite mutés à CNO. En leur qualité personnelle et en leur qualité de représentants, ils ont prétendu avoir droit à une partie de l'excédent actuariel qu'affichait le régime de HBC au moment du transfert. Ils ont également demandé le remboursement des frais d'administration du régime prélevés sur la caisse par HBC, de même que des fonds provenant de l'excédent actuariel dont cette dernière s'était servie pour s'accorder des périodes d'exonération de cotisations.

[18] Le juge Campbell de la Cour supérieure de justice de l'Ontario a instruit les demandes présentées par les employés mutés. Il a conclu que l'excédent du régime était assujetti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Le juge Campbell a estimé que les employés demeurés en poste chez HBC auraient la chance de bénéficier d'une caisse

employees were deprived of the actuarial surplus that would have provided greater security for the payment and potential improvement of their benefits. The trial judge concluded that the disparate treatment of the beneficiaries was a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. The details of the remedy would be determined after further submissions from the parties.

[19] Campbell J. found in favour of HBC on the issue of expenses and concluded, based on contract principles, that HBC was entitled to charge plan administration expenses to the pension fund. Campbell J. also concluded that HBC was permitted to take contribution holidays. His conclusion on the latter issue was not appealed.

B. *Ontario Court of Appeal, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC appealed the issue of surplus to the Court of Appeal and the transferred employees cross-appealed on the issue of expenses. Gillese J.A., for a unanimous court, allowed the appeal and dismissed the cross-appeal.

[21] On the issue of surplus, Gillese J.A. determined that the matter could only be resolved by first determining whether the transferred employees had any entitlement to the actuarial surplus at the time of the transfer. If they did not, then HBC could not have had any obligation to transfer a portion of the actuarial surplus. Surplus entitlement is a matter of construction. Gillese J.A. analysed the language of the plan documentation and found that the documents did not contain any of the language that courts have found to establish employee entitlement to surplus. On the basis of several provisions in the plan text, Gillese J.A. found that the employees were entitled to only the defined benefits provided by the terms of the plan.

mieux garnie, parce que HBC avait conservé la totalité de l'excédent actuariel, tandis que les employés mutés se voyaient privés de ces fonds qui auraient mieux garanti leurs prestations et qui étaient susceptibles de les bonifier. Le juge du procès a conclu que le traitement différent accordé aux bénéficiaires contrevenait à une fiducie régie par l'equity et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. Les détails de cette mesure de réparation seraient déterminés une fois que les parties auraient présenté leurs observations à cet égard.

[19] Le juge Campbell a donné gain de cause à HBC sur la question des frais d'administration et, se fondant sur les principes du droit des contrats, a conclu que HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. Le juge Campbell a également conclu que HBC était autorisée à s'exonérer du versement des cotisations. Il n'a pas été interjeté appel de sa conclusion sur cette dernière question.

B. *Cour d'appel de l'Ontario, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC s'est pourvue devant la Cour d'appel sur la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. Dans une décision unanime, la juge Gillese a accueilli l'appel et a rejeté l'appel incident.

[21] Au sujet de l'excédent, la juge Gillese a conclu qu'elle ne pouvait trancher cette question qu'après avoir déterminé si les employés mutés avaient un droit quelconque à l'excédent actuariel au moment du transfert. Dans la négative, HBC ne pouvait avoir eu l'obligation d'en transférer une portion. Le droit à l'excédent est une affaire d'interprétation. Après avoir analysé le libellé des documents relatifs au régime, la juge Gillese était d'avis qu'ils ne contenaient aucune des formules reconnues par les tribunaux comme conférant un droit à l'excédent aux employés. Se fondant sur plusieurs dispositions du texte du régime, la juge Gillese a conclu que les employés n'avaient droit qu'aux prestations déterminées que leur accordait le régime.

[22] Gillese J.A. agreed with the trial judge that a fundamental principle of trust law is that the beneficiaries are to be treated with impartiality and an even hand. However, she noted, this principle is subject to the terms of the trust instrument. Gillese J.A. found that the plan documentation displaced the duty of even-handedness with respect to the actuarial surplus. Because the employees were only entitled to the defined benefits at the time of the transfer, the duty of even-handedness only required ensuring that the defined benefits were protected. In her opinion, the considerable discretion afforded to the employer on the use of actuarial surplus supported her conclusion.

[23] Based on the text of the plan documentation, Gillese J.A. found that HBC was entitled to charge plan administration expenses to the fund. Silence does not create a positive obligation on the employer to pay expenses. The plan text was silent on plan administration expenses; therefore, HBC was not obliged to pay out of its own pocket. Subsequent amendments to the documentation made this explicit, stating that administration costs could be paid out of the pension fund.

[24] Mr. Burke et al. ("Burke") appeal the decision on both issues.

IV. Issues

[25] I will deal with the issues in the reverse order of the Court of Appeal. First, did HBC properly pay the plan administration expenses from the pension fund? Second, was HBC obligated to transfer a portion of the actuarial surplus in the sale of Northern Stores?

V. Analysis

[26] Both issues in this appeal concern HBC's obligations with respect to surplus in the pension plan. Pension surpluses raise contentious issues that this Court has considered previously: *Schmidt*

[22] La juge Gillese a souscrit à la conclusion du juge du procès qu'un principe fondamental du droit des fiducies exige que les bénéficiaires soient traités de manière impartiale et égalitaire. Toutefois, a-t-elle fait remarquer, ce principe est assujetti à la convention de fiducie. Selon elle, les documents relatifs au régime supplantent le devoir de traitement égalitaire relativement à l'excédent actuariel. Comme les employés n'avaient droit qu'aux prestations déterminées au moment du transfert, le devoir de traitement égalitaire se limitait à la protection de ces prestations. À son avis, l'important pouvoir discrétionnaire conféré à l'employeur quant à l'utilisation de l'excédent actuariel étayait sa conclusion.

[23] Se fondant sur le libellé des documents relatifs au régime, la juge Gillese a conclu que HBC pouvait imputer les frais d'administration du régime à la caisse. L'absence d'une disposition sur le paiement des frais n'impose pas à l'employeur l'obligation positive de les acquitter. Le texte du régime ne prévoyait rien à l'égard des frais d'administration du régime; en conséquence, HBC n'était pas tenue de les payer de sa poche. Des modifications subséquentes aux documents ont clarifié la question, en permettant expressément le paiement des frais d'administration à même la caisse de retraite.

[24] M. Burke et les autres appelants (« le groupe de M. Burke ») ont interjeté appel du jugement rendu sur les deux questions.

IV. Questions en litige

[25] J'analyserai les questions dans l'ordre inverse de celui adopté par la Cour d'appel. Premièrement, HBC a-t-elle agi à bon droit en payant les frais d'administration du régime à même la caisse de retraite? Deuxièmement, HBC était-elle tenue de transférer une portion de l'excédent actuariel dans le cadre de la vente des Magasins du Nord?

V. Analyse

[26] Les deux questions dont notre Cour est saisie en l'espèce portent sur les obligations de HBC à l'égard de l'excédent accumulé par le régime de retraite. L'excédent d'une caisse de retraite soulève

v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678. In all these cases the interests in the surplus of the pension plan have been determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions.

A. *Plan Administration Expenses*

[27] In 1982, when the pension fund had its first actuarial surplus, HBC began paying plan administration expenses out of the fund. Burke alleges that HBC improperly charged these expenses to the fund and that HBC, itself, should have paid the expenses. They seek to reclaim the funds used to pay expenses from 1982 until they were transferred to NWC in 1987.

[28] This Court recently addressed the issue of plan administration expenses in *Kerry*. While this Court's reasons in *Kerry* were released after the Court of Appeal's decision in the present appeal, my view is that the issue was correctly decided by Gillese J.A. I will briefly address why HBC properly paid the expenses from the fund in accordance with the principles in *Kerry*, but the Court of Appeal's decision correctly analyses this issue in more detail.

[29] In *Kerry*, this Court determined that absent a statutory or common law authority creating an obligation on the employer to pay for expenses, such an obligation must arise from the text and the context of the pension plan documents (para. 40). There was no statutory obligation on HBC to pay expenses. Accordingly, Burke argues that the obligation on HBC derives from the plan documents and the common law. This argument was rejected at the Court of Appeal, and for the following reasons I would also reject this argument.

des questions litigieuses sur lesquelles notre Cour a déjà été appelée à se pencher : *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678. Dans toutes ces affaires, le droit à l'excédent a été déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables.

A. *Frais d'administration du régime*

[27] En 1982, année où le régime a affiché son premier excédent actuariel, HBC a commencé à payer à même la caisse les frais d'administration du régime. Le groupe de M. Burke prétend que HBC a irrégulièrement imputé ces frais à la caisse et qu'elle aurait dû les acquitter elle-même. Il sollicite le remboursement des fonds ayant servi au paiement de ces frais, de 1982 jusqu'à sa mutation à CNO, en 1987.

[28] Notre Cour a récemment traité de la question des frais d'administration d'un régime dans l'arrêt *Kerry*. Certes, nos motifs ont été publiés après l'arrêt de la Cour d'appel en l'espèce, mais j'estime que la juge Gillese a correctement tranché la question. Je traiterai brièvement des raisons pour lesquelles, selon les principes établis dans *Kerry*, HBC a agi à bon droit en payant ces frais à même la caisse, mais je rappelle que la Cour d'appel analyse correctement cette question plus en détail dans sa décision.

[29] Dans l'arrêt *Kerry*, la Cour a statué qu'en l'absence d'une source de nature législative ou jurisprudentielle qui obligerait l'employeur à acquitter les frais d'un régime de retraite, une telle obligation devrait découler du texte et du contexte des documents relatifs au régime (par. 40). Aucune loi n'imposait à HBC l'obligation de payer ces frais. Par conséquent, le groupe de M. Burke soutient que cette obligation découle des documents relatifs au régime et de la jurisprudence. Cet argument a été rejeté par la Cour d'appel et je suis d'avis de faire de même pour les motifs qui suivent.

[30] Burke argues that art. 21 of the original 1961 trust agreement imposes an obligation on the employer to pay plan administration expenses. The article provides:

21. COMPENSATION OF TRUSTEE

The Trustee shall be entitled to such compensation as may from time to time be mutually agreed in writing with the Company. Such compensation and all other disbursements made and expenses incurred in the management of the Fund shall be paid by the Company.

Burke puts particular emphasis on the last sentence of the provision and argues that "all other disbursements made and expenses incurred in the management of the Fund" is an ambiguous phrase and could include not only trustee expenses, but also additional plan administration expenses.

[31] In light of this broad wording, Burke argues that the ambiguity should be resolved having regard to the statements made in booklets distributed to the employees by HBC for the purpose of explaining their pension benefits. The HBC pension booklets for 1961, 1975 and 1980 stated that the entire cost of administering the plan will be borne or paid by the Company. Therefore, Burke argues that the combined effect of art. 21 and these booklets is that HBC improperly charged the plan administration expenses to the fund.

[32] I cannot accept this argument. In my opinion, art. 21 is not broad nor ambiguous. Article 21 deals with expenses incurred by the trustee "in the management of the Fund" and does not address plan administration expenses. The plan text, which deals with the administration of the plan, is silent on plan administration expenses. This Court reached the same conclusion in *Kerry*, where a similar article was found to impose an obligation on the employer to pay only for trustee expenses and not plan administration expenses. In my opinion, art. 21 is not ambiguous, as Burke suggests. The article

[30] Le groupe de M. Burke prétend que l'art. 21 de la convention de fiducie originale, qui date de 1961, impose à l'employeur l'obligation de payer les frais d'administration du régime. L'article est ainsi rédigé :

[TRADUCTION]

21. RÉMUNÉRATION DU FIDUCIAIRE

Le fiduciaire aura droit à la rémunération dont il aura convenu par écrit avec la société. Cette rémunération, ainsi que tous les autres débours et frais engagés dans le cadre de la gestion de la caisse, seront acquittés par la société.

Le groupe de M. Burke, insistant sur la dernière phrase de la disposition, fait valoir que la proposition [TRADUCTION] « tous les autres débours et frais engagés dans le cadre de la gestion de la caisse » est ambigüe et qu'elle pourrait viser non seulement les dépenses du fiduciaire, mais également les autres frais d'administration du régime.

[31] Invoquant le caractère général du libellé, le groupe de M. Burke prétend que l'ambiguïté devrait être résolue à la lumière des affirmations qui figurent dans les brochures distribuées par HBC à ses employés pour leur expliquer leur régime de retraite. Les brochures de 1961, 1975 et 1980 affirment que la totalité des frais relatifs à l'administration du régime seront assumés ou payés par la société. Partant, le groupe de M. Burke soutient que, compte tenu de l'art. 21 et des brochures, interprétés ensemble, HBC a agi irrégulièrement en prélevant sur la caisse les frais d'administration du régime.

[32] Je ne puis retenir cet argument. À mon avis, l'art. 21 n'est ni général ni ambigu. L'article 21 traite des dépenses engagées par le fiduciaire « dans le cadre de la gestion de la caisse » et non des frais d'administration du régime. Le texte du régime, qui porte sur l'administration de ce dernier, est muet sur la question des frais d'administration. La Cour est arrivée à la même conclusion dans l'arrêt *Kerry*, où elle a jugé qu'une disposition semblable imposait à l'employeur l'obligation de ne payer que les dépenses du fiduciaire, et non les frais d'administration du régime. Selon moi, l'art. 21 n'est pas

clearly outlines HBC's obligation with respect to trustee expenses and nothing else.

[33] In 1971, HBC entered into a new trust agreement. This new trust agreement included a provision which expressly allowed HBC to charge plan administration expenses to the fund. Again, in 1984, HBC entered into a new trust agreement. The 1984 trust agreement also expressly allowed HBC to charge plan administration expenses to the fund. Since the new trust agreements merely confirmed expressly what was already implicitly provided for in the original trust agreement, there is no need to discuss whether the new versions were valid as they introduce no new obligations or rights with respect to plan administration expenses.

[34] What, then, is the effect of the HBC pension booklets that stated that HBC would bear the entire cost of administering the pension plan? In light of my conclusion that art. 21 was unambiguous, it is not necessary to look to the booklets as an interpretative aid. Burke did not advance the argument in this Court that the statement in the booklets was a binding promise and created an estoppel.

[35] I would dismiss this ground of the appeal.

B. *Transfer of Surplus*

[36] The primary issue on this appeal is whether HBC was required to transfer a portion of the actuarial surplus when it sold Northern Stores to NWC in 1987. This is a novel question in pension law. The novelty arises from the fact that the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan.

[37] Burke argues that, because the transfer occurred in the context of an ongoing plan, plan administration principles should govern the transfer. He says that he has an equitable interest in the

ambigu, comme le prétend le groupe de M. Burke. Cette disposition décrit clairement l'obligation de HBC à l'égard des dépenses engagées par le fiduciaire, et rien d'autre.

[33] En 1971, HBC a conclu une nouvelle convention de fiducie, laquelle autorisait expressément HBC à imputer à la caisse les frais d'administration du régime. En 1984, HBC a conclu une autre convention de fiducie, qui comportait elle aussi une disposition expresse à cet effet. Puisque les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale et n'ont pas créé de nouvelles obligations ni de nouveaux droits à l'égard des frais d'administration du régime, il n'y a pas lieu de se pencher sur leur validité.

[34] Quel est donc l'effet des brochures sur le régime de retraite de HBC qui affirmaient que cette dernière supporterait la totalité des frais relatifs à l'administration du régime? Vu ma conclusion que l'art. 21 n'est pas ambigu, il n'est pas nécessaire de recourir aux brochures comme outil d'interprétation. Le groupe de M. Burke n'a pas prétendu devant la Cour que l'affirmation figurant dans les brochures était une promesse exécutoire et qu'elle emportait la préclusion.

[35] Je suis d'avis de rejeter ce moyen d'appel.

B. *Transfert de l'excédent*

[36] La principale question en litige dans le présent pourvoi est de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu ses Magasins du Nord à CNO en 1987. Il s'agit d'une question nouvelle intéressant le droit applicable aux régimes de retraite. Sa nouveauté tient au fait que le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé.

[37] Le groupe de M. Burke soutient que le transfert, survenu dans le contexte du prolongement du régime, était assujetti aux principes applicables à l'administration du régime. Il affirme avoir un droit

total assets of the fund and therefore he can bring a claim against HBC for breach of fiduciary duty and compel due administration of the fund. He says HBC, as a fiduciary, had the obligation to treat the beneficiaries of the fund with an even hand and that in not transferring a portion of the surplus in the fund for the benefit of the transferred employees, HBC breached its fiduciary duty of even-handedness.

[38] I will first address the question of whether HBC is a fiduciary in the circumstances of this case. Second, I will address the role of the *1987 PBA* in the transfer of assets to NWC. I will then turn to Burke's argument that he has an equitable interest in the total assets of the fund. After that, I deal with the even-handedness argument and finally the obligations of HBC in the due administration of the pension fund.

(1) HBC as Fiduciary

[39] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 408, La Forest J. endorsed the indicia that help recognize a fiduciary relationship set forth by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136:

> (1) [S]cope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

La Forest J. wrote that "Wilson J.'s mode of analysis has been followed as a 'rough and ready guide' in identifying new categories of fiduciary relationships" (see also D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 42).

[40] At para. 55 of her reasons, Gillese J.A. found that HBC, as pension plan administrator, was a fiduciary. Article 11.01 of the 1985 restatement of the pension plan designates HBC as the

en equity dans l'actif total de la caisse et pouvoir, en conséquence, intenter une action contre HBC pour violation de son devoir fiducial et exiger la bonne administration de la caisse. Selon lui, HBC était tenue, en sa qualité de fiduciale, d'accorder un traitement égalitaire aux bénéficiaires de la caisse et elle aurait manqué à ce devoir fiducial par son défaut de transférer une portion de l'excédent au profit des employés mutés.

[38] Je trancherai d'abord la question de savoir si HBC est une fiduciale dans le contexte qui nous occupe. J'examinerai ensuite le rôle de la PBA de 1987 dans le transfert des éléments d'actifs à CNO. J'analyserai par la suite la prétention du groupe de M. Burke selon laquelle il aurait un droit en equity dans l'actif total de la caisse. Enfin, je traiterai de l'argument relatif au traitement égalitaire et j'aborderai les obligations de HBC à l'égard de la bonne administration de la caisse de retraite.

(1) HBC agissant à titre fiducial

[39] Dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 408, le juge La Forest fait siennes les caractéristiques qui aident le tribunal à reconnaître une relation fiduciale énoncées par la juge Wilson dans *Frame c. Smith*, [1987] 2 R.C.S. 99, à la p. 136 :

> (1) [U]n certain pouvoir discrétionnaire peut être exercé, (2) ce pouvoir discrétionnaire peut être exercé unilatéralement de manière à avoir un effet sur les intérêts juridiques ou pratiques du bénéficiaire, et (3) une vulnérabilité particulière à l'exercice de ce pouvoir discrétionnaire.

Le juge La Forest a précisé que « la méthode d'analyse du juge Wilson a été suivie en tant que "guide sommaire et existant" pour identifier de nouvelles catégories de rapports [fiduciaux] » (voir aussi D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 42).

[40] Au paragraphe 55 de ses motifs, la juge Gillese a conclu que HBC, en sa qualité d'administratrice du régime, agissait à titre fiducial. L'article 11.01 de la reformulation du régime de

plan administrator with the power to "conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan". Article 11.01 provides:

11.01 Company Administration

The Plan shall be administered by the Company which shall determine all questions relating to the length of Continuous Service, eligibility, early or postponed retirement, and rates and amounts of Annual Earnings and Average Earnings for the purposes of the Plan and shall conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan, consistent, however, with the text of the Plan, the terms of the Trust Agreement, and the Act and the *Income Tax Act* (Canada). [Emphasis added.]

[41] Subject to the text of the plan, the terms of the trust agreement, and relevant statutes, there is no doubt that HBC had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees, and to which exercise of discretion the employees were vulnerable. Therefore, I agree with Gillese J.A. that in these circumstances HBC, as plan administrator, was a fiduciary and that a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan. As Gillese J.A. wrote, at para. 55, "[h]ad there been a legal obligation to transfer part of the surplus at the time of Sale and had it been found that the Bay failed to cause that to occur, the proper nomenclature would have been a finding that the Bay was in breach of its fiduciary obligations to the Transferred Employees." The question is whether there was such a legal obligation.

(2) The *Pension Benefits Act, 1987*

[42] HBC argues that s. 81 of the *1987 PBA* is a specialized regime for transferring pension assets

retraite de 1985 désigne HBC à titre d'administratrice du régime et lui confère le pouvoir de régler [TRADUCTION] « définitivement toutes les questions relatives à l'administration, à l'interprétation, au fonctionnement général et à l'application du régime ». L'article 11.01 est ainsi libellé :

[TRADUCTION]

11.01 Administration par la société

Le régime est administré par la société, qui tranche toutes les questions relatives à la durée du service ininterrompu, à l'admissibilité, à la retraite anticipée ou différée, ainsi qu'aux taux et aux montants de revenu annuel et de revenu moyen pour l'application du régime et règle définitivement toutes les questions relatives à l'administration, à l'interprétation, au fonctionnement général et à l'application du régime, en conformité toutefois avec le texte du régime, avec la convention de fiducie et avec la Loi et la *Loi de l'impôt sur le revenu* (Canada). [Je souligne.]

[41] Sous réserve du texte du régime, de la convention de fiducie et des lois applicables, il ne fait aucun doute que HBC avait, à l'égard du régime de retraite, un vaste pouvoir discrétionnaire, qu'elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés, et que les employés étaient vulnérables à l'exercice de ce pouvoir. Par conséquent, je conviens avec la juge Gillese qu'en l'espèce, HBC, en qualité d'administratrice du régime, agissait à titre fiducial et qu'un lien fiducial unissait HBC, en tant qu'administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite. Comme l'écrivait la juge Gillese au par. 55 : [TRADUCTION] « S'il avait existé une obligation juridique de transférer une portion de l'excédent lors de la vente, et s'il avait été déterminé que La Baie avait omis de faire en sorte que le transfert soit effectué, il aurait fallu dire, en conclusion, que La Baie avait manqué à ses obligations fiduciales envers les employés mutés. » Il s'agit de déterminer si une telle obligation lui incombait effectivement en droit.

(2) La *Pension Benefits Act, 1987*

[42] HBC prétend que l'art. 81 de la PBA de 1987 constitue un régime spécialisé, régissant le

and that it was simply required to comply with this regime, which it did. It says this situation is like that in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, where this Court found that the general trust rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), which allows beneficiaries to collapse a trust in certain circumstances, was displaced by legislative provisions.

[43] The transfer of pension assets to NWC was subject to the *1987 PBA* (decision of the Superintendent of the Pension Commission of Ontario, April 30, 1990, Reference C-8389). I note that this statute has been subsequently amended, with the most recent revision receiving Royal Assent as of May 2010. I would also note that the issue of surplus transfer when there is a transfer of pension assets is dealt with under the yet to be proclaimed s. 80(13) of the amended statute (S.O. 2010, c. 9, s. 68). Section 81 of the *1987 PBA* deems the transfer of pension assets in this case to be a continuation of the HBC plan, and it ensures the protection of the employees' defined benefits already accrued, as well as any other benefits provided under the plan. This section provides:

81.—(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

(a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension plan of the successor employer for the period of

transfert de l'actif d'un régime de retraite et qu'il suffisait qu'elle s'y conforme, ce qu'elle a fait. À son avis, la présente situation est semblable à celle qui était examinée dans l'arrêt *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973, où la Cour a statué que les dispositions législatives supplantent la règle de *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), en matière de fiducie, selon laquelle les bénéficiaires peuvent mettre fin à une fiducie dans certaines circonstances.

[43] Le transfert à CNO de l'actif du régime de retraite était assujetti à la PBA de 1987 (décision du 30 avril 1990 du surintendant de la Commission des régimes de retraite de l'Ontario, n^{o} de dossier C-8389). Je signale que cette loi a été modifiée depuis. La dernière modification a reçu la sanction royale en mai 2010. Je tiens également à signaler que la question du transfert de l'excédent dans le cadre du transfert d'éléments d'actif d'une caisse de retraite est traitée dans le par. 80(13), non encore promulgué, de la loi modifiée (L.R.O. 2010, ch. 9, art. 68). Suivant l'art. 81 de la PBA de 1987, qui protège les prestations déterminées accumulées ainsi que tous les autres avantages accordés aux employés par les régimes, le transfert de l'actif de la caisse en l'espèce est réputé prolonger le régime de HBC. Cet article est ainsi libellé :

[TRADUCTION]

81.—(1) Si un employeur qui cotise à un régime de retraite vend ou cède la totalité ou une partie de ses affaires ou de l'actif de ses affaires, ou l'aliène autrement, un participant au régime de retraite qui, à la suite de la vente, de la cession ou de l'aliénation, devient un employé de l'employeur subséquent et un participant au régime de retraite offert par l'employeur subséquent :

a) continue d'avoir droit aux prestations prévues aux termes du régime de retraite de l'employeur à l'égard de l'emploi en Ontario ou dans une province désignée jusqu'à la date de prise d'effet de la vente, de la cession ou de l'aliénation sans accumulation supplémentaire;

b) a droit au crédit dans le régime de retraite de l'employeur subséquent pour la période

membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

(2) Clause (1) (a) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and the pension plan of the successor employer shall be deemed to be a continuation of the employer's plan with respect to any benefits or assets transferred.

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

(4) Where a transaction described in subsection (1) occurs and the successor employer assumes responsibility in whole or in part for the pension benefits provided under the employer's pension plan, no transfer of assets shall be made from the employer's pension fund to the pension fund of the plan provided by the successor employer without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the employer's pension plan or that does not meet the prescribed requirements and qualifications.

[44] I am not persuaded that s. 81 resolves the issue. Nor do I see this as analogous to the situation in *Buschau*.

[45] Pensions legislation is not a complete code (*Buschau*, at para. 35). As this Court said in *Monsanto* (speaking of the *Pension Benefits Act*, R.S.O. 1990, c. P.8), the *PBA*'s "purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans" (para. 38 (emphasis added)).

d'affiliation au régime de retraite de l'employeur, afin de déterminer l'admissibilité à l'affiliation au régime de retraite de l'employeur subséquent ou le droit aux prestations aux termes de ce régime;

c) a droit au crédit dans le régime de retraite de l'employeur pour la période d'emploi chez l'employeur subséquent afin de déterminer le droit aux prestations aux termes du régime de retraite de l'employeur.

(2) L'alinéa (1) a) ne s'applique pas si l'employeur subséquent assume la responsabilité des prestations de retraite accumulées dans le régime de retraite de l'employeur. Le régime de retraite de l'employeur subséquent est réputé être un prolongement du régime de l'employeur à l'égard des prestations ou de l'actif transférés.

(3) Si une opération décrite au paragraphe (1) a lieu, l'emploi de l'employé est réputé, pour l'application de la présente loi, ne pas avoir pris fin en raison de l'opération.

(4) Si l'opération décrite au paragraphe (1) a lieu et que l'employeur subséquent assume la responsabilité totale ou partielle des prestations de retraite prévues aux termes du régime de retraite de l'employeur, aucun transfert de l'actif n'est fait de la caisse de retraite de l'employeur à celle du régime de retraite offert par l'employeur subséquent sans le consentement préalable du surintendant ou à l'encontre des conditions prescrites.

(5) Le surintendant refuse de consentir à un transfert d'actif qui ne protège pas les prestations de retraite et les autres prestations des participants et des anciens participants au régime de retraite de l'employeur ou qui ne répond pas aux exigences et aux conditions requises qui sont prescrites.

[44] Je ne suis pas convaincu que l'art. 81 tranche la question, ni que la présente situation est analogue à celle en cause dans *Buschau*.

[45] La loi sur les régimes de retraite n'est pas un code exhaustif (*Buschau*, par. 35). Ainsi que l'a affirmé la Cour dans *Monsanto* (au sujet de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8), la loi « vise à établir des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des participants, des anciens participants et des autres personnes qui ont droit à des prestations en vertu des

In my opinion, s. 81(5) does exactly that — establishes a minimum standard for the transfer of pension assets. The terms of the relevant plan and trust documentation may impose a higher standard.

[46] In this way it would not be inconsistent with the legislative scheme for the plan and trust documentation to require a higher standard than that set out in s. 81. By contrast, in *Buschau*, the application of the trust rule in *Saunders* would have allowed the employees to circumvent the statutory procedure and defeat the objective of the legislative scheme (para. 28). These concerns do not arise in the present case. Requiring an employer to transfer additional funds on a sale would not interfere with the procedure set out in s. 81, and would not impede the objective of protecting employees' pension benefits in the context of a sale. Thus, I cannot agree with HBC that compliance with the *1987 PBA* is a complete answer to Burke's claim.

[47] It is therefore necessary to turn to the common law and equitable principles that govern the interpretation of the plan and trust documentation.

(3) Common Law and Equitable Principles

[48] Where a pension plan is created in the form of a trust, trust principles will apply. If there is no express or implied declaration of trust, then the pension plan will be governed by the terms of the plan (*Schmidt*, at p. 639).

[49] The parties agree that the pension fund is held in trust and that it must be administered according to trust principles. Based on the text of the plan documentation, the trust extends to the total assets in the fund (art. 1, 1961 trust agreement).

[50] The trust instrument in this case incorporates the terms of the pension plan (art. 2, 1961

régimes de retraite complémentaires » (par. 38 (je souligne)). À mon avis, c'est exactement l'effet du par. 81(5) : il établit des normes minimales pour le transfert de l'actif d'un régime de retraite. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure.

[46] Ainsi, l'imposition par les documents constituant le régime et la fiducie d'une norme plus élevée que celle prévue à l'art. 81 ne serait pas contraire au régime législatif. À l'opposé, dans *Buschau*, l'application de la règle de *Saunders* en matière de fiducie aurait permis aux employés de se soustraire aux modalités prévues par la loi, ce qui allait à l'encontre de l'objectif du régime législatif (par. 28). De telles considérations ne sont pas présentes en l'espèce. Obliger l'employeur à transférer des fonds additionnels dans le cadre d'une vente ne menace pas les modalités prévues à l'art. 81 et ne nuirait pas à l'objectif de protéger les prestations de retraite des employés dans le contexte d'une vente. Par conséquent, je ne puis admettre la thèse de HBC selon laquelle le respect des dispositions de la PBA de 1987 suffit à réfuter l'argument du groupe de M. Burke.

[47] Par conséquent, il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

(3) Principes de common law et d'equity

[48] Lorsqu'un régime de retraite est constitué en fiducie, les principes de la fiducie s'y appliquent. En l'absence d'une déclaration expresse ou implicite de fiducie, le régime de retraite est régi par les dispositions du régime (*Schmidt*, p. 639).

[49] Les parties reconnaissent que la caisse de retraite est détenue en fiducie et qu'elle doit être administrée conformément aux principes de la fiducie. Aux termes des documents relatifs au régime, la fiducie porte sur tous les éléments d'actif de la caisse (article premier, convention de fiducie de 1961).

[50] En l'espèce, la convention de fiducie incorpore par renvoi les dispositions du régime (art. 2,

trust agreement). Thus, both documents are relevant in determining the rights and obligations of the employees and employer under the plan.

(a) *Equitable Interest*

[51] Burke relies on the statement in *Schmidt* that employees have an equitable interest in pension plan surplus prior to termination. He argues that "the absence of a specific legal interest in surplus . . . does not mean that no rights or obligations exist in relation to plan surplus while a pension plan is ongoing" (A.F., at para. 67 (emphasis omitted)). He argues that his equitable interest in the total assets of the fund gives him the ability to bring his claim against his employer for breach of fiduciary duty of even-handedness in its dealings (or lack thereof) with the actuarial surplus.

[52] Burke relies on the following passage in *Schmidt*:

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus. [Emphasis added; pp. 654-55.]

[53] In my view, it is necessary to first determine what is meant by the use of the phrase "equitable interest" in *Schmidt* and, second, to examine how this concept fits within the terms of this specific plan.

[54] Equitable interest typically means "an actual right of property, such as an interest under a trust" (J. McGhee, ed., *Snell's Equity* (31st ed. 2005),

convention de fiducie de 1961). Ainsi, ces deux documents sont pertinents dans l'analyse des droits et obligations des employés et de l'employeur en vertu du régime.

a) *Intérêt en equity*

[51] Le groupe de M. Burke invoque un passage de l'arrêt *Schmidt* selon lequel les employés ont un droit en equity sur l'excédent avant la cessation du régime. Selon lui, [TRADUCTION] « il ne faut pas déduire de l'inexistence d'un intérêt précis en common law dans l'excédent [. . .] l'inexistence de tout droit et de toute obligation relativement à l'excédent pendant l'existence du régime » (m.a., par. 67 (soulignement omis)). Il prétend que son intérêt en equity dans l'actif total de la caisse l'habilite à intenter une action contre son employeur pour violation de son devoir fiducial de traitement égalitaire dans l'utilisation qu'il fait — ou ne fait pas — de l'excédent actuariel.

[52] Le groupe de M. Burke invoque l'extrait suivant tiré de l'arrêt *Schmidt* :

> Pendant l'existence d'un régime sous forme de fiducie, le surplus est un surplus actuariel. Ni l'employeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. La distinction entre le surplus réel et le surplus actuariel signifie qu'il n'y a pas d'incompatibilité entre le droit de l'employeur à des périodes d'exonération de cotisations et le fait qu'il n'a pas le droit de récupérer le surplus accumulé à la cessation du régime. Le premier repose sur un surplus actuariel et le second, sur un surplus réel. [Je souligne; p. 654-655.]

[53] À mon avis, il faut commencer par définir ce qu'on entend par un « intérêt en equity », ou par le terme « droit en equity » employé dans l'arrêt *Schmidt*, pour ensuite déterminer comment s'applique ce concept dans le cadre du régime qui nous intéresse.

[54] Un intérêt en equity est généralement [TRADUCTION] « un véritable droit de propriété, tel l'intérêt détenu en vertu d'une fiducie » (J. McGhee,

at para. 2-05). The holder of an equitable interest owns that property in equity (S. J. Hepburn, *Principles of Equity and Trusts* (4th ed. 2009), at p. 63). According to *Snell's Equity* an equitable interest is distinct from mere equities, floating equities and equitable remedies, though the term "equity" is often used to refer to any or all of these more specific concepts (para. 2-01).

[55] The phrase "equitable interest" was only used once by Cory J. in the course of his judgment in *Schmidt*. The question, then, is in what sense did he use this phrase? In my view, the following observations can be made.

[56] First, it is clear that in a defined benefit pension governed by trust principles, employees have an equitable interest in their defined benefits. As in the case of a classic trust, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees' defined benefits are held in trust on their behalf. As beneficiaries, the employees have an equitable interest in the funds needed to cover their defined benefits.

[57] Second, and importantly, when Cory J. referred to the employees' equitable interest in the total assets of the fund, he was writing on the premise that the employees were entitled to the actual surplus on termination. This is clear from the language that follows his use of "equitable interest", which I repeat:

> Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

If the employees are entitled to actual surplus on termination then they do have an equitable interest in that surplus, and, when added to their defined

dir., *Snell's Equity* (31e éd. 2005), par. 2-05). Le détenteur d'un intérêt en equity dans un bien en est le propriétaire en equity (S. J. Hepburn, *Principles of Equity and Trusts* (4e éd. 2009), p. 63). Suivant *Snell's Equity*, un intérêt en equity se distingue des simples droits en equity, des droits flottants en equity et des recours d'equity, même si le terme « *equity* », en anglais, sert souvent à désigner ces notions spécifiques individuellement ou collectivement (par. 2-01).

[55] Dans ses motifs dans l'affaire *Schmidt*, le juge Cory ne mentionne qu'une seule fois le « droit en equity » des employés. La question qui se pose alors est de savoir ce qu'il entendait par là. On peut à bon droit, selon moi, faire les observations suivantes.

[56] Tout d'abord, dans le cadre d'un régime de retraite à prestations déterminées régi par les principes de la fiducie, les employés ont à l'évidence un intérêt en equity dans les prestations déterminées. Comme dans le cas d'une fiducie classique, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds.

[57] Ensuite, fait important, lorsque le juge Cory mentionne que les employés ont un droit, en equity, sur tous les éléments d'actif de la caisse, il part du postulat que les employés ont droit à l'excédent réel à la cessation du régime. C'est ce qui ressort clairement de la phrase qui suit celle où il parle du droit en equity des employés et que je répète :

> Ni l'employeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. [Je souligne.]

Si les employés ont droit à l'excédent réel à la cessation du régime, ils ont un intérêt en equity dans cet excédent. Or, le total de cet excédent et de leurs

benefits, this constitutes the total assets of the fund. Thus, I would agree with Cory J. that, where employees are entitled to actual surplus on termination, they have an equitable interest in the total assets of the fund.

[58] Cory J. did not elaborate on the significance, or content, of that equitable interest in the surplus while the plan is ongoing. However, it seems to me that it might be somewhat analogous to a floating equity. A floating equity attaches to, for example, the residue in a will. The residuary beneficiary does not immediately obtain an equitable interest in the residue of the estate, because the assets may be needed to pay debts. Even in the case of a solvent estate, it is still unclear what property constitutes residue until the administration of the estate is complete. The residuary beneficiary is therefore said to have a "'floating equity', which may or may not crystallise". A floating equity "protects the beneficiaries, not by giving them equitable interests, but by ensuring the due administration of assets by the personal representatives" (*Snell's Equity*, at para. 2-06).

[59] It appears to me that entitlement to surplus on termination is analogous to the entitlement of a residuary beneficiary. The vesting of actual surplus in the employees is contingent on (a) the plan terminating, (b) there being an actual surplus once the liabilities are satisfied and (c) the employees surviving the date of the termination of the trust.

[60] Do the transferred employees in this case have a floating equity in the total assets of the HBC pension fund during its subsistence? In my view, they do not. As I will explain, the plan text limits their interest to their defined benefits and, unlike the circumstances in *Schmidt*, they are not entitled to surplus on termination.

(b) *The Employees' Rights and Interests Under the Plan*

[61] The original pension plan text provides that the employees' rights and interests under the plan

prestations déterminées correspond à l'actif total de la caisse. Par conséquent, je partage l'avis du juge Cory selon lequel les employés qui ont droit à l'excédent réel à la fin du régime ont un intérêt en equity sur tous les éléments d'actif de la caisse.

[58] Le juge Cory n'a précisé ni la portée ni la teneur de ce droit en equity sur l'excédent d'un régime qui existe toujours. Or, une analogie avec un droit flottant en equity me semble possible. Un droit flottant en equity se rattache, par exemple, au reliquat d'une succession testamentaire. Le bénéficiaire du reliquat n'obtient pas immédiatement un intérêt en equity dans le reliquat de la succession, dont les éléments d'actif risquent d'être affectés en totalité au paiement des dettes. Même lorsque la succession est solvable, on ne peut déterminer les biens qui constitueront le reliquat qu'au terme de l'administration successorale. On dit donc du bénéficiaire du reliquat qu'il possède un [TRADUCTION] « "droit flottant en equity", qui se cristallisera ou non plus tard ». Un droit flottant en equity « protège les bénéficiaires, non pas en leur conférant un intérêt en equity, mais en assurant la bonne administration des éléments d'actif par les représentants successoraux » (*Snell's Equity*, par. 2-06).

[59] Selon moi, le droit des employés à l'excédent à la cessation du régime s'apparente à celui du bénéficiaire du reliquat. L'excédent réel ne leur est dévolu qu'à la réalisation des trois conditions suivantes : il est mis fin au régime, un excédent réel subsiste après la liquidation du passif et les employés survivent à la fin de la fiducie.

[60] En l'espèce, les employés mutés possèdent-ils un droit flottant en equity dans tous les éléments d'actif de la caisse de retraite de HBC pendant son existence? Je ne le crois pas. Comme je l'expliquerai, aux termes du texte du régime, leur intérêt se limite aux prestations déterminées, et ils n'ont pas droit à l'excédent lorsqu'il est mis fin au régime, comme c'était le cas dans l'affaire *Schmidt*.

b) *Les droits et intérêts conférés aux employés par le régime*

[61] Le texte initial du régime de retraite prévoit que les employés bénéficient uniquement des droits

are limited only to that which is expressly and specifically provided for in the plan.

11.03 *Rights in the Trust Fund:* . . . No Member or person entitled to benefits under the Plan has any right or interest in the Trust Fund except as expressly provided in the Plan; . . .

. . .

14.01 . . . There shall be no right to any benefit under this Plan except to the extent such right is specifically provided under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

[62] A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits.

[63] Under the original pension plan provisions in this case, the employees' entitlements in the event of plan termination were expressly limited to their defined retirement benefits:

12.024 *Apportionment of Balance of the Trust Fund to be Proportional:* Any apportionment within each group, in the order stated, shall be proportionate to but not in excess of the actuarially determined present values at the date of the termination of the Plan of their respective retirement benefits and accrued retirement benefits. [Emphasis added.]

[64] At the oral hearing of this appeal, counsel for Burke argued that art. 12.024 had to be interpreted in light of art. 12.022 and 12.023, which are other provisions dealing with plan termination. Counsel submitted that the operation of these provisions required that there had to be at least some employee entitlement to surplus on plan termination (transcript, at pp. 11-19). It was argued that art. 12 required a two-stage distribution to employees on plan termination: first, a distribution

et intérêts qui leur sont accordés expressément par le régime.

[TRADUCTION]

11.03 *Droits sur la caisse de retraite :* [. . .] Les participants et personnes ayant droit à des prestations en vertu du régime n'ont aucun autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime; . . .

. . .

14.01 . . . Le régime n'accorde aucun droit à quelque avantage ou prestation que ce soit, à moins que ses dispositions le prévoient expressément et que le fiduciaire dispose de fonds à cette fin.

[62] Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime.

[63] Selon les dispositions initiales du régime de retraite, les droits des employés dans le cas où il serait mis fin au régime se limitaient expressément à leurs prestations déterminées de retraite :

[TRADUCTION]

12.024 *Répartition proportionnelle du solde de la caisse de retraite :* Toute répartition au sein de chacun des groupes, dans l'ordre prévu, sera proportionnelle, mais non supérieure, à la valeur actuarielle de leurs prestations de retraite respectives et prestations de retraite accumulées à la date où il est mis fin au régime. [Je souligne.]

[64] À l'audition du pourvoi, l'avocat du groupe de M. Burke a fait valoir que l'art. 12.024 devait être interprété à la lumière des art. 12.022 et 12.023, qui traitent aussi de la cessation du régime. Selon l'avocat, l'application de ces dispositions exigeait que les employés aient à tout le moins un droit quelconque à l'excédent lorsqu'il serait mis fin au régime (transcription, p. 11-19). On a fait valoir que la distribution aux employés prévue à l'art. 12 comportait deux étapes : premièrement, la distribution des

of contributions plus credited interest (under art. 12.022); and second, a distribution of defined retirement benefits (under art. 12.023). The limitation in art. 12.024, it was argued, only applied to the second distribution, which meant that "in order to fully satisfy both of these two distributions, arithmetically, there would have to be a surplus on hand to enable that to be done on plan termination" (transcript, at p. 13).

[65] HBC argued that art. 12 operated on termination to provide members with their contributions (and credited interest), and then to "top up" that amount to provide the defined retirement benefits (transcript, at p. 37). Counsel argued that the limitation in art. 12.024 applied to apportionment upon plan termination, and therefore applied with respect to both art. 12.022 and 12.023. Interpreting art. 12.024 in this manner would limit the employees' entitlement on termination solely to their defined retirement benefits (transcript, at pp. 37-39).

[66] Articles 12.022 and 12.023, as set out in the original pension plan, are as follows:

12.022 *Allocation of the Trust Fund:* The Retirement Board shall then allocate to each Member, Retired Member (including Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) a benefit, payable monthly, of an amount actuarially equivalent to (or, in lieu of such benefit, if so determined by the Retirement Board with respect to any or all such Members, Retired Members and Terminated Members, a lump sum payment equal to) the total of his own contributions plus Credited Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions and Credited Interest in accordance with the Plan, theretofore received by him. If the Trust Fund is insufficient for this purpose, it shall be allocated to each Member, Retired Member ([including] Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) in the proportion that the amount of his contributions plus Credited

cotisations majorées de l'intérêt crédité (selon l'art. 12.022); deuxièmement, la distribution des prestations déterminées de retraite (selon l'art. 12.023). On a aussi soutenu que la limite prévue à l'art. 12.024 ne s'appliquait qu'à la deuxième étape, ce qui signifie que [TRADUCTION] « ces deux distributions ne pourront se faire intégralement, sur le plan arithmétique, que s'il existe un excédent suffisant au moment où il est mis fin au régime » (transcription, p. 13).

[65] HBC a fait valoir que l'art. 12 s'appliquait à la cessation du régime de façon que les participants recouvrent leurs cotisations (majorées de l'intérêt crédité) et reçoivent ensuite le montant additionnel nécessaire pour toucher leurs prestations déterminées de retraite (transcription, p. 37). Ses avocats ont soutenu que la limite prévue à l'art. 12.024 visait la répartition effectuée à la cessation du régime et qu'elle s'appliquait donc à la fois à l'art. 12.022 et à l'art. 12.023. Cette interprétation de l'art. 12.024 limiterait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées (transcription, p. 37-39).

[66] Voici les art. 12.022 et 12.023 du régime de retraite initial :

[TRADUCTION]

12.022 *Répartition de la caisse de retraite :* Le Comité de la caisse de retraite verse ensuite à tous les participants, participants retraités (y compris leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs bénéficiaires, le cas échéant) une prestation mensuelle dont le montant équivaut, sur le plan actuariel, (ou, au lieu d'une telle prestation, si le Comité de la caisse de retraite en décide ainsi à l'endroit d'une partie ou de l'ensemble des participants, participants retraités et participants sortis, un paiement forfaitaire équivalent) au total de leurs cotisations majorées de l'intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l'intérêt crédité qui leur ont été remboursées conformément au régime. Si la caisse de retraite est insuffisante pour ce faire, elle est répartie entre tous les participants, participants retraités ([y compris] leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs

Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions plus Credited Interest in accordance with the Plan, theretofore received by him, bears to the total of such amounts with respect to all such Members, Retired Members and Terminated Members.

12.023 *Application of Balance of the Trust Fund:* If any balance of the Trust Fund shall remain, it shall then be applied in the following manner:

First, for the benefit of Retired Members and such of the Terminated Members who have reached their Normal Retirement Date and are entitled to retirement benefits under Article 6 of the Plan, in each case upon the basis of their retirement benefits; and

Second, as to any balance remaining, for the benefit of all Members and such of the Terminated Members who are entitled to retirement benefits under Article 6 of the Plan but who have not yet reached their Normal Retirement Date, in each case upon the basis of their accrued retirement benefits at the date of such termination of contributions.

[67] I do not agree with counsel for Burke that art. 12 requires two distributions and operates to provide employees with an entitlement to a portion of the surplus on plan termination.

[68] When art. 12.022, 12.023 and 12.024 are examined, there is nothing in the wording used that indicates there are two separate distributions. Article 12.022 discusses the allocation of the trust fund between three groups of members: members, retired members and terminated members. Under art. 12.022, each of the members is allocated a sum that represents contributions plus credited interest less any retirement benefits already received. The opening words of art. 12.023 are, "[i]f any balance of the Trust Fund shall remain". It therefore deals with the application of the funds remaining after the initial allocation under art. 12.022. Article 12.023 acts to "top up" the amounts allocated to the three groups under art. 12.022 to a maximum of their defined benefits. It is not a separate distribution.

bénéficiaires, le cas échéant) selon la proportion que représente le montant de leurs cotisations majorées de l'intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l'intérêt crédité qui leur ont été remboursées conformément au régime, par rapport au total de ces montants à l'égard de tous les participants, participants retraités et participants sortis.

12.023 *Attribution du solde de la caisse de retraite :* S'il reste un solde dans la caisse de retraite, il est attribué comme suit : Tout d'abord aux participants retraités et aux participants sortis qui sont arrivés à leur date normale de retraite et qui ont droit à des prestations de retraite selon l'article 6 du régime, dans tous les cas en fonction de leurs prestations de retraite respectives; ensuite, s'il reste toujours un solde, à tous les participants et aux participants sortis qui ont droit à des prestations de retraite selon l'article 6 du régime, mais qui ne sont pas encore arrivés à leur date normale de retraite, dans tous les cas en fonction de leurs prestations de retraite accumulées à la date où ils ont cessé de verser leurs cotisations.

[67] Je ne partage pas l'avis de l'avocat du groupe de M. Burke que l'art. 12 exige une distribution en deux étapes et s'applique de façon à conférer aux employés un droit sur une partie de l'excédent lorsqu'il est mis fin au régime.

[68] Lorsqu'on examine les art. 12.022, 12.023 et 12.024, on constate que les termes employés dans ceux-ci n'indiquent aucunement qu'il existe deux distributions distinctes. L'article 12.022 parle de la répartition de la caisse de retraite entre trois groupes de participants : les participants, les participants retraités et les participants sortis. Selon l'art. 12.022, tous les participants reçoivent une somme correspondant aux cotisations majorées de l'intérêt crédité, moins les prestations de retraite déjà versées. L'article 12.023 commence par les mots suivants : [TRADUCTION] « [s]'il reste un solde dans la caisse de retraite ». Il traite donc de l'attribution des fonds qui restent après la répartition faite au départ conformément à l'art. 12.022. L'article 12.023 a pour effet de compléter les sommes réparties entre

Article 12.024 then operates in conjunction with art. 12.022 and 12.023, and deals with the apportionment of funds within the three groups of members. Article 12.024 expressly limits the apportionment within each of the three groups to the defined retirement benefits. Therefore, under art. 12, there is only one distribution of funds, which is expressly limited to the defined retirement benefits.

[69] Additionally, the pension plan documents (the pension plan text and trust agreement) do not contain any of the language that would typically give employees an entitlement to surplus. Except for the 1984 trust agreement, none of the pension plan documents include the "exclusive benefit" or "non-diversion" language which was found to result in an employee entitlement to surplus in *Schmidt* (p. 659). (Below, I will discuss why the inclusion of this language in the 1984 trust agreement also does not provide the employees with such an entitlement to the surplus.) Instead of using the language in *Schmidt*, the pension plan text indicates that the trust fund was held exclusively for the purposes of the *plan* and that no part could be diverted except for the purposes of the *plan* (e.g. art. 11.02 of the 1961 plan text).

[70] At the oral hearing, counsel for Burke argued that the purpose of the plan was to exclusively benefit employees, and that such a purpose could be inferred from the preamble to the trust agreement text (transcript, at pp. 8-10). If that purpose could be inferred, it was argued, an employee entitlement to the surplus existed in a similar manner to the employee entitlement to surplus that existed in one of the pension plans in *Schmidt*.

[71] The preamble provided in part:

WHEREAS the Company has established a Pension Plan (hereinafter referred to as "the Plan") for the

les trois groupes en application de l'art. 12.022 jusqu'à concurrence de leurs prestations déterminées. Il ne s'agit pas d'une distribution distincte. L'article 12.024 s'applique ensuite en combinaison avec les art. 12.022 et 12.023, et porte sur la répartition des fonds au sein des trois groupes de participants. L'article 12.024 limite expressément la répartition au sein des trois groupes aux prestations déterminées de retraite. Par conséquent, l'art. 12 ne prévoit qu'une seule distribution des fonds, expressément limitée aux prestations déterminées.

[69] En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie) ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l'excédent. Exception faite de la convention de fiducie de 1984, aucun des documents relatifs au régime de retraite ne contient de disposition relative au « bénéfice exclusif » ou à « l'interdiction d'utiliser à d'autres fins », comme celles qui, a-t-on conclu dans *Schmidt* (p. 659), conféraient à un employé un droit à l'excédent. (J'expliquerai ci-dessous pourquoi l'insertion de ces formules dans la convention de fiducie de 1984 ne confère pas non plus aux employés un tel droit à l'excédent.) Au lieu de reprendre les formules employées dans l'affaire *Schmidt*, le texte du régime de retraite indique que la caisse de retraite devait servir exclusivement aux fins du *régime* et qu'aucune partie de la caisse ne pouvait être utilisée à d'autres fins que celles du *régime* (p. ex., l'art. 11.02 du texte du régime de retraite de 1961).

[70] À l'audience, l'avocat du groupe de M. Burke a fait valoir que le régime avait été créé exclusivement au bénéfice des employés, et que cette fin pouvait être inférée du préambule de la convention de fiducie (transcription, p. 8-10). On soutient que, s'il est possible d'inférer cette fin, un employé avait droit à l'excédent, tout comme l'employé avait droit à l'excédent de l'un des régimes de retraite dans *Schmidt*.

[71] Le préambule disait notamment ce qui suit :

[TRADUCTION]

ATTENDU que la Société a constitué un régime de retraite (ci-après appelé « le régime ») au bénéfice

benefit of employees engaged in its Canadian business . . . .

It is obvious that the plan was established for the benefit of employees. But the wording says nothing about the specific entitlements of the employees under the plan. Nothing about those entitlements can be inferred from the words of the preamble. To determine those entitlements it is necessary to have regard to the operative language of the plan as a whole.

[72] I agree with Gillese J.A. (at para. 44 of her reasons) that, when read as a whole, the plan provisions indicate that the purpose of the plan is to provide employees with their defined retirement benefits. In *Schmidt*, in addition to the preamble, the operative language of the pension plan documents, including that the trust fund was for the "exclusive benefit" of employees, "non-diversion" language, and other provisions re-allocating the contributions of certain employees who left the plan, allowed the inference to be drawn that the employees were entitled to actual surplus on termination (see *Schmidt*, at pp. 658-59). The operative language of the HBC plan is to the contrary.

[73] Article 12.024 in the original plan expressly limited the entitlement of the employees on termination of the plan to their defined benefits. The provisions dealing with plan termination were amended by HBC in 1980 with the addition of art. 12.025 and restated in 1985 with art. 14.05, which expressly referred to surplus, specifically providing that HBC was entitled to the surplus on termination:

12.025 Refund of Surplus to Company:

If any balance of the Trust Fund shall remain after the satisfaction of all obligations of the plan in accordance with the provisions of this article 12, such balance shall be paid to the Company.

14.05 Excess Assets

If after provision for the satisfaction of all liabilities under the Plan has been made, there should

des employés travaillant pour son entreprise canadienne . . .

De toute évidence, le régime a été constitué au bénéfice des employés. Cependant, les termes employés ne disent rien des droits précis que le régime confère aux employés. Aucune inférence ne peut être tirée du texte du préambule quant à ces droits. Pour déterminer en quoi ils consistent, il faut tenir compte des termes performatifs du régime dans son ensemble.

[72] Je suis d'accord avec la juge Gillese (par. 44 de ses motifs) que, lues dans leur ensemble, les dispositions du régime indiquent qu'il a pour objet d'accorder aux employés leurs prestations déterminées de retraite. Dans *Schmidt*, outre le préambule, les termes performatifs des documents relatifs au régime de retraite, notamment l'affectation de la caisse de retraite au « bénéfice exclusif » des employés, « l'interdiction [de l']utiliser à d'autres fins » et d'autres dispositions réattribuant les cotisations de certains employés qui ont cessé de cotiser au régime, permettent de conclure que les employés avaient droit à l'excédent existant lorsqu'il a été mis fin au régime (voir *Schmidt*, p. 658-659). Les termes performatifs du régime de HBC ont l'effet contraire.

[73] L'article 12.024 du régime initial limitait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées. En 1980, HBC a modifié les dispositions traitant de la cessation du régime en ajoutant l'art. 12.025, reformulé en 1985 à l'art. 14.05, pour traiter expressément de l'excédent et préciser que HBC y avait droit à la cessation du régime :

[TRADUCTION]

12.025 Remboursement de l'excédent à la société :

S'il reste un solde quelconque dans la caisse de retraite après la liquidation complète du passif du régime en conformité avec les dispositions du présent article 12, ce solde est versé à la société.

14.05 Excédent

S'il reste un excédent dans la caisse de retraite après la liquidation complète du passif

> remain assets in the Trust Fund, such assets shall revert to the Company or be used as the Company may direct, subject to the provisions of the Act and the rules and regulations of the Department of National Revenue as amended from time to time.

[74] With respect to the 1984 trust agreement, I am in agreement with the analysis of Gillese J.A. (at paras. 49 to 53 of her decision) that the inclusion of "exclusive benefit" and "non-diversion" language in that trust agreement does not give the employees an entitlement to surplus. Burke argued that art. 2(d) and 11(ii) of the 1984 trust agreement confirm that employees have an entitlement to surplus. I agree with Gillese J.A.'s reasons for rejecting this argument. The 1984 trust agreement has to be read consistently with the then existing provisions of the pension plan, including art. 12.025. To read art. 2(d) and 11(ii) in the manner suggested by Burke would result in an inconsistency with art. 12.025 of the pension plan, which expressly confers the surplus on termination on HBC.

[75] Article 2(d) deals with expenses incurred for the sale and purchase of investments, taxes and other expenses and costs of administering the funds by the Trustee. It provides in part:

> The Trustee is hereby authorized to pay out of each of the appropriate Funds:
>
> (i) all brokerage fees, transfer taxes . . .
>
> (ii) all property, income and other taxes . . .
>
> (iii) amounts on account of income tax . . .
>
> (iv) all other expenses and costs of administering the Funds . . . .
>
> ALWAYS PROVIDED that no part of the funds may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the respective Plans and their beneficiaries.

> conformément au régime, cet excédent est versé à la société ou est utilisé au gré de celle-ci, sous réserve de la Loi ainsi que des règles et règlements du ministère du Revenu national et de leurs modifications.

[74] Quant à la convention de fiducie de 1984, je souscris à l'analyse de la juge Gillese (par. 49 à 53 de sa décision) selon laquelle l'insertion de dispositions relatives au « bénéfice exclusif » et à « l'interdiction d'utiliser à d'autres fins » dans cette convention de fiducie ne confère pas aux employés un droit sur l'excédent. Le groupe de M. Burke a fait valoir que l'al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 confirment que les employés ont droit à l'excédent. Je suis d'accord sur les motifs pour lesquels la juge Gillese a rejeté cet argument. Il faut interpréter la convention de fiducie de 1984 conformément aux dispositions du régime de retraite en vigueur à cette époque, et notamment à l'art. 12.025. Si l'on donnait à l'al. 2d) et au sous-al. 11(ii) l'interprétation proposée par le groupe de M. Burke, ces dispositions seraient incompatibles avec l'art. 12.025 du régime de retraite, qui prévoit expressément le versement de l'excédent à HBC à la cessation du régime.

[75] L'alinéa 2d) porte sur les dépenses engagées pour la vente et l'achat de placements, les taxes et les autres frais d'administration des fonds par le fiduciaire. Cet alinéa prévoit notamment ce qui suit :

> [TRADUCTION] La présente autorise le fiduciaire à payer toutes les dépenses suivantes à même les fonds appropriés :
>
> (i) les frais de courtage, les droits de mutation . . .
>
> (ii) l'impôt foncier, l'impôt sur le revenu et les autres taxes . . .
>
> (iii) les sommes à verser au titre de l'impôt sur le revenu . . .
>
> (iv) les autres frais d'administration du fonds . . .
>
> TOUJOURS À LA CONDITION qu'aucune partie des fonds ne peut être utilisée à d'autres fins que celles liées au bénéfice exclusif des participants aux régimes respectifs et de leurs bénéficiaires.

[76] It is in the context of authorized expenses that no part of the funds may be used for or diverted to any purpose other than those associated with the exclusive benefit of members. Having regard to the context, it is clear that these words do not afford a new entitlement to surplus which had not previously existed and which is expressly addressed in art. 12.025.

[77] Article 11(ii) provides in part:

> The Bay . . . shall have the right at any time . . . to change or modify by amendment any of the provisions of, and to terminate, this Agreement . . . provided that
>
> . . .
>
> (ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Funds being used for or diverted to purposes other than for the benefit exclusively of members of the Plans . . . .

[78] Article 11(ii) is addressed to changes. In other words, the "benefit exclusively of members" language must be read in the context of what the employees were entitled to before any change. The entitlements before any change were the defined benefits. No change may result in the funds being used other than for those defined benefits, except as specified. The provision does not confer on employees a new and additional entitlement they did not previously have.

[79] Additionally, the pension plan documents have made the pension plan text the dominant document over the trust agreement. For example, art. 23 of the 1961 trust agreement provided that it could be amended but that "[n]o such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan" and art. 11.03 of the 1961 pension plan provided that "[n]o Member . . . has any right or interest in the Trust Fund except

[76] C'est dans le contexte des dépenses autorisées qu'aucune partie des fonds ne peut être utilisée à d'autres fins que celles liées au bénéfice exclusif des participants. Compte tenu du contexte, les dispositions ci-dessus ne confèrent manifestement pas un droit à l'excédent qui n'existait pas auparavant et dont le sort est fixé expressément à l'art. 12.025.

[77] L'alinéa 11(ii) prévoit notamment ce qui suit :

[TRADUCTION]

> La Baie [. . .] peu[t] à son gré [. . .] remplacer ou modifier toute disposition de la présente convention et résilier la présente convention [. . .] pourvu que
>
> . . .
>
> (ii) ce remplacement, cette modification ou cette résiliation n'autorise, ne rende possible ni n'entraîne l'usage d'une quelconque partie du capital ou des revenus de la caisse à d'autres fins qu'au bénéfice exclusif des participants aux régimes . . .

[78] Le sous-alinéa 11(ii) porte sur les modifications. Autrement dit, il faut interpréter l'expression « au bénéfice exclusif des participants » en tenant compte des avantages auxquels les employés avaient droit avant toute modification à la convention. Le droit dont ils bénéficiaient avant toute modification était le droit aux prestations déterminées. Sauf disposition contraire, aucune modification ne peut entraîner l'utilisation des fonds à une autre fin qu'aux fins des prestations déterminées. Cette disposition ne confère pas aux employés un droit supplémentaire qu'ils n'avaient pas auparavant.

[79] De plus, les documents relatifs au régime de retraite ont fait en sorte que le texte du régime l'emporte sur la convention de fiducie. Par exemple, l'art. 23 de la convention de fiducie de 1961 prévoyait que celle-ci pouvait être modifiée, mais que [TRADUCTION] « cette modification ne peut autoriser ni rendre possible l'utilisation d'une partie de la caisse à d'autres fins que celles prévues au régime » et, selon l'art. 11.03 du régime de retraite de 1961, [TRADUCTION] « [l]es participants [. . .] n'ont aucun

as expressly provided in the Plan". The pension plan text and the trust agreement have to be read together, so if art. 2(d) and 11(ii) of the 1984 trust agreement were interpreted in the manner suggested by Burke, there would be a conflict with art. 12.025 of the pension plan text. However, even if one were to conclude that art. 2(d) and 11(ii) should be interpreted in a manner that creates such a conflict, which I do not, the conflict would be resolved in favour of art. 12.025, as the pension plan is the dominant document.

[80] Thus, the pension plan documents in this case use language different than that found in *Schmidt*. The documents do not contain language that would give the employees an entitlement to the surplus.

[81] Burke relies on *Schmidt* to argue that employee entitlement to surplus may only be restricted if the language of the documentation is "explicit", which he argues is not the case here. As HBC has pointed out, "explicit" does not prescribe a word formula. HBC's entitlement to surplus must be clear. In my opinion, it is. As Gillese J.A. noted at para. 8 of her reasons, and as the foregoing analysis demonstrates, the documentation in this case limited the employees' entitlement to their defined benefits provided for in the plan.

[82] Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination.

(c) *Fiduciary Duty of Even-Handedness*

[83] Burke says that HBC undertook to improve pension benefits from time to time. He argues that the transferred employees' interest in the actuarial surplus stems from the lost possibility of future improvements to their defined benefits as such improvements might be received by the employees

autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime ». Il faut interpréter conjointement le texte du régime de retraite et la convention de fiducie. Ainsi, si l'al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 recevaient l'interprétation proposée par le groupe de M. Burke, ils entreraient en conflit avec l'art. 12.025 du texte du régime. Toutefois, même si l'on statuait, contrairement à ce que je conclus, qu'il faut attribuer à l'al. 2d) et au sous-al. 11(ii) une interprétation qui occasionne un tel conflit, celui-ci serait résolu en faveur de l'art. 12.025, car le régime de retraite a préséance.

[80] Par conséquent, le libellé des documents relatifs au régime de retraite en l'espèce diffère de celui en cause dans l'affaire *Schmidt*. Les présents documents ne contiennent pas de disposition dont les termes conféreraient aux employés un droit sur l'excédent.

[81] Le groupe de M. Burke se fonde sur *Schmidt* pour soutenir que le droit de l'employé à l'excédent ne peut être restreint que si le libellé des documents l'indique « explicitement », ce qui, prétend-il, n'est pas le cas ici. Comme l'a souligné HBC, il n'est pas impératif d'utiliser une formule précise pour l'indiquer « explicitement ». Le droit de HBC à l'excédent doit être clair. À mon avis, il l'est. Comme la juge Gillese l'a souligné au par. 8 de ses motifs, et comme le démontre l'analyse qui précède, les documents en l'espèce limitaient les droits des employés aux prestations déterminées que leur accordait le régime.

[82] Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime.

c) *Devoir fiducial de traitement égalitaire*

[83] Aux dires du groupe de M. Burke, HBC s'était engagée à bonifier les prestations de retraite de temps à autre. Il prétend que l'intérêt dans l'excédent actuariel revendiqué par les employés mutés découle de la perte de cette possibilité d'amélioration de leur régime à prestations déterminées,

retained by HBC. Therefore, HBC breached its fiduciary duty of even-handedness by treating retained and transferred employees differently. I cannot agree. For the reasons I have given, employees, either retained or transferred, have no equitable interest in the surplus. The fact that an employer may voluntarily choose to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. The employees' equitable interest is limited to their defined benefits.

[84] At the oral hearing, counsel for Burke also argued that failing to transfer part of the surplus deprived the transferred employees of any protection against solvency swings that would be available to retained employees and that HBC was again in breach of its fiduciary duty of even-handedness (transcript, at p. 23). Although in practice actuarial surplus may provide a cushion against insolvency, employees have no right to compel surplus funding to provide this extra protection (*Kerry*, at para. 113). In the absence of such a right, no fiduciary obligation of even-handedness applies. As the plan was a defined benefit plan, HBC assumed the risk of ensuring that sufficient assets existed to fund the liabilities (i.e. defined benefits) of the pension. The employer's duty is to ensure that funds at all times meet the fixed benefits promised by the employer. Unlike defined contribution pension plans in which the employee bears the risk of fluctuations in capital markets, the risk of unfunded liabilities falls on HBC, as it is obligated under its defined benefit plan to provide the employees with their defined benefits. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded.

amélioration dont les autres employés de HBC sont susceptibles de bénéficier. Par conséquent, HBC aurait manqué à son devoir fiducial de traitement égalitaire en agissant différemment à l'égard des deux groupes d'employés. Je ne suis pas de cet avis. Pour les motifs que j'ai déjà exposés, ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possèdent d'intérêt en equity dans l'excédent. Le fait que l'employeur soit libre de décider d'augmenter ou non les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciales de l'employeur à ses actes gratuits. L'intérêt en equity des employés ne vise que leurs prestations déterminées.

[84] À l'audience, l'avocat du groupe de M. Burke a également fait valoir que le défaut de HBC de transférer une partie de l'excédent a privé les employés mutés de la protection contre les fluctuations de solvabilité de leur caisse dont les autres employés bénéficient toujours et constitue un autre manquement de la part de HBC à son devoir fiducial de traitement égalitaire (transcription, p. 23). Même si, dans la pratique, l'excédent actuariel peut servir à parer au risque d'insolvabilité, les employés n'ont pas le droit d'exiger qu'il soit utilisé pour leur assurer cette protection supplémentaire (*Kerry*, par. 113). Sans un tel droit, il n'existe pas d'obligation fiduciale de traitement égalitaire. Comme il s'agit d'un régime à prestations déterminées, HBC assumait le risque inhérent à l'obligation que l'actif soit suffisant pour couvrir le passif de la caisse, c'est-à-dire les prestations déterminées. Le devoir de l'employeur consiste à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Au contraire d'un régime de retraite à cotisations déterminées, dans le cadre duquel les employés assument le risque de fluctuations dans les marchés financiers, en l'espèce, le risque d'un déficit actuariel pèse sur HBC, puisqu'elle est tenue, par les modalités de son régime de retraite, de verser des prestations déterminées à ses employés. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel.

[85] The duty of even-handedness must be anchored in the terms of the pension plan documentation. It does not operate in a vacuum. The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer (*Waters'*, at p. 966). In its role as pension plan administrator, HBC was a fiduciary and had fiduciary obligations. However, just because HBC has fiduciary duties as plan administrator does not obligate it under any purported duty of even-handedness to confer benefits upon one class of employees to which they have no right under the plan. It was the obligation of HBC to carry out the terms of the pension plan documents and to ensure that in the administration of the plan they do not give an advantage or impose a burden when that advantage or burden is not found in the terms of the plan documents (*Waters'*, at pp. 966-67). Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Accordingly, there is no duty of even-handedness applicable to the surplus.

(d) *Due Administration of the Fund*

[86] Burke argues that it is their equitable interest in the total assets of the pension fund that allows them to compel due administration of the pension fund which they say would require transfer of a portion of the actuarial surplus. I agree that Burke has a right to compel the due administration of the pension trust fund, but not because they have an equitable interest in the surplus.

[87] A beneficiary of a trust has the right to compel its due administration even if he does not have an equitable interest in all the assets of the trust. In this case, because Burke has an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents (see *Snell's Equity*, at para. 27-24; *Waters'*, at pp. 1203-4).

[85] Le devoir de traitement égalitaire doit reposer sur le libellé des documents relatifs au régime de retraite; il n'existe pas dans l'absolu. Dans les situations mettant en cause au moins deux groupes de bénéficiaires, ce devoir exige que chaque groupe reçoive exactement les avantages conférés par les documents (*Waters'*, p. 966). En tant qu'administratrice du régime, HBC agissait à titre fiducial, ce qui lui imposait des obligations fiduciales. Toutefois, ses obligations fiduciales ne la contraignaient pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. HBC était tenue de donner effet aux documents relatifs au régime de retraite et de veiller, en administrant le régime, à ce qu'aucun avantage ne soit attribué ni fardeau imposé qui ne soit pas prévu dans ces documents (*Waters'*, p. 966-967). Ni les employés mutés ni les autres n'avaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'applique à l'affectation de l'excédent.

d) *Bonne administration de la caisse*

[86] Le groupe de M. Burke prétend que son intérêt en equity dans l'actif total de la caisse de retraite l'habilite à en exiger la bonne administration, ce qui nécessite, selon lui, le transfert d'une portion de l'excédent actuariel. Certes, le groupe de M. Burke a le droit d'exiger la bonne administration de la caisse de retraite, mais ce droit ne tient pas au fait qu'il aurait un intérêt en equity dans l'excédent.

[87] Le bénéficiaire d'une fiducie est en droit d'en exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme le groupe de M. Burke possède un intérêt en equity dans les prestations déterminées, il a le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime (voir *Snell's Equity*, par. 27-24; *Waters'*, p. 1203-1204).

[88] Thus, the employer does not have free rein in its use of the actuarial surplus. The obligations of the employer are governed by the terms of the pension plan. Thus, an employer is only permitted to use actuarial surplus in a way that is consistent with the plan documentation.

[89] It is the trustee's obligation to ensure that funds held in trust are distributed in a manner that is consistent with the terms of the trust. In the present case, this obligation on the trustee was made express in the original trust agreement:

> The Retirement Board may from time to time require the Trustee to make payments out of the Fund to an insurer and to such persons, beneficiaries, personal representatives in such amounts, for such purposes and in such manner as the Retirement Board may from time to time in writing direct; provided that no payments shall be made out of the Fund until the Retirement Board shall have certified to the Trustee in writing that such payments are in accordance with the terms and conditions of the Plan. [Emphasis added.]

The trustee's role is to ensure that the funds are distributed in accordance with the plan and that any actuarial surplus is not abused by the employer and used for an improper purpose.

[90] While the record before this Court is sparse on the details of the communications between HBC and the trustees of its pension fund, I find it difficult to see how the circumstances of this case could suggest an improper purpose on the part of HBC.

[91] What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction.

[92] In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan

[88] C'est donc dire que l'employeur ne peut pas user de l'excédent actuariel à son gré. Ses obligations sont régies par les dispositions du régime de retraite. Par conséquent, il ne peut utiliser cet excédent que pour des fins compatibles avec celles prévues dans les documents relatifs au régime.

[89] Il incombe au fiduciaire de veiller à ce que les fonds détenus en fiducie soient distribués conformément aux conditions de la fiducie. En l'espèce, cette obligation du fiduciaire était prévue expressément en ces termes dans la convention de fiducie originale :

> [TRADUCTION] Le Comité de retraite peut ordonner par écrit au fiduciaire de verser un montant déterminé, par prélèvement sur la caisse, à un assureur et aux personnes, bénéficiaires et représentants successoraux désignés, aux fins et de la manière précisées dans ses instructions, à la condition qu'aucun versement ne soit effectué sans que le Comité de retraite ait au préalable attesté par écrit au fiduciaire que ce versement est conforme aux dispositions du régime. [Je souligne.]

Le fiduciaire a pour rôle de veiller à ce que les fonds soient distribués conformément au régime et à ce que l'employeur n'utilise pas un excédent actuariel d'une façon ou à une fin irrégulière.

[90] Certes, le dossier qui a été présenté à la Cour était avare de détails sur les communications entre HBC et les fiduciaires de la caisse de retraite, mais je vois mal en quoi les circonstances pourraient laisser croire que HBC aurait utilisé les fonds à des fins inappropriées en l'espèce.

[91] HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est en outre d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi.

[92] Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux

documentation, the employees' rights and interests were limited to their defined benefits. The plan documentation permitted HBC to take contribution holidays and charge administrative expenses to the plan. Moreover, if an individual employee had left HBC, either voluntarily or by reason of discharge, that individual employee would not be entitled to any portion of the actuarial surplus under the terms of the plan.

[93] HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

VI. Conclusion

[94] I would dismiss the appeal on the issue of plan administration expenses. The HBC pension plan did not impose an obligation on HBC to pay plan administration expenses. HBC was permitted to charge plan administration expenses to the pension fund. The issue of whether HBC was permitted to take contribution holidays was not appealed. However, the language in the pension plan documents indicates that the employer's contributions were determined by an actuary. Therefore, the trial judge was correct in concluding that HBC was permitted to take contribution holidays.

[95] I would also dismiss the appeal on the issue of the transfer of the surplus. Gillese J.A. correctly found that the transferred employees did not have an equitable interest in the surplus of the pension fund. Their only interest was in their defined benefits. As the defined benefits were protected in the transfer, HBC did not breach any fiduciary obligation that it owed.

[96] I should emphasize that this decision depends upon the text and context of the pension plan documentation that was before this Court. An analysis of that documentation leads to the finding

termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. Ces documents habilitaient HBC à s'accorder des périodes d'exonération de cotisations et à imputer les frais d'administration à la caisse. De plus, selon les dispositions du régime, l'employé qui quittait HBC, de son gré ou par suite d'un congédiement, n'avait droit à aucune portion de l'excédent actuariel.

[93] En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaux envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciale de transférer quelque portion que ce soit de l'excédent actuariel.

VI. Conclusion

[94] Je suis d'avis de rejeter le pourvoi en ce qui concerne la question des frais d'administration du régime. Le régime de retraite de HBC n'obligeait pas cette dernière à en assumer les frais d'administration. HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. La question de savoir si HBC pouvait s'accorder des périodes d'exonération de cotisations n'était pas portée en appel. Toutefois, aux termes des documents relatifs au régime, les cotisations de l'employeur étaient déterminées par un actuaire. Par conséquent, j'estime juste la conclusion du juge du procès que HBC était autorisée à s'accorder de telles périodes.

[95] Je suis également d'avis de rejeter le pourvoi en ce qui concerne la question du transfert de l'excédent. La juge Gillese a conclu, à bon droit, que les employés mutés ne possédaient aucun intérêt en equity dans l'excédent de la caisse de retraite. Ils avaient seulement un intérêt dans leurs prestations déterminées. Comme ces dernières ont été protégées dans le cadre du transfert, HBC n'a manqué à aucune obligation fiduciale lui incombant.

[96] Je tiens à souligner que la présente décision découle du libellé et du contexte des documents relatifs au régime de retraite soumis à la Cour. L'analyse de ces documents mène à la conclusion

that the employees are not entitled to any portion of the surplus on their transfer to NWC. This decision does not purport to deal with other situations involving actuarial surplus and plan transfer. Each situation must be evaluated on a case-by-case basis. Specifically, the resolution of the issue of surplus transfer when the pension plan documents indicate that employees are entitled to surplus on plan termination is best left to another case where that issue arises.

[97] The Court of Appeal's ruling on costs was not challenged in this Court. Gillese J.A. found that for this case it was appropriate for costs to be paid out of the pension trust fund because this case dealt with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries (*Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). The parties submit that this is an appropriate case for costs in this Court to be paid to both parties on a full-indemnity basis out of the trust fund. Therefore, in accordance with the terminology used in this Court, I order costs on a solicitor-and-client basis in this Court, including costs of the leave application, to be paid to both parties out of the trust fund.

Appeal dismissed with costs.

Solicitors for the appellants: Bellmore & Moore, Toronto.

Solicitors for the respondents: Osler, Hoskin & Harcourt, Toronto.

que les employés n'avaient droit à aucune part de l'excédent au moment de leur mutation à CNO. La présente décision ne prétend pas répondre à d'autres situations mettant en cause un excédent actuariel et le transfert d'un régime. Chaque situation appelle un examen au cas par cas. Tout particulièrement, il est préférable de laisser irrésolue la question du transfert de l'excédent d'un régime dont les documents accordent aux employés un droit à l'excédent à la cessation du régime pour la trancher lorsqu'elle sera éventuellement soulevée dans un autre pourvoi.

[97] Il n'était pas interjeté appel, devant la Cour, de la décision de la Cour d'appel quant aux dépens. La juge Gillese était d'avis qu'il convenait dans ce cas de prélever les dépens sur la caisse de retraite parce que le litige portait sur des questions intéressant la bonne administration de la caisse de retraite détenue en fiducie et que leur règlement allait profiter à tous les bénéficiaires (*Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). Les parties font valoir qu'il conviendrait, en l'espèce, que la Cour accorde les dépens devant la Cour sur la base d'une indemnisation totale aux deux parties et ordonne qu'ils soient prélevés sur la caisse de retraite. Pour reprendre la formule usuelle, par conséquent, j'accorde les dépens devant la Cour aux deux parties sur la base procureur-client, y compris les dépens relatifs à la demande d'autorisation d'appel, et ordonne qu'ils soient prélevés sur la caisse de retraite.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Bellmore & Moore, Toronto.

Procureurs des intimés : Osler, Hoskin & Harcourt, Toronto.

Tab 8

Cannon v. Funds for Canada Foundation

CITATION: Cannon v. Funds for Canada Foundation, 2013 ONSC 7686
COURT FILE NO.: CV-08-362807-CP
DATE: 20131219

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL CANNON / Plaintiff / Moving Party

AND

FUNDS FOR CANADA FOUNDATION, MATT GLEESON AND SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES (BERMUDA) LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY, GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON / Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Margaret Waddell, Samuel Marr and Andrew Lewis* for the Plaintiff

HEARD: October 18, 2013

APPROVAL OF LEGAL FEES

[1] In a short endorsement dated October 18, 2013 I approved the class action settlements with the FFCF-Gleeson Defendants and the Lawyer Defendants. I was satisfied that these settlement agreements were in the best interests of the class members. The class members will receive about $28.2 million. The class action will continue against the non-settling defendants.

[2] I also considered class counsel's motion for the approval of their legal fees on the settlements achieved. Based on the contingency fee retainer agreement, class counsel was asking for one-third of the settlement amount – about $9.4 million. Contingency fee awards of 25 per cent (sometimes 30 per cent) have been approved by Ontario courts. But, I was not aware of any decision that had approved a full one-third. I therefore advised class counsel I was prepared to approve legal fees in the amount of 25 per cent (because my sense of the case law was that the accepted range was 20 to 25 per cent), but that I needed further written submissions to persuade me that the approval of the full one-third was indeed fair and reasonable.

[3] I have now been provided with these supplementary submissions and I am persuaded that my Order of October 18, 2013 approving the 25 per cent amount should be varied to allow the full one-third. I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity.

Analysis

[4] I initially approved class counsel's legal fees at the 25 per cent level (rather than the full one-third that had been agreed to in the retainer agreement) because, frankly, that's what other judges were doing. I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.) By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level.

[5] I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"?[1] If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed?

[1] To borrow the language of Cumming J. in *Vitapharm Canada Ltd. v. Hoffman LaRoche Ltd.*, 12 C.P.C. (6th) 226, [2005] O.J. No.1117 (S.C.J.) at para. 107 (QL).

This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.

[6] If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees. And why are we approaching legal fees approval as a building blocks exercise to begin with, working from the bottom up rather than from the top down? Why not start at the top with the retainer agreement that was agreed to by the clients and their solicitor when the class action began?

[7] In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

[8] What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

[9] Examples of clear cases where the presumption of validity could be rebutted include the following:

(i) *Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff*. Did the representative plaintiff truly understand that one-third of the recovery would be claimed by class counsel as legal fees? Class counsel would be wise to set out the consequences of their contingency fee arrangement in some detail in the retainer agreement: e.g. "if we recover $30 million for the class, we will be entitled to legal fees of $10 million." Settlement agreement notices should bold-face or highlight the legal fees portion in order to focus class members' attention on the amount being requested. Affidavits from the representative plaintiffs or class members supporting the legal fees request would certainly be relevant.

(ii) *Where the agreed-to contingency amount is excessive*. I, for one, am prepared to accept that a one-third contingency is presumptively reasonable and acceptable in the class actions area because that amount that has been

found to be reasonable and acceptable (and successful) in the personal injury area.[2] If class counsel seek higher amounts, say 40 or 50 per cent, they should be prepared to provide a detailed justification because these higher amounts fall outside the penumbra of what, in my view, is currently acceptable.

(iii) *Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable*. I know that I would be quite comfortable approving legal fees of $10 or even $15 million based on overall cash recoveries of $30 or $45 million. But I frankly don't know what I would or should do as a class actions judge when the recovery is, say, $150 million and class counsel are asking for $50 million. Although the $50 million legal fees award would be enormous, to say the least, I really can't think of a principled reason for not approving these larger amounts. Fortunately, I don't have to decide this today.

[10] In my view, the judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

- Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach.[3]
- The contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice.

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[2] As Strathy J. noted in *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105, 98 C.P.R. (4th) 244, at para. 64: "Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result."

[3] The "multiplier" approach requires the court to accept as fair and reasonable monopoly-based hourly rates that are everything but fair and reasonable; and, it asks the court to divine a "multiplier" reflecting the risks incurred which, as already noted, is an almost impossible task on the material that is typically provided, and almost always results in a parody of the judicial process. Fortunately, most class counsel appear to be choosing contingency fees over multipliers in their retainer agreements. In a few years, the latter may (happily) become extinct.

- According presumptive validity to a one-third contingency fee, and thus making class counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit.[4]

[11] The approach that I have discussed works best when you have, as we do here, an all-cash settlement. An across the board one-third recovery will likely not be available when the settlement is in-kind, or involves vouchers or coupons, or where class counsel compensation is best determined by considering the take-up rate. But to the extent that the retainer agreement provides for a percentage-based fee approach rather than the multiplier approach, I will be one judge that will accept a fully understood one-third contingency fee agreement as presumptively valid.

[12] Returning, then, to the motion before me. I am satisfied that the one-third contingency fee should be approved. The contingency fee retainer agreement was fully understood and agreed to by Michael Cannon, the representative plaintiff. Indeed, Mr. Cannon filed an affidavit strongly supporting the one-third legal fee and no class members have voiced any objections. The one-third contingency is not excessive because it is in line with the percentages that are charged in the personal injury area. And there is no suggestion that the $9.4 million amount that class counsel will receive is unseemly or inherently unreasonable. In short, no reasons have been advanced to rebut the presumption of validity.

Disposition

[13] Class counsel's request for the full one-third contingency fee is granted. My Order of October 18, 2013 shall be amended to reflect this variation.

Belobaba J.

[4] See the discussion in the opening pages of my costs awards in *Dugal v. Manulife Financial*, 2013 ONSC 6354 or *Rosen v. BMO Nesbitt Burns Inc*., 2013 ONSC 6356. I tried to inject a measure of certainty and predictability into the calculation of legal costs for certification motions, just as I am doing here with respect to class counsel's legal fees. In my view, predictability is a good thing in the continuing evolution of the class action. Who knows, maybe in a decade or two, with a class actions bar that has a more confident understanding of the certification proceeding (it was always intended to provide a very low procedural hurdle and was never intended to generate the frenzied over-litigation that currently exists) and with a more competitive legal services market-place, class counsel may be willing to undertake class proceedings on the basis of a 20 per cent or even 10 per cent contingency. (One can hope.)

Date: December 19, 2013

Tab 9

Cassano v. Toronto-Dominion Bank

Cassano et al. v. Toronto-Dominion Bank

[Indexed as: Cassano v. Toronto-Dominion Bank]

98 O.R. (3d) 543

Ontario Superior Court of Justice,
Cullity J.
July 9, 2009

Civil procedure -- Class proceedings -- Settlement -- Approval -- Plaintiffs bringing class action based on allegedly undisclosed and unauthorized charges levied by defendant bank for foreign currency credit card transactions -- Parties proposing to settle action for $55 million -- Total amount available for distribution to class members being $39,100,000 -- Approximately $10.75 million of that amount to be paid directly to cardholders and balance to be applied cy pres -- Class counsel requesting fee of $11 million -- Settlement approved.

A class action was brought based on allegedly undisclosed and unauthorized charges levied by the defendant bank for foreign currency transactions conducted with credit cards it had issued. The parties proposed to settle the action for $55 million. Approximately $39,100,000 would be available for distribution for the benefit of class members. From that amount, approximately $10.75 million would [page544] be paid directly to cardholders whose cards were issued before certain dates included in the class definition and who were in good standing and active as of June 1, 2009. The balance of approximately $28.4 million would be applied cy pres as it would be impracticable to attempt to identify more than a relatively small percentage of the class members who were potential claimants. Counsel requested a fee of $11 million,

which represented 20 per cent of the settlement amount. The parties moved for approval of the proposed settlement.

Held, the motion should be granted.

The proposed division between direct and indirect benefits struck a reasonable balance between reimbursing class members and applying funds cy pres. Although, as a general rule, cy pres distributions should not be approved where direct compensation to class members is practicable, the allocation of $10.75 million to be paid directly to cardholders was on the generous side as proof that one subgroup of them engaged in foreign currency transactions -- and, in consequence, were within the class definition -- would not be required. One-half of the cy pres amount should be used to create a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada. The other half should be used to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians and should be paid to, administered by and distributed by Social and Enterprise Development Innovations, a non-profit charitable organizati on. Taking into account the course of the litigation, the risks accepted by counsel and the extent of the recovery achieved for the class, a fee of $11 million was appropriate.

Cases referred to

Incorporated Council of Law Reporting for England and Wales v. Attorney-General, [1972] Ch. 73, [1971] 3 All E.R. 1029, [1971] 3 W.L.R. 853 (C.A.); Laidlaw Foundation (Re) (1984), 48 O.R. (2d) 549, 13 D.L.R. (4th) 491, 18 E.T.R. 77 (Div. Ct.); Levy Estate (Re) (1989), 68 O.R. (2d) 385, [1989] O.J. No. 660, 58 D.L.R. (4th) 375, 33 O.A.C. 99, 33 E.T.R. 1, 15 A.C.W.S. (3d) 206 (C.A.), consd

Other cases referred to

A.Y.S.A. Youth Soccer Association v. Canada (Revenue Agency), [2007] 3 S.C.R. 217, [2007] S.C.J. No. 42, 2007 SCC 42, 287 D.L.R. (4th) 4, 367 N.R. 264, J.E. 2007-1894, [2008] 1 C.T.C. 32, 2007 D.T.C. 5527, 160 A.C.W.S. (3d) 567, EYB

2007-124583; Cassano v. Toronto-Dominion Bank (2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406, 2007 ONCA 781, 230 O.A.C. 224, 47 C.P.C. (6th) 209, 162 A.C.W.S. (3d) 18, revg [2006] O.J. No. 2930, 35 C.P.C. (6th) 84, 149 A.C.W.S. (3d) 750 (Div. Ct.), affg [2005] O.J. No. 845, [2005] O.T.C. 161, 9 C.P.C. (6th) 291, 137 A.C.W.S. (3d) 684 (S.C.J.); Casselman v. CIBC World Markets Inc., unreported, December 21, 2007; Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254, 2000 BCSC 971, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 45 C.P.C. (4th) 39, 97 A.C.W.S. (3d) 550; Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (S.C.J.); Gilbert v. Canadian Imperial Bank of Com merce, [2004] O.J. No. 4260, [2004] O.T.C. 902, 3 C.P.C. (6th) 35, 134 A.C.W.S. (3d) 556 (S.C.J.); Markson v. MBNA Canada Bank (2007), 85 O.R. (3d) 321, [2007] O.J. No. 1684, 2007 ONCA 334, 282 D.L.R. (4th) 385, 224 O.A.C. 71, 32 B.L.R. (4th) 273, 43 C.P.C. (6th) 10, 157 A.C.W.S. (3d) 29; Martin v. Barrett, [2008] O.J. No. 2105, 67 C.C.P.B. 102, 55 C.P.C. (6th) 377 (S.C.J.); Meretsky v. Bank of Nova Scotia, unreported, January 23, 2009; Stastny v. Southwestern Resources Corp., unreported, November 3, 2008; Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 S.C.R. 10, [1999] S.C.J. No. 5, 169 D.L.R. (4th) 34, 234 N.R. 249, J.E. 99-329, 59 C.R.R. (2d) 1, [1999] 2 C.T.C. 1, 99 D.T.C. 5034, 85 A.C.W.S. (3d) 196; Vitapharm Canada Ltd. v. Hoffman-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208, 138 A.C.W.S. (3d) 20 (S.C.J.) [page545]

Statutes referred to

Canadian Charter of Rights and Freedoms

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1)(e), 26, (3), (4), (6), 29, (2), 33

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Law Society Act, R.S.O. 1990, c. L.8, ss. 55, 56(2), 59.1

Legal Aid Services Act, 1998, S.O. 1998, c. 26

Perpetuities Act, R.S.O. 1990, c. P.9, s. 16

Statute of Elizabeth, 1601 (U.K.), 43 Eliz. I, c. 4

Authorities referred to

Ontario Law Reform Commission, Report on Class Actions, vols. 1-3 (Toronto: Queen's Printer, 1982)

MOTION for approval of the proposed settlement of class action.

Harvey T. Strosberg, Q.C., and Patricia A. Speight, for plaintiffs.

Lyndon A.J. Barnes and Laura K. Fric, for defendant.

[1] CULLITY J.: -- The parties moved for approval of the settlement of this action commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA").

[2] The claims advanced on behalf of the class concern allegedly undisclosed and unauthorized charges levied by the defendant (the "Bank") for foreign currency transactions conducted with Visa credit cards it had issued. The Bank asserts that these were not fees, but rather part of the exchange rates that it was authorized by the provisions of the cardholder agreements to determine from time to time.

[3] The proceeding was certified by the Court of Appeal on November 14, 2007 [(2007), 87 O.R. (3d) 401, [2007] O.J. No. 4406 (C.A.)]. Certification had previously been denied by the Divisional Court [[2006] O.J. No. 2930, 35 C.P.C. (6th) 84 (Div. Ct.)] and in this court [[2005] O.J. No. 845, [2005] O.T.C. 161 (S.C.J.)]. Actions involving similar claims were previously certified and settlements approved by Winkler J. (now Winkler C.J.O.) in Gilbert v. Canadian Imperial Bank of Commerce, [2004] O.J. No. 4260, [2004] O.T.C. 902 (S.C.J.) and by Brockenshire J. in Meretsky v. Bank of Nova Scotia, unreported, January 23, 2009.

The Settlement

[4] Section 29(2) of the CPA provides that a settlement of a class proceeding is not binding unless it is approved by the court. In Gilbert, the principles to be applied for this purpose were summarized by Winkler J. (now Winkler C.J.O.) as follows [at paras. 9-11]: [page546]

There is a presumption of fairness when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give-and-take. It is a question of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.

There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. These include likelihood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining.

[5] It follows that, in all cases, the court must weigh the benefits to be conferred on the class against the risks of continuing the litigation.

[6] From the inception of the proceeding, the Bank has denied that the charges were fees rather than part of the exchange rates it was authorized to determine from time to time. It has also asserted that the rates were reasonable and that the plaintiffs' interpretation of the cardholder agreements was contrary to the intentions of the parties, as well as inconsistent with commercial realities and the competitive practices adopted by other financial institutions. At the hearing of the motion, the Bank's counsel emphasized that it was the economic considerations of proceeding to trial and not any acknowledgement of the validity of the claims advanced by the plaintiffs that influenced its agreement to settle. The

Bank has not resiled from its position that the alleged charges were disclosed to cardholders.

[7] While strongly contesting the correctness of the Bank's characterization of the charges, class counsel were conscious that, on the main issue, this was all-or-nothing litigation and that it would be vigorously defended. Even if the plaintiffs were successful in characterizing the charges as fees, there were still limitations defences that potentially affected a significant number of the class members' claims. They were also concerned about the length and future expense of the litigation if it proceeded to trial and the difficulty that class members would have in proving their damages if individual determinations were found to be required.

[8] In an affidavit sworn for the purpose of the approval motion, one of the plaintiffs' solicitors, Mr. Paul J. Pape, indicated that, based on reports prepared for the Bank, class counsel had [page547] estimated that the maximum amount recoverable for the class was approximately $161.5 million. After taking into account the risk that the Bank would succeed at trial, class counsel targeted $50 million -- $60 million as a reasonable range for settlement. Mr. Pape stated that they had this in mind when, in December 2008, they agreed to mediation by the Honourable George Adams. The plaintiffs' subsequent acceptance of the Bank's offer to pay $55 million in settlement of the claims was recommended by the mediator.

[9] The settlement amount was negotiated at arm's-length by experienced counsel after more than 11 years of litigation and after extensive productions by the Bank. There is, in my judgment, nothing in the record before me to suggest that the decision to settle for $55 million falls outside the zone of reasonableness and displaces the presumption of fairness referred to by Winkler J. In this case, the most difficult questions relate not to the amount the Bank has agreed to contribute in settlement of the claims advanced by the plaintiffs, but rather to the nature and extent of the distributions that are proposed.

[10] As in Markson v. MBNA Canada Bank (2007), 85 O.R. (3d)

321, [2007] O.J. No. 1684 (C.A.) -- where, again, certification was ordered by the Court of Appeal after having been denied at first instance and in the Divisional Court -- the class consists of several million cardholders whose transactions were entered into over a period of many years. In view of the difficulty of identifying class members with potential claims and quantifying the harm each had suffered, the requirement that the procedure of the CPA must be manageable was given considerable weight in this court and in the Divisional Court. In Markson, the proceeding was held [to] be manageable because, it seems, of the Court of Appeal's conclusion that there was a reasonable likelihood that an aggregate assessment of damages would be possible. The question whether difficulties of distributing damages had any bearing on the issue of manageability was not discussed, and it is notable that, in deciding tha t certification should be granted, the court did not find it necessary to consider whether a "workable" litigation plan had been produced by the plaintiff as required by s. 5(1)(e) of the CPA.

[11] A similar conclusion that an aggregate assessment of damages might be available was reached by the Court of Appeal in this case where, however, Winkler C.J.O. also concluded that the conditions for certification would have been satisfied if the court at a trial of common issues determined that individual assessments were necessary. Moreover, on either approach to the assessment of damages, it appears that the [page548] Chief Justice accepted that problems of distribution may have some relevance to the issue of manageability that is inherent in the requirement that a class proceeding is the preferable procedure. Paragraphs 67-68 of the reasons of the Court of Appeal read as follows:

> The CPA also provides a range of options for distributing amounts awarded under ss. 24 or 25. For example, s. 26(2)(a) permits the court to require the defendant to distribute monetary relief directly to class members "by any means authorized by the court, including abatement and credit". I draw particular attention to s. 26(3), which states:
>
> 26(3) In deciding whether to make an order under clause (2)

(a), a court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the Bank.

Evidently, the CPA provides a procedural mechanism on which the trial judge could rely to distribute amounts awarded under either s. 24 or s. 25. Thus, in my view, the preferable procedure requirement is satisfied in this case regardless of whether the assessment and distribution of damages, if necessary, are to be conducted on an aggregate or individual basis.

(Emphasis in original)

[12] In this context, I note that the learned Chief Justice attributed no significance to the Bank's evidence that "it would take 1500 people about one year to identify and record the foreign exchange transactions on the cardholder statements that are available only on microfiche and that this would cost about $48,500,000": at para. 48. As in Markson, this "economic argument" was specifically rejected.

[13] Despite the emphasis given to s. 26(3) of the CPA, I do not understand the Chief Justice to have excluded the possibility that the trial judge might rely on other provisions of s. 26, including s. 26(4) and (6), that read as follows:

26(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

. . . . .

(6) the court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. [page549]

[14] These provisions contemplate what are often called cy pres orders by analogy to the cy pres jurisdiction that courts of equity have traditionally applied in cases involving charities and rules against remoteness. As was the case in Gilbert, such orders are commonly made in settlements approved by the court by a further analogy to the provisions of s. 26. In Gilbert, the settlement that was approved by the court provided for a payment of $1 million out of the settlement amount of $16.5 million to the United Way in order to benefit past cardholders who could no longer be identified. Winkler J. stated (at paras. 15-16):

> One might observe that a situation such as this could be addressed with a settlement that is entirely Cy pres. However, it is not the role of this court to substitute its settlement for that fashioned by the parties. Also, a disadvantage of settlement that is entirely Cy pres is that it does not compensate individual class members.
>
> Past cardholders are not part of the distribution list. The payment to the United Way on their collective behalf is in lieu of this and is acceptable given the peregrinations involved in pursuing these claims. This approach is acceptable in the present circumstances given the impossibility of identifying such class members. The CPA specifically contemplates a cy pres distribution in s. 26(6).

[15] Under the proposed settlement in this case, approximately $39,100,000 would be available for distribution for the benefit of class members after the payment of the counsel fees and disbursements requested, the levy payable to the Law Foundation and administrative expenses out of the settlement amount of $55 million. From the amount of $39,150,000, approximately $10,750,000 would be paid directly to cardholders whose cards were issued before certain dates included in the class definition, and who were in good standing and active as of June 1, 2009. The balance of approximately $28.4 million would be applied cy pres as, despite the Court of

Appeal's reference to s. 26(3) of the CPA, the parties are in agreement that it would be impracticable to attempt to identify more than a relatively small percentage of the class members who are potential claimants.

[16] Before finalising their proposals for the division between direct and indirect benefits to class members, counsel devoted considerable time and energy in considering different alternatives. The task of identifying cardholders who had engaged in foreign currency transactions -- as well as the amounts involved -- was hampered by the absence of records, including some that had been destroyed inadvertently during the course of the proceeding. The various alternatives were discussed at case conferences prior to the hearing before counsel agreed on a final proposal. [page550]

[17] I am satisfied that, in the light of these difficulties and when compared with the other alternatives, the proposed division between direct and indirect benefits strikes a reasonable balance between reimbursing class members and applying funds cy pres and should be approved. Although, as a general rule, cy pres distributions should not be approved where direct compensation to class members is practicable, the allocation of $10.75 million to be paid directly to cardholders is on the generous side as proof that one subgroup of them engaged in foreign currency transactions -- and, in consequence, were within the class definition -- will not be required.

[18] As a general rule, the court's jurisdiction on motions under s. 29(2) of the CPA is limited to granting, or withholding, approval. Exceptionally in this case, the minutes of settlement provide that, as part of the approval process, the court may change the amount proposed to be applied cy pres, the cy pres recipients and the division of funds between them. This provision reflects the parties' understanding that, in view of the size of the cy pres amount and the nature of the claims in this case, outright payments to charitable or other non-profit organizations -- the most common form of cy pres distributions -- might not be appropriate. For this reason, it was proposed that special purpose gifts would be made in order

to ensure that the purposes for which the funds would be applied bore a sufficient relation to the interests and claims of the class members to justify a conclusion that the distribution would be for their benefit.

[19] The question of the most appropriate cy pres distributions was discussed in a number of case conferences. Proposals by the plaintiffs with respect to one half of the cy pres amount of $28.4 million and by the Bank for the other half were considered.

Cy Pres: The Plaintiffs' Proposal

[20] The plaintiffs' original proposal involved grants to Canadian common-law law schools to be used to foster professionalism and ethical conduct among practising lawyers. The amounts each law school would receive would reflect the distribution of class members across the country. It was suggested that teaching law students to be more professional and ethical in their behaviour when practising law would benefit class members and the public. It was said that:

> Contracts such as those in issue in this action may be more carefully drafted, banks, commercial institutions and all clients may be better advised and, as a result, disputes such as in this action and others may be avoided. [page551]

[21] Apart from the establishment of a committee of five to seven members of the legal profession, with volunteers from the judiciary, to receive proposals and to disburse the funds to the law schools, no method of supervising or controlling the expenditure of the funds by the recipients was suggested. It may have been contemplated that the use of the funds would be entirely within the discretion of the recipients subject only to a moral obligation to apply them for the approved purposes.

[22] Without -- I hope -- being unduly cynical about the optics of the plaintiffs' proposal in the present context, I suggested that a preferable alternative would be to create a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada. Although in a number of cases -- including Gilbert

-- cy pres distributions that benefit class members together with other members of the public have been approved, the suggested alternative would confer benefits on the class more directly than the original proposal and would do so in a manner that is consistent with, and would advance, one of the objectives of the CPA. Access to justice was relied on heavily by the Court of Appeal in Markson and in this case as a ground for certifying the proceeding. Class members have benefited thereby and they and other members of the public would benefit from its enhancement in the future.

[23] This suggestion was discussed with representatives of the Law Foundation -- including the chair of its board of trustees and they have indicated that it is acceptable in principle.

[24] The proposal contemplates the creation of a special trust-fund to be administered by the trustees of the foundation. Section 56(2) of the Law Society Act, R.S.O. 1990, c. L.8 provides that the trustees have power to accept gifts and donations on trust in furtherance of the objects of the foundation. The objects include "legal aid" -- a term that, I am informed, has been construed broadly by the trustees and has, correctly in my opinion, not been confined to financial aid provided to Legal Aid Ontario -- a corporation that is incorporated pursuant to the Legal Aid Services Act, 1998, S.O. 1998, c. 26 for the purpose of providing access to justice for low-income individuals, and is referred to by name in s. 55 of the Law Society Act.

[25] There are, of course, special difficulties that can be encountered in establishing valid purpose trusts under the laws of Ontario. Such trusts are not valid unless they are exclusively charitable, or can be treated as powers of appointment pursuant to s. 16 of the Perpetuities Act, R.S.O. 1990, c. P.9. In my opinion, this limitation is as applicable to trusts created pursuant to an [page552] order of the court as it is to other trusts and, if that is not correct, it is still one that the court should respect.

[26] Is the purpose of promoting and advancing access to

justice a charitable purpose? Given the repeated endorsement by courts, as well as by the Law Reform Commission, of access to justice as a socially valuable objective of the CPA -- and even ignoring some of the rather more dubiously valuable purposes that have been accepted as charitable over the years -- it would, I believe, be extraordinary if it were held that it is not worthy of recognition as a possible object of a valid trust.

[27] The law on charities is notoriously technical and arcane. Numerous judicial pleas for legislative intervention have fallen on deaf ears. Judicial attempts in cases such as Laidlaw Foundation (Re) (1984), 48 O.R. (2d) 549, 13 D.L.R. (4th) 491 (Div. Ct.) and Levy Estate (Re) (1989), 68 O.R. (2d) 385, [1989] O.J. No. 660 (C.A.) to rid the law of its antiquated foundations in the Statute of Elizabeth, 1601 (U.K.), 43 Eliz. I., c. 4 are uncertain in their effects and, since the comments of Rothstein J. in A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency), [2007] 3 S.C.R. 217, [2007] S.C.J. No. 42, at paras. 37-39, their correctness is not free from doubt. In one of the most recent cases in the Supreme Court of Canada -- Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 S.C.R. 10, [1999] S.C.J. No. 5 -- the court was divided (5-4) on, among other things, the question whether a purpose of assisting immigrant w omen to obtain employment was charitable. The lengthy judgments delivered are replete with conflicting views on the same authorities that have been the subject of inconclusive analyses in a legion of cases stretching back over at least two centuries.

[28] Access to justice connotes access by persons to whom it would not otherwise be available for the purpose of protecting and enforcing their legal rights. Although barriers to access to justice are very commonly -- although by no means exclusively -- financial in nature, a purpose of removing the barriers cannot, I think, be considered to fall exclusively within the first of the three traditional heads of charity -- the relief of poverty: see the Law Reform Commission's Report on Class Actions (Toronto: Queen's Printer, 1982), pp. 119-29. Nor would such a purpose be considered to be religious,

or educational, even in the expanded sense in which that term was given in Vancouver Society. That leaves only the fourth head -- other purposes beneficial to the public -- with, or without, in Ontario, the qualification that they must also be within the spirit and intendment of the Statute of Elizabeth, 1601. [page553]

[29] I do not think there is any doubt that a purpose of providing or promoting access to justice must be considered to be beneficial to the public. As the Law Reform Commission stated, at p. 139 of its report:

> Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

[30] Access to justice is, in other words, an essential component of the rule of law, which, in turn, is one of the constitutional underpinnings of our democratic constitutional system of government.

[31] If, despite the views expressed in Laidlaw Foundation (Re) and Levy Estate (Re), access to justice will not be a valid charitable purpose unless it is within the spirit and intent of the Elizabethan statute, I believe that requirement is also satisfied.

[32] In Incorporated Council of Law Reporting for England and Wales v. Attorney-General, [1972] Ch. 73, [1971] 3 All E.R. 1029 (C.A.), different approaches for ascertaining whether a purpose was within the spirit and intent of the statue -- or within its "mischief" or "equity" were discussed. The Court of Appeal held that the publication of law reports by a non-profit corporation was a charitable purpose. Russell L.J. placed the purpose under the fourth head of charity. In his view, the correct approach was to apply a presumption that a purpose that benefits the public will be within the equity of the Statute of Elizabeth, and charitable in the absence of good reasons for a contrary conclusion. Sachs and Buckley JJ. preferred to characterize the purpose as educational, but agreed that it would otherwise be upheld on the basis of the reasoning of Russell L.J.

[33] Russell L.J. also considered whether the purpose of the Council would fall within the spirit and intendment of the statute if the correct approach was to find an analogy with purposes previously held to be charitable. The judge at first instance had referred to the very early judicial acceptance that the purpose of building a courthouse was charitable and Russell L.J. concluded that no distinction could properly be drawn between the provision of physical facilities for the administration of justice, and a dissemination of knowledge of the law to be administered in them.

[34] On either of these approaches, I am satisfied that a trust to provide access to the courts and the administration of justice must be held to be charitable. Access to justice is presupposed by the provisions of the Canadian Charter of Rights and Freedoms and, without it, the provision of courthouses and law reports would be otiose.

[35] For these reasons, I am satisfied that the proposed establishment of a fund to promote access to justice would create a [page554] valid charitable trust. I am also satisfied that such a trust could properly be administered by the Law Foundation as falling within its corporate object of "legal aid". As I have mentioned, this is consistent with the information provided by the chair of the board of trustees of the foundation that the object has in the past been construed broadly and has not been confined to financial aid provided to Legal Aid Ontario.

[36] For reasons of completeness, I note, also, that if, contrary to my opinion, a trust to promote and advance access to justice is not charitable, it could, I believe, be upheld as a specific non-charitable purpose trust that, pursuant to s. 16 of the Perpetuities Act, is to be treated as a power of appointment over capital and income for a maximum period of 21 years.

[37] The precise terms of the trust will be included in the order approving the settlement but, subject to any further submissions of counsel, or representations of the Law

Foundation, my present preference would be for the trustees of the foundation to have discretion as to the application of funds for the approved purpose subject only to the limitation that they are not to form part of the Class Proceedings Fund established pursuant to s. 59.1 of the Law Society Act.

Cy Pres: The Bank's Proposal

[38] The Bank proposed that the other half of the cy pres amount should be used to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians. For this purpose, the funds would be paid to, and administered and distributed by, a non-profit charitable organization, Social and Enterprise Development Innovations ("SEDI").

[39] SEDI was incorporated as a corporation without share capital under Part III of the Corporations Act on March 14, 1995. Its objects, as amended by supplementary letters patent of April 21, 1997, are as follows:

> 1. To establish, maintain and supervise non-profit centres for the encouragement of people who are both poor and unemployed to develop self-employment projects with the objective of preventing and reducing unemployment and its attendant poverty;
>
> 2. To provide counselling and supportive services for the benefit of persons who are both poor and unemployed and otherwise economically disadvantaged persons including youth;
>
> 3. To set up programmes to carry out the foregoing objects;
>
> 4. To consult with other charitable, non-profit community and governmental agencies and organizations in developing programmes to carry out the foregoing objects and to provide funding for same. [page555]

[40] SEDI is registered as a charitable organization within the meaning of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (Canada). It complies with the annual reporting obligations under the statute. To date, it has been funded

largely through grants and donations from federal, provincial and municipal governments, banks and other financial institutions and private charitable foundations.

[41] The promotion of financial literacy has been one of SEDI's principal activities since its creation. To this end, it has worked with governmental agencies and community organizations to develop courses, programmes and projects and to train personnel whose employment brings them in contact with unemployed, poor and otherwise disadvantaged Canadians. SEDI's activities are founded on a conviction that there are social, market and governmental pressures that limit the ability of such persons to make informed financial decisions that are essential to their well-being and their capacity to become economically self-sufficient. Accordingly, financial literacy, in the sense understood by SEDI, refers to the knowledge, skills and ability to understand, analyze and use information to make informed judgments about financial decisions. Such decisions range from simple budgeting skills, to understanding choices between banking and credit products, to understanding rights and obligations created by financial documents such as credit card agreements, to understanding how to effectively save for retirement, home-ownership or post-secondary education.

[42] SEDI is administered under the supervision of a nine-member board of directors who serve without remuneration. In 2008, it had ten permanent and four part-time employees.

[43] By a resolution of the board of directors of October 9, 2008, SEDI's financial literacy activities were expanded and organized by the creation of a new internal division known as the "Canadian Centre for Financial Literacy" (the "Centre"). This is dedicated to assisting and training the staff of community organizations to deliver literacy counselling and supportive services to needy and otherwise disadvantaged groups in society.

[44] The Bank's proposal is for 50 per cent of the cy pres amount to be paid to SEDI. $3.5 million of this would be used for the support of the Centre for a period of five years and

the balance would be held as a fund (the "TD Financial Literacy Fund") that, over a period of six years, would be applied in making grants to non-profit organizations who work with economically disadvantaged groups -- such grants to be used by the recipients to promote and support financial literacy among [page556] the members of such groups. All such grants would require the approval of SEDI's directors.

[45] Counsel for the bank made submissions and filed extensive material in support of its proposals. This included a description of SEDI's activities during the past five years, the annual reports filed with Canada Revenue Agency, explanation of its financial reporting and a legal opinion of SEDI's solicitor, Fasken Martineau, that the promotion of financial literacy is charitable in law as educational and for the relief of poverty, and is within the objects of SEDI. I share that opinion.

[46] In addition, letters attesting to the valuable work performed by SEDI in promoting financial literacy among low-income Canadians were provided by five individuals who have either participated in SEDI's activities or occupied positions with governmental organizations that have been involved with them.

[47] On the basis of the submissions of counsel and the material filed, I am satisfied that the advancement of financial literacy is a worthy method of applying the cy pres amount for the benefit of the class members. I am also satisfied that SEDI is an appropriate entity to administer the funds for this purpose.

[48] For the purpose of settling the terms of the approval order, counsel should consider whether it is necessary to have a trust agreement between the Bank and SEDI with respect to the administration of the funds. In view of the relatively simple and short-term obligations of SEDI, it may be possible to define those obligations adequately in the body of the order. It must, however, be made clear that the funds provided to the Centre for the support of its work are intended to enhance it and not simply to make available for SEDI's other purposes

funds that would otherwise be used for the support of the Centre. Given the provisions of the Law Society Act that govern the administration of gifts received by the trustees of the Law Foundation, a separate trust agreement with respect to the other half of the cy pres amount should not be necessary to complement the provisions of the order.

[49] Subject to settling the terms of the order, the settlement will be approved.

Fees of Class Counsel

[50] Counsel have requested a fee of $11 million, which represents 20 per cent of the settlement amount and approximately 28 per cent of the net amount that would be distributable to, or for the benefit of, class members. [page557]

[51] Provision for a fee of 20 per cent of the gross recovery was made in retainer agreements with Dr. Cassano and Dr. Bordoff executed in April 2002 and September 2004, respectively. These written agreements are said to reflect the terms of an oral agreement made at the inception of the proceeding with Dr. Cassano in 1997. Dr. Bordoff was added as a plaintiff on March 9, 2005.

[52] Each of the plaintiffs has supported the request for approval of a fee of $11 million and has expressed appreciation of the quality of the services performed by their counsel.

[53] Contingent fee agreements that provide for fees to be calculated as a percentage of gross recovery have been approved in many class proceedings in this jurisdiction, and an application of percentages in excess of 20 per cent has been approved in several of them. In Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 56 C.P.C. (6th) 357 (S.C.J.), for example, I considered the fee awarded to represent approximately 26.7 per cent of the value of the compensation and other benefits recovered for the class members. In Stastny v. Southwestern Resources Corp., unreported, November 3, 2008, and Casselman v. CIBC World

Markets Inc., unreported, December 21, 2007, percentages in excess of 20 per cent were approved by Brockenshire J., and, in Meretsky -- one of the companion actions to this case -- the same learned judge indicated that 20 per cent was acceptable.

[54] Counsel's intention to request a fee of 20 per cent of the gross recovery was communicated to the numerous class members who contacted counsel at different times throughout this lengthy litigation, the information was provided on its website and it was disclosed in the notice of the fairness hearing. Only one member of the class of several million persons has objected to the size of the fee.

[55] This was hard-fought litigation -- conducted with tenacity and skill by counsel who, in effect, snatched victory from the jaws of defeat by persevering with it through successive appeals from the initial decision that denied certification. It is inherent in percentage of recovery agreements that counsel may receive large fees where, as here, the degree of success achieved is substantial. Equally, of course, they take the risk that the results achieved will provide them with little or no compensation.

[56] Taking into account the course of the litigation, the risks accepted by counsel and the extent of the recovery achieved for the class, a fee of $11 million will be approved, together with the disbursements claimed of $138,000. [page558]

[57] There are three other matters on which I believe I should comment.

[58] The first is that Dr. Cassano is the spouse of Ms. Pat Speight, who is a "non-equity partner" in the firm of Sutts Strosberg, who acted as co-counsel for the plaintiffs. A relationship of this kind is one that in some cases will call for close examination and, perhaps, suspicion. It was, however, disclosed at the hearing of the certification motion, and again at the fairness hearing, and Dr. Cassano was accepted as a suitable representative plaintiff and, with Dr. Bordoff, was appointed as such in the order of the Court of Appeal. In these circumstances, I see no reason for considering the relationship

to be a factor that should have any bearing on the amount of counsel's fee.

[59] The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in s. 33 of the CPA. They did not do this.

[60] While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In Martin v. Barrett, [2008] O.J. No. 2105, 67 C.C.P.B. 102 (S.C.J.), at paras. 38-39, I referred to criticisms of the lodestar method. One of these that has been repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.

[61] As Smith J. stated in Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254, [2000] 8 W.W.R. 294 (S.C.), at para. 74:

> Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their clients' objectives.

[62] In contrasting the percentage of recovery approach with the application of a multiplier, Cumming J. stated in VitaPharm Canada Ltd. v. Hoffma-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.), at para. 107:

> Using a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A

percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours". [page559]

[63] Of course, if counsel accept a retainer on the basis that the lodestar method is to apply, the requirements of s. 33 -- including that of a reasonable base-fee -- must be observed. Class counsel did not choose to adopt that method and, having achieved an excellent result, they submit that it would be unreasonable to reduce their fee by reference to the time they expended to do so. They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial and there is nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.

[64] The final matter relates to the contents of the objection received from Mr. Andrew Martin of Toronto. This was the only objection received from the members of the enormous class. I have not commented on it previously in the above reasons because, to the extent that his criticisms have not been met by the changes I have made to the proposed cy pres distributions, I believe that the authorities I should properly follow foreclose acceptance of them. At the same time, Mr. Martin's comments address quite fundamental issues relating to settlements of class actions such as this. As it may be that his views are shared by other class members who thought it useless, or just too much trouble, to voice their objections, I have included the substance of Mr. Martin's e-mail letter as an appendix to these reasons, together with my brief comments.

Motion granted.

APPENDIX

From : Andrew Martin

To: [Objections]

I am writing to object to the proposed settlement.

My reasons relate to the overall terms of the settlement. The amount that will be paid may (or may not) be appropriate relative to the allegations, but I do not believe that this settlement is in the interests of the plaintiff class. Specifically:

-- Either TD did or did not levy unauthorised, undisclosed or inadequately disclosed charges. This needs to be determined so that in future, conditions of use can be drafted and interpreted correctly. [While no one could deny that clarification is desirable, the class action procedure has costs and risks for the representative plaintiffs and their counsel that are not shared by the [page560] other class members who, in effect, have a free ride. Simply as one example, the plaintiffs incurred an expense of approximately $67,000 in respect of the fees of the firm of chartered accountants who received and dealt with the 11,500 cardholders who opted out of the litigation.]

-- In my personal view, given that certain costs were going to be charged in respect of these uses of the credit cards, the plaintiff class has not been disadvantaged and I suspect would have used the cards in any circumstances. The consequences of this litigation may well be to increase future charges. [I do not disagree but the Court of Appeal did, or did not consider these considerations to be relevant.]

-- I strongly object to the proposal to distribute $14 million to charitable organisations. The purpose of a settlement should be to compensate people to who have suffered actual loss, and while these are laudable charitable purposes, I see no way reason for a publicly-owned financial institution, as custodian of its shareholders' money, should make such a payment as part of a class action settlement. [Mr. Martin does not indicate his preferred position on the facts of this case that involve more than 4.5 million cardholders of whom only a relatively small number of those

who entered into foreign currency transactions can be identified.]

-- I also object to the proposal to distribute $14 million to law schools. This is highly offensive and, again, an inappropriate use of shareholder money (to support what are presumably ethical shortcomings of lawyers). It also poses a conflict of interest for the judiciary, which might feel reluctant to query or disallow such a proposal giving their own ties to the profession. [I do not disagree.]

-- The proposal to pay up to $11 million to the lawyers is outrageous. While only (only!) 20 per cent of the total, it is a huge multiple of legal fees likely to have been incurred. This does not seem a particularly complicated case and cannot have consumed that much time. For instance, if it is a 4x multiplier that suggests 7,000 bars at $400/hour. This seems unrealistic, and so the multiplier is presumably much higher. And yet the risk in a case like this is, historically, quite low. I therefore object to any payment of legal fees in excess of 3x docketed hours at a reasonable hourly rate. Any excess between that and $11 million can either be added to the distribution to cardholders, or distributed to organisations providing free legal services to those unable to pay the fees now charged by lawyers. [I am not sure why Mr. Martin believes the risk in cases like this is, historically, quite low. His support of imposing the multiplier approach irrespective of the terms of counsel's agreement with the plaintiffs, the criticism to which the approach has been subjected, and the difficulties of applying it in practice, is not consistent with the provisions of the CPA as judicially interpreted in previous cases.]

It is not currently my intention to appear at the hearing on April 24.

Andrew Martin

Tab 10

Cohen v. Kealey & Blaney

Cohen v. Kealey & Blaney (Ont. C.A.) IN THE MATTER OF the Solicitors' Act R.S.O. 1980, CHAPTER 478; AND IN THE MATTER OF Kealey & Blaney, solicitors of the Supreme Court of Ontario and Suzanne Cohen, client

Ontario Judgments

Supreme Court of Ontario - Court of Appeal

Toronto, Ontario

Howland C.J.O., Lacourciere and Robins JJ.A.

Heard: June 13, 1985

Oral judgment: June 13, 1985

Judgment: June 28, 1985

[1985] O.J. No. 160 | 10 O.A.C. 344 | 26 C.P.C. (2d) 211 | 31 A.C.W.S. (2d) 436 | 1985 CarswellOnt 1906

Between Suzanne Cohen, Appellant, and Kealey & Blaney, Respondents

(8 pp.)

James Chadwick, Q.C., for the Appellant. William Riley, for the Respondent.

Judgment of the Court delivered by

ROBINS J.A. (Orally)

ROBINS J.A. (Orally):-- This is an appeal by the client, Suzanne Cohen, from the order of Mr. Justice Southey dated the 3rd day of October, 1984 dismissing her appeal from the report of the Taxing Officer taxing the solicitors' account in the sum of $40,000 for fees (representing a reduction of $20,000) and $5,777.82 for disbursements.

The solicitors were retained with respect to the following matter. The client had entered into a separation agreement with her husband dated July 6, 1977 which was based upon information provided by him that his net asset position was $76,202. The couple was subsequently divorced by decree nisi dated December 20, 1977 and made absolute May 2, 1978. The decree nisi incorporated the terms of the separation agreement. In December 1980, stories appeared in local newspapers in which the client's former husband was said to have a net worth in excess of three million dollars. This prompted her to seek legal advice. She was referred to Mr. Glen Kealey, a solicitor experienced in the area of matrimonial law, and retained him to act on her behalf.

The client was extremely concerned about fees from the commencement of her relationship with the solicitor. There were detailed discussions about fees and letters were exchanged on the subject. On December 30, 1980, confirming previous conversations, the solicitor wrote:

> I have told you that the total expenses that you may incur for legal fees and disbursements including chartered accountant and real estate appraiser fees will certainly exceed $10,000 and may be as high as $50,000. You have given me today a retainer in the amount of $10,000 which I will put into my trust account and account to you on a regular basis. You will be kept fully advised at all times of all legal steps and settlement negotiations. If at any time you have the slightest concern or anxiety please do not hesitate to ask for further information.

> I cannot now exactly determine the total fee for legal services since this primarily depends upon the results and on the time. At this point I cannot exactly predict the results because we simply do not know what your ex-husband's financial position was at the material time. Moreover, I cannot predict the exact time since if the matter does not settle before trial the trial itself I would estimate would take at least three days.

It was acknowledged on the taxation that the $50,000 figure was inclusive of all fees and disbursements to the completion of trial. In response to that letter, the client wrote under date of January 9, 1981:

> You have stated that fees for my claim, inclusive of accountants, real estate appraisers and legal, would be a minimum of $10,000 and maximum of $50,000, including trial. I am concerned by this fact.
>
> You have, firstly, stated verbally that I will have a monthly statement, of expenses incurred with the moneys from the $10,000 retainer I have paid you.
>
> In addition to this, since there is quite a discrepancy between $10,000 and $50,000, and because I have little past experience and knowledge in legal matters, I would further like some indication as to costs at the various stages you have outlined to me, that we must go through in this procedure.
>
> ...
>
> I have expressed to you the fact, that while I am in a position to pay you $10,000, I am certainly in no financial position to pay you $50,000.
>
> It is, therefore, our understanding, as discussed, that I am unable to pay the maximum fee indicated. Such fees would have to be taken from a successful judgement that I might obtain.
>
> You have also indicated that it is also understood that in the event that we are unsuccessful, that the trial of this matter would cost me $20,000 maximum, and no more, as I would have to borrow even that, and I would be unable to pay any greater sum.

The solicitor replied on January 16, 1981, confirming the $20,000 limit if the action proved unsuccessful at trial and set forth his hourly rate as being between $100 and $150 per hour.

Upon retaining the solicitor the client paid $10,000 by way of retainer fee and later paid a further $10,500 by way of interim retainer accounts to November 1982.

In November 1982, the solicitor adopted a position with respect to fees contrary to the arrangement set forth in the correspondence. By letter dated November 11, 1982 he demanded an additional retainer of $30,000 payable by post-dated cheques in four monthly instalments of $7,500 each commencing November 1982 and stated that he required that sum to proceed with the pending actions. The client treated this as a repudiation of "our original agreement" and terminated the solicitor-client relationship.

The solicitor had commenced two separate actions, one by way of originating notice of motion seeking to vary the decree nisi; the other, by way of writ claiming deceit and fraudulent misrepresentation against the former husband. There were a considerable number of motions in the proceedings and undoubtedly much time and effort was expended by the solicitor in seeking to advance these matters to trial. However, at this stage, that is, by November 1982, examinations for discovery had not yet been held. The matter was subsequently settled before trial by other solicitors.

In June 1983 the solicitor submitted the account which is the subject matter of these proceedings. A lengthy taxation hearing was conducted by the local Taxing Officer in Ottawa at the conclusion of which, in brief reasons, he reduced the account from $60,089 to $40,000 and allowed disbursements of $5,777.82. The client's appeal from that decision to Southey J. sitting in Motions Court was dismissed.

With the greatest of deference to the learned Motions Court Judge we are unable to agree with his conclusion that the Taxing Officer made no error in principle that would justify interference with the taxation.

It is conceded that the understanding upon which the solicitor was retained fixed the maximum fee, inclusive of disbursements, that the solicitor was entitled to receive for his services through to trial at $50,000. The range of

fees originally quoted by the solicitor was a wide one, between $10,000 and $50,000 including disbursements. The Taxing Officer properly listed the considerations normally applicable to the taxation of a solicitor's account, namely, the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee. He did not, however, appear to fully appreciate the significance of the understanding reached by the parties on the basis of which the solicitor was hired or attach sufficient weight to that understanding. He treated the understanding as an estimate rather than a firm understanding as to the maximum fee he was entitled to charge depending on the success of the proceedings. Even in the case of an estimate, a solicitor is obliged to advise the client without delay of any developments that are likely to increase the fee beyond the estimate and that was not done in this case.

The client here had an understanding with the solicitor that the fees payable aftEr a successful trial would not exceed $50,000 including disbursements. When the solicitor in breach of that understanding demanded a further $30,000 retainer thereby causing his services to be terminated, the fee to which he is entitled for the services rendered to the date of termination of his retainer should bear an appropriate relationship to the overall fee to which he would have been entitled had he carried the litigation through trial.

In this case, if the report of the Taxing Officer were to stand the client would be required to pay $45,777 for legal services rendered to a stage before discoveries when her maximum fees, assuming a successful trial (and the length of trial has been estimated by the solicitor as being at least three days), could not have exceeded $50,000. In our opinion, that amount is so disproportionate to the maximum fee agreed upon as to be unreasonable.

A question was raised during argument with respect to the settlement which was eventually reached between the client and her former husband the terms of which have not been disclosed. We can assume, as did the courts below, that the settlement was a good one and that the solicitor is entitled to be paid for the "groundwork" contributed by him to the settlement. indeed all of his service can be considered groundwork leading to the ultimate settlement of the actions. Nonetheless, notwithstanding the reduction ordered by the Taxing Officer, in the circumstances of this case the account as taxed remains so inordinately and unfairly high in relationship to the maximum fee agreed upon as to reflect error in principle and in our view cannot be justified.

This has been a protracted and expensive matter. All of the testimony adduced at the taxation hearing is before us. We see no reason to remit the matter for another taxation. Having regard to the applicable considerations in taxation matters and to the evidence in the case, it is our view that to reflect properly the agreement to which the solicitor committed himself at the time he was retained, his bill of costs should be reduced a further $15,000 to $25,000 plus disbursements of $5,777.82.

For these reasons the appeal is allowed and the order of Southey J. is set aside. The certificate of the Taxing Officer is varied so that the bill of costs as taxed by the Taxing Officer is reduced by $15,000 to the sum of $30,777.82. The appellant shall have her costs of this appeal on a party and party basis and her costs of the application to Southey J. on the same basis.

ROBINS J.A.

HOWLAND C.J.O.

LACOURCIERE J.A.

Tab 11

Commonwealth Investors Syndicate Ltd. v. Laxton

CA016525 & CA016964
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

COMMONWEALTH INVESTORS SYNDICATE LTD.

PETITIONER
(APPELLANT)
(RESPONDENT ON CROSS APPEAL)

AND:

JOHN N. LAXTON, Q.C., Barrister and Solicitor,
practising in partnership in the firm of
LAXTON, PIDGEON & COMPANY,
and the said LAXTON, PIDGEON & COMPANY

RESPONDENTS
(RESPONDENTS)
(APPELLANTS ON CROSS APPEAL)

Before: The Honourable Chief Justice McEachern
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Donald

I.G. Nathanson, Q.C. & G. Gomery	Counsel for the Appellant (Respondent on Cross Appeal)
Thomas R. Berger, Q.C. & Gary A. Nelson	Counsel for the Respondents (Appellants on Cross Appeal)
Place and Date of Hearing:	Vancouver, British Columbia May 9th, 10th and 11th, 1994
Place and Date of Judgment:	Vancouver, British Columbia Wednesday, July 20th, 1994

Written Reasons by:
The Honourable Chief Justice McEachern

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Donald

Court of Appeal for British Columbia

Commonwealth Investors Syndicate Ltd.

v.

John N. Laxton, Q.C.

Reasons for Judgment of Chief Justice McEachern

I. The Nature of the Proceedings

1 This is a Petition brought by a client, Commonwealth Investors Syndicate Ltd. ("CIS"), to set aside or modify a Contingency Fee Agreement entered into with the law firm of Mr. John Laxton Q.C., Laxton, Pidgeon & Company. Mr. Allan Coles was the sole shareholder in CIS. As Mr. Laxton was the member of the firm retained in the matter, I shall refer to the lawyers throughout these Reasons for Judgment as "Mr. Laxton."

2 This is the third stage of this proceeding. In the first instance, the agreement was set aside as unfair but this Court disagreed, found the agreement fair, and ordered a fresh hearing on the issue of reasonableness.

3 Hall J. then heard evidence and argument on the issue of reasonableness. At that hearing, the Petitioner argued that the agreement was unreasonable in result, and asked that the Court fix the fee that Mr. Laxton should recover. On the other hand, Mr.

Laxton asserted the agreement was reasonable, but asked in the alternative, that the agreement be modified appropriately.

4 Hall J., in extensive and helpful Reasons for Judgment, modified the Agreement slightly and acceded to Mr. Coles' request that he fix a dollar figure for Mr. Laxton's fee. In the result, Hall J. awarded Mr. Laxton a net fee of $2,250,000 and costs, hence this appeal. Mr. Nathanson for CIS argues that a fee of not more than $1,000,000 would be generous, while Mr. Berger for Mr. Laxton argues that the full fee provided by the unmodified agreement should be allowed. The final fee, on this basis, would depend upon the amount recovered by CIS, but would exceed $2,750,000.

II. The Facts

5 The detailed circumstances are fully and completely set out in the earlier Reasons for Judgment which are reported at [1989] B.C.W.L.D. 2052 (B.C.S.C.); (1990), 50 B.C.L.R. (2d) 186 (B.C.C.A.); and in the judgment under appeal, reported at (1992), 76 B.C.L.R. (2d) 1. It will not therefore be necessary for me to give more than a very general outline of the facts of this remarkable story.

6 CIS was the central company in a group of companies originally promoted by a former member of the Bar, Mr. A.G. Duncan Crux. Some

of the companies failed many years ago, and Receiver-Managers and eventually Trustees in Bankruptcy took over. In 1985, Mr. Coles, who was both an accountant and a former employee of CIS, was aware of a substantial business opportunity in the affairs of that company even though it had been in the hands of Receiver-Managers or in Bankruptcy for almost 20 years. CIS, through a subsidiary company, Commonwealth Savings Plan ("CSP"), owned valuable lands in Surrey-Delta. By 1970, however, these companies had been restored to good financial health by the sale of some of these assets. Mr. Coles estimated CIS and CSP had net assets and cash in the range of $4 - 6,000,000, and claims for further substantial amounts.

7 Mr. Crux owned 6,000 of the 10,000 outstanding voting, common shares in CIS. The other 4,000 shares were owned by a Liechtenstein company controlled by Mr. Crux. There were a further 635,000 non-voting, preferred shares held by about 300 shareholders.

8 With borrowed money, Mr. Coles was able to purchase all the voting shares in CIS for $60,000, but he faced a number of very serious problems. These may be summarized as follows:

1. The Trustee in Bankruptcy intended to wind up CIS and CSP, in which event all shareholders of both classes would rank equally;

2. It was necessary to get rid of the Trustee who appeared to favour the preferred shareholders, possibly because of antipathy towards Mr. Crux with whom Mr. Coles had at one time been associated. There was also a risk that the preferred shareholders would themselves have the Trustee removed so that they could seek to wind up the companies for their own advantage;

3. Thus it became necessary to acquire the preferred shares by purchase or otherwise in order to maximize the value of the common shares and to avoid the obvious risk that the shareholders seize the opportunity that Mr. Coles had identified;

4. There were potential income tax liabilities arising out of the management of CIS by Mr. Crux, and there was concern that the CIS shares formerly owned by the Liechtenstein Company may have escheated to the Provincial Crown by reason of that company having been struck off the Register of that Principality.

9 All this came to a head in March, 1985 when the preferred shareholders brought a Petition seeking an Order winding up CIS. Mr. Coles was able to retain a firm of solicitors to obtain an order that the Company fund his expenses of defending the Petition, but he did not have $25,000 which these solicitors required to oppose the Petition.

10 On the recommendation of a judge friend, who told him Mr. Laxton would probably require a 25% contingency agreement, Mr. Coles caused CIS to enter into such an agreement with Mr. Laxton.

11 This agreement provided that Mr. Laxton would oppose the Winding Up Petition, seek the discharge of CIS from Bankruptcy, and "conduct such other actions including appeals as may be necessary to protect the assets of CIS."

12 In return, CIS agreed to pay a $5,000 retainer which was provided to pay all costs recovered (which was changed in February, 1986 to a lump sum of $250,000, and a fee equal to 25% of the asset value of CIS at the completion of litigation and settlement). "Asset value" was defined as the value of the assets of CIS less the value of the preferred shares.

13 With this Agreement in hand, Mr. Laxton arranged an adjournment of the Petition over the summer of 1985, and then developed an argument that winding up was not available during the currency of a bankruptcy. In quick succession, Mr. Laxton secured the dismissal of the Winding Up Petition and the removal of the Trustee. This, in turn, exposed a potential claim for substantial damages for mis-administration which later realized $3,750,000. Mr. Laxton also negotiated the purchase by Mr. Coles of the preferred shares at an advantageous price substantially less than Mr. Coles was prepared to pay. The difficulties with income tax

and the escheat problem did not materialize. It became a mere formality to obtain the discharge of CIS from Bankruptcy in late 1986, but as already mentioned, it remains a mystery why the preferred shareholders did not avail themselves of the opportunity Mr. Coles was pursuing.

14 As Hall J. observed, most of what the parties had envisaged had been accomplished by June, 1986 when the preferred shareholders agreed to sell their shares to Mr. Coles.

15 Thus, Mr. Coles found himself in control of CIS and its very substantial assets which ultimately totalled from $11 - 12 million. As Mr. Laxton acknowledged in his evidence, these matters were resolved much more quickly than he or anyone had anticipated.

16 After that, however, there was a falling out between Mr. Laxton and Mr. Coles. Their separation seems to have been completed by late August, 1987. Mr. Coles then retained other lawyers to pursue the claim against the former Trustee as previously planned by Mr. Laxton. The substantial recovery of $3,750,000 was achieved by settlement in 1988 using some of the documentation prepared by Mr. Laxton.

17 While the evidence of expert witnesses at the trial before Hall J. was understandably full of praise for Mr. Laxton's considerable success, Mr. Nathanson points out that most of this

was accomplished through two fairly brief but successful Chamber applications which were not appealed, and some skillful negotiations with the preferred shareholders. It was not necessary for Mr. Laxton to prepare lists of documents or to conduct any Examinations for Discovery, or even to put on his gown because there were no trials and no appeals.

III. The Findings of Hall J.

18 What follows in this section are direct quotations from the Reasons for Judgment of Hall J.:

> 1. Mr. Laxton and Mr. Coles had every reason to believe in June of 1985 that they were in for a long and dreary battle with many possibilities for failure. The task was daunting and the risks were real and substantial.
>
> 2. As time went by, significant progress occurred much more rapidly than could have been initially suspected. The scope and pace of the success achieved was due, I believe, to the very able counsel work manifested by [Mr. Laxton]. There was skill in research, skill in tactical approach and skill in execution.
>
> 3. I think counsel for the respondents in argument referred to the metaphor of the castle or citadel falling more easily than was anticipated. That is probably an apt description of what occurred here but it must be remembered that in part, the citadel fell because dynamite was placed in the right locations.
>
> 4. Thus, the risks of expenditure of time and non-payment had altered quite dramatically by mid 1986.
>
> 5. In June of 1985, the parties agreed with each other that a 25% contingency fee was an appropriate basis of compensation. I am not at all inclined to disagree with their assessment of the reasonableness of that percentage up to the summer of 1986.

> 6. What happened ultimately in this case is that the necessary confidence or rapport between the lawyer and the client fell apart. This rapport is often a delicate thing but it is of course absolutely essential that this trust and confidence exist if the relationship is to work.
>
> 7. As I said, I believe that there should be some modification of the agreement. My view of what should be done is as follows. I see no reason for alteration of the agreement up to the summer of 1986. About $6.2 million was realized by that time and 25% of that is $1.55 million. After that time, I think a fee in the range of 10% is justifiable but I doubt if mathematical exactitude is precisely the test we are looking for. At the end of the day one must consider what is appropriate. On the one hand, as noted in ***Deans***, *the court must ask itself, does the agreement* uphold the integrity of the profession, and on the other hand, one must ensure that the law firm is properly compensated for stellar work. One has to have regard to many factors including as an especially important consideration the terms that the parties initially agreed upon. Agreements freely entered into between parties of equal bargaining power are not lightly to be disturbed. I am of the view that the ultimate recovery figures in the litigation will be in the range of $11-12 million. Some of that is not yet in hand but approximately $10 million has been realized to date. On account of recoveries to date and anticipated post 1986, I believe the law firm should be awarded $550,000 in addition to the sum of $1.55 million pertaining to the recovery of $6.2 million. These sums added together aggregate $2.1 million in total.
>
> 8. It is my view that a modification from $250,000 to $150,000 [for costs] would be reasonable. As I have said, I believe that the $250,000 is unduly favourable to the law firm and I believe that this downward modification ensures that the law firm gets something of what was bargained for under that aspect of the agreement but at the same time, the sum awarded on this account does not impose a cost upon the client that is unreasonable.

IV. The Judgment of Hall J.

19 In the result, Hall J. fixed Mr. Laxton's fee at a total of $2,225,000. The fee provided by the agreement would have been 25%

of the net amount recovered (found by Hall J. to be from $11 - 12,000,000) plus $250,000 for costs.

V. The Statutory Test.

20 The law has recently been changed. The present test, found in the ***Legal Professions Act***, S.B.C. 1987, c. 25, s. 78(9) is reasonableness at the date of the agreement.

21 The test which governs this case, however, was contained in the former s. 99(2) which provided in part:

> If the court does not consider the contract fair and reasonable, it may either modify the contract or order the contract to be cancelled...

22 This provision has been considered by this Court on a number of occasions. For a full discussion of this question, see the judgment of this Court on the fairness issue: (1990), 50 B.C.L.R. (2d) 186 at 196 ff.

23 At p. 198 of the above report, this Court said:

> In our opinion, s. 99 contemplates a two-step inquiry.
>
> The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents...

> The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered, and each factor may be the subject of professional evidence to assist the judge in determining the reasonableness of the fee in the particular circumstances.

24 This Court's conclusion is expressed at p. 202:

> In our view the two inquiries are in nearly watertight compartments. One compartment investigates the mode of obtaining the contract and whether the client understood and appreciated its content. The second inquiry involves the reasonableness of the <u>amount</u> of the fee. (emphasis added)

25 I take the foregoing to mean that a contingency fee agreement under the old regime had to be reasonable in the result. This brought into play the well established principles which generally govern the fixing of a lawyer's fee such as those stated in ***Yule v. Saskatoon*** (1955), 1 D.L.R. (2d) 540 (Sask. C.A.), and, of course, those further considerations that apply only to contingency fees. These include at least the risk of there being no recovery at all and the expectation of a larger fee based upon results than would be appropriate in non-contingency cases.

V. The Appellant's Argument

26 Briefly stated, Mr. Nathanson argued that frequent references in the Reasons for Judgment to the bargain struck at the commencement of the retainer, and to the principle that parties should be held to their bargains, suggest that the learned trial judge confused reasonableness with fairness and transferred the onus to CIS. In short, it was argued that Hall J. found the agreement reasonable because it was fair. If correct, this would be serious error.

27 Mr. Nathanson is right that the bargain is mentioned several times in the long reasons of Hall J., but a fair reading of what he wrote persuades me that he did not fall into that error. First, as I shall later point out, the bargain was an important factor the court had to consider both for the context in which the reasonableness of the fee was to be assessed and as the subject matter of the inquiry.

28 Further, Hall J. in no way relied entirely upon the bargain. He thoroughly considered the evidence, particularly that of the experts, and concluded that although their evidence was helpful, it was his responsibility to decide reasonableness. Later in his Reasons he said:

> When the client invokes this procedure, the court is called upon to decide whether the contingency fee contract can be sustained as one that is fair and reasonable. Fairness has been previously determined in separate

> proceedings and the only issue now extant is reasonableness.

29 Shortly after that, he said:

> However, although the views of experts are of undoubted assistance, it is ultimately the responsibility of the court to arrive at its own conclusions based on a consideration of all of the evidence and bearing in mind that [the lawyers] have the obligation to demonstrate that the agreement is reasonable.

30 With respect, I am not persuaded that Hall J. misdirected himself on these important questions.

31 Next, Mr. Nathanson argued that Hall J. erred in failing to give sufficient weight to the diminution in the risk when that happy state was achieved by Mr. Laxton's early success. There is no doubt that a substantial reduction in risk of non-payment occurred early in this case, and it is probably true that Hall J., on the advice of an expert whose evidence he favoured, did not give as much weight to this factor as Mr. Coles would prefer, but he said it was a factor to be considered because it related to the skill of the lawyer which is one of the important ***Yule*** factors.

32 Moreover, Hall J. expressly said that this question of attribution of diminution of risk to the skill of the lawyer was not a "large factor" -- only that it was worthy of consideration.

33 What the judge did, of course, was to reduce the lawyer's recovery from 25% to "a range of 10%" for funds recovered after the summer of 1986 by which time about $6.2 million had been recovered. This substantially reduced Mr. Laxton's recovery by about $750,000. In my view, therefore, substantial weight was obviously given to the reduction of risk brought about by Mr. Laxton during the first year of the retainer.

34 Mr. Nathanson's principal submission may be summarized by saying that the proper course to follow would be to determine a proper fee in accordance with the ***Yule*** factors, and then to consider the changing risk to the lawyer as the matter progresses. He does not mention the agreed expectations and entitlement to larger fees based upon success when retained by a Contingency Fee Agreement.

35 On the first stage, Mr. Nathanson analyzed the course of the proceedings in the terms of the ***Yule*** principles, namely, complexity, time, skill, results etc., and suggested that a fee of from $250,000 to $350,000 would be reasonable. With respect, I do not agree and there was expert evidence to the contrary. Nevertheless, I shall discuss the ***Yule*** factors briefly.

1. Extent and Character of the services rendered.

36 The extent and character of the services rendered were, from any perspective, formidable, even to an experienced lawyer. Mr. Nathanson argued that Mr. Laxton did not have any expertise in winding up companies, bankruptcy, and related matters. The truth is that few senior counsel have much experience with such matters. Because of the breadth of their experience, and their special adversarial skills, however, senior counsel are quick learners who master the details, understand the issues, conceptualize the difficulties, and figure out how to achieve the desired result. The problems faced by Mr. Laxton were complex and formidable.

37 As Hall J. said, "It is all too easy in hindsight to underestimate the task and the performance." Hall J. also characterized the scope of the litigation as "considerable" and "fraught with difficulty." With respect, I think that understates the magnitude of the task at the outset because, it must be remembered, the Trustee was favourably disposed to the preferred shareholders and it must be assumed they too knew the value of the underlying assets.

2. The labour, time and trouble involved.

38 This is undoubtedly the weakest part of Mr. Laxton's case because he achieved success so quickly. Except for this, the full

contract fee would likely be payable. On the other hand, if the other factors were as favourable to Mr. Coles as this one, then a *Yule*-based fee of $250,000 - $350,000 might have been appropriate although it might still be inadequate considering the magnitude of the success achieved.

3. The Character and Importance of the Litigation

39 In his Factum, Mr. Nathanson conceded that the litigation was "...very important to Mr. Coles and C.I.S. Coles stood to gain many millions of dollars for an investment of $60,000." I agree with Mr. Nathanson on this question.

4. The Amount of Money and the Value of the Property Involved.

40 It is only necessary to mention that Mr. Coles was seeking control of an incredible windfall. Such substantial opportunities come along infrequently in business and professional life.

5. The Professional Skill and Experience Called For.

41 The professional skills and experience called for in this case were legal judgment, audacity and skill on the part of a counsel who could figure out how to win, and pull it off. Mr. Laxton is one of only a very few counsel at our Bar who possessed the right

combination of talents for this task. He had precisely what the job required even though, as mentioned above, he had little experience with this discrete area of practice.

6. <u>The Character and Standing of Counsel in his Profession.</u>

42 Mr. Laxton's character has never been questioned and it is hardly relevant to this enquiry. His standing and reputation is that of a lawyer who is retained in important cases and often wins. He is, without question, one of our pre-eminent counsel with over 30 years standing at the Bar. He was recommended to Mr. Coles as the best person for the job by a shrewd observer of legal talent.

7. <u>The Results Achieved.</u>

43 As Mr. Nathanson said in his Factum, the trial judge characterized the skill brought to bear with superlatives. This is what Hall J. said:

> The scope and pace of the success achieved was due, I believe, to the very able counsel work manifested by the respondent law firm. There was skill in research, skill in tactical approach and skill in execution. After the event, many things in human affairs look a great deal simpler. Matters as disparate as the Civil War or the latest Super Bowl are generally susceptible of a clear view post event but those engaged in contested human endeavours know how much more confused and inchoate matters can appear from 'the trenches'. It would be fundamentally unjust to not recognize the immense achievement of the law firm here. It is all too easy in hindsight to underestimate the task and the performance.

> In the CIS case, a superb result for the client was achieved by highly skilled effort . . .

44 In more practical terms, Mr. Coles had invested $60,000 in CIS before he met Mr. Laxton. He could not pay more than $5,000 as a retainer. A year later, he controlled a company with over $6 million in assets with potential for twice that amount, all brought about through the agency of Mr. Laxton.

45 Having regard to all of the above, I believe Mr. Nathanson's estimate of a fee of from $250,000 to $350,000 based upon the ***Yule*** principles is completely inadequate even though only a few well timed and well-argued Chambers motions were required.

46 While the ***Yule*** principles furnish useful categories to consider in a matter of this kind, I am not persuaded that the "Registrar's" process asserted by Mr. Nathanson is the proper way to determine the reasonableness of a fee in a case of this kind. That process lacks relevance in the context of a case where both judgment, audacity and legal skill, which were obviously required, must be measured against an agreed formula. Furthermore, the process suggested by Mr. Nathanson requires this Court to assess the expert evidence and apply arbitrary values to a variety of factors to reach a base figure and then to add a further arbitrary amount for risk and expectation which, in turn, would produce an arbitrary fee. In this kind of a process, it would be just as reasonable to

measure the ***Yule*** factors at $1.5 million as at $500,000, and although a Registrar would have to do that in the absence of an agreement, I do not think that would be the correct way to approach this problem.

47 Instead of making such an assessment, I believe this Court, particularly, must remember its task. This is not to fix a fee either by a reconsideration of all the evidence and the application of judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context. All the circumstances must be considered, including the ***Yule*** factors, the risks and expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment.

48 Hall J. obviously proceeded in this way and I think he was correct in doing so. Assisted by expert evidence, he concluded that 25% of the amount realized was a reasonable fee up to the summer of 1986 having regard to the daunting nature of the task, the improbability that a group of companies so long in the hands of trustees could be captured by a clever opportunist, the risk and

expectations involved in the context, and the incredible success achieved.

49 Considering the circumstances already described, I find nothing unreasonable or threatening to the integrity of the profession in a fee of 25% for the skillful recovery of $6.5 million. Furthermore, as this is essentially a matter of judgment based upon the evidence, and no error suggests itself to me, there is no reason to interfere with this part of the judgment appealed against.

50 Next, Hall J. considered what Mr. Laxton should recover for services subsequent to the summer of 1986. By this time, the risk was greatly lessened but it is anomalous, to say the least, that a lessened risk resulting from Mr. Laxton's skill should be charged against him. Hall J., however, again as a matter of judgment, thought the agreement produced an unreasonable fee for such services and he determined that a reduction to a range of 10% for subsequently recovered and anticipated funds would produce a reasonable fee.

51 I remain unconvinced that there should be much, if any, reduction in a lawyer's fee for lessened risk brought about by the skill of the lawyer, but I do not find it necessary to agonize over this question because of the view I have of the rest of this case.

52 While I would not have reduced Mr. Laxton's recovery from 25% to a range of 10% in these circumstances, I cannot say Hall J. was wrong in doing so or that my assessment of the appropriate fee for post-1986 realizations would be any better than his. He appears to have exercised his judgment in a perfectly appropriate way for which he gave rational reasons and again, I would not interfere with what he decided in this connection.

53 The next question is the $250,000 additional fee provided by the agreement in lieu of recoverable costs ordered by Arkell L.J.S.C. (as he then was), on the Winding Up Petition. There was a further order, made by Gibbs J. (as he then was), ordering the Trustee, personally, to pay what were then called solicitor and client costs. Mr. Laxton's counsel says these are the costs that were thought to be in the range of $125,000 to $140,000.

54 Hall J. does not seem to have recognized this distinction in his Reasons for Judgment, probably because Gibbs J. made his order after the date of the agreement which was not before him. Those costs clearly belong to CIS and do not form part of the present dispute between Mr. Laxton and CIS. I do not propose to say anything further about those costs.

55 Hall J. estimated the legal costs mentioned in the agreement would not likely exceed $100,000, but he awarded $150,000 because he thought $250,000 was too favourable to the law firm and because

$100,000 did not give sufficient weight to the bargain. Mr. Nathanson argued that this carried the logic of the agreement to an illogical extreme but I construe this to mean that Hall J. recognized Mr. Laxton was entitled to something on this account but that $250,000 was unreasonable for costs which were not likely to exceed $100,000.

56 Again, I might have been persuaded to reduce this amount to the costs likely to be recovered, but it is impossible to say which of us would be correct. Hall J. apparently thought the costs might be more that $100,000 and decided as a matter of judgment that the agreement should be modified in this way. In such circumstances, I would not interfere with the conclusions reached by the trial judge.

57 Accordingly, I would dismiss the appeal.

58 Mr. Laxton has brought a cross-appeal, asking that the Contingency Fee Agreement be enforced without modification. He argues that there is nothing which operates unreasonably in the Agreement already found to be fair, or which impairs the integrity of the profession.

59 With respect, for the reasons already mentioned, Hall J. found that the Contingency Fee Agreement did operate unreasonably after the summer of 1986, and with respect to the allowance for costs.

Having already concluded that I should not interfere on those issues, which were matters of judgment that Hall J. made on valid grounds, I would dismiss the counterclaim.

60 As Mr. Laxton has succeeded in resisting the appeal, and as the counterclaim took very little of the time of counsel either in their Factums or on the appeal, I would allow Mr. Laxton the costs of the appeal and make no order for costs on the counterclaim.

"The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Madam Justice Rowles"

I AGREE: "The Honourable Mr. Justice Donald"

Tab 12

Consulate Ventures Inc. v. Amico Contracting & Engineering

CITATION: Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc., 2007 ONCA 324
DATE: 20070501
DOCKET: C42803

COURT OF APPEAL FOR ONTARIO

WEILER, GOUDGE and CRONK JJ.A.

B E T W E E N :	)	
	)	
CONSULATE VENTURES INC.	)	***L. David Roebuck and Patrick J. Cotter,***
	)	**for the appellant**
	)	
Appellant (Plaintiff)	)	
	)	
- and -	)	
	)	
AMICO CONTRACTING & ENGINEERING (1992) INC., WINDSOR FACTORY OUTLET MALL LTD., and DOMINIC AMICONE	)	***Myron W. Shulgan, Q.C.,*** **for the respondent, Windsor Factory Outlet Mall Ltd.**
	)	
Respondents (Defendants)	)	***Claudio Martini,***
	)	**for the respondents, Amico Contracting & Engineering (1992) Inc. and Dominic Amicone**
	)	
	)	**Heard: December 4 and 5, 2006**

On appeal from the judgment of Justice Ellen M. Macdonald of the Superior Court of Justice dated November 19, 2004, and the costs order of Justice Macdonald dated October 6, 2006, with reasons reported at [2004] O.J. No. 4777.

CRONK J.A.:

I. Introduction

[1] This litigation concerns a dispute between two developer groups regarding an alleged joint venture for three development projects, including a retail outlet mall in a suburb of the City of Windsor. There are two principal issues on appeal: first, whether the parties entered into a binding joint venture agreement ("JVA"), the wrongful termination of which by the respondents, Amico Contracting & Engineering (1992) Inc.,

Windsor Factory Outlet Mall Ltd., and Dominic Amicone,[1] would entitle the appellant, Consulate Ventures Inc. ("Consulate"), to damages for breach of contract; and, in the alternative, whether Consulate is entitled to restitutionary relief based on *quantum meruit* for services rendered in respect of the Windsor outlet mall.

[2] The trial judge held that a binding JVA had not been finalized by the parties, thereby precluding the recovery by Consulate of damages for breach of contract. She also denied Consulate's *quantum meruit* claim. Accordingly, she dismissed Consulate's action and awarded the respondents their costs of the trial, together with prejudgment interest.

[3] For the following reasons, I agree with the trial judge that an enforceable JVA was not concluded by the parties. However, it is also my view that the trial judge erred by dismissing Consulate's *quantum meruit* claim. Accordingly, I would allow the appeal and, given the record in this case, direct a new trial on the latter issue.

II. Facts

[4] Although many of the facts relevant to the issues on appeal are not in dispute before this court, the parties are divided on the question of the adequacy of the trial judge's assessment of the evidence. Accordingly, it is necessary to consider the factual context of the parties' relationship and certain of the trial judge's factual findings in some detail.

(1) Preliminary Events

[5] In 1995, Heritage Centre Holdings Inc. ("Heritage") acquired twenty-two acres of land in LaSalle, Ontario (the "Windsor Property"), which it intended to 'flip' to a third party for the development of retail facilities. However, despite its efforts during the next two years, Heritage was unable to sell or lease the Windsor Property.

[6] Consulate, an experienced shopping plaza developer, was introduced to the Windsor Property by a Heritage representative in the summer of 1997 when Consulate's president, John Sorokolit ("Sorokolit"), visited the site. At that time, Consulate owned forty acres of land in Niagara Falls, Ontario (the "Niagara Property"), which it was proposing to develop as a retail outlet facility. It was also involved in preliminary plans for a resort in Niagara Falls, referred to by the parties as the "Grand Niagara Project".

[7] Sorokolit was experienced in the development of outlet malls, a relatively new concept in Canada in 1997. When Sorokolit saw the Windsor Property, he thought that it had potential for the establishment of an outlet mall. This led to a series of proposals by

[1] Windsor Factory Outlet Mall Ltd. was previously known as Heritage Centre Holdings Inc. I refer to the respondents collectively as the "Heritage Group" in these reasons.

Consulate to Heritage in the summer and early fall of 1997 regarding the possible joint development of the Windsor Property as a retail outlet mall. Heritage rejected these proposals.

[8] In mid-September 1997, however, Consulate and Heritage agreed in writing to explore the possibility of jointly developing a manufacturers' outlet mall on the Windsor Property (the "1997 Agreement"). Under this agreement, the parties agreed that if Consulate obtained sufficient prospective tenant interest in the proposed outlet mall by the end of 1997, the parties would "proceed to formulate a [JVA] on terms which are reasonable and are mutually acceptable to both parties". The 1997 Agreement further stated that if Heritage was satisfied with the leasing potential of the Windsor Property as a manufacturers' outlet mall, "both parties shall enter into a [JVA] prior to March 1, 1998".

[9] Although the 1997 Agreement was superceded by later events, the parties emphasize two of its terms. The first stated that if Heritage cancelled the 1997 Agreement prior to December 31, 1997 due to insufficient tenant interest in the proposed outlet mall, but nonetheless commenced construction of a manufacturers' outlet mall within two years, Heritage would pay Consulate a consulting fee (a "break fee") of two million dollars.

[10] The second term concerned the consensual dissolution of the arrangement between the parties. It provided that if the parties mutually agreed to dissolve their relationship by December 31, 1997, "neither party shall be liable to the other for any loss, costs or expenses". When Heritage executed the 1997 Agreement, its president – the respondent Dominic Amicone ("Amicone") – added a handwritten note immediately after this dissolution provision, stating that, in addition, Heritage would "no longer be responsible for the costs" – the break fee – outlined in the 1997 Agreement.

[11] At trial, Amicone testified that he intended this note to be a stand-alone term that eliminated any obligation to pay the break fee. Consulate, in turn, maintained that the note applied only if the consensual dissolution provision of the 1997 Agreement was triggered. It also asserted, in any event, that the break fee was relevant to its *quantum meruit* claim because it afforded important evidence of the parties' intention that Consulate would be paid for its efforts relating to the proposed Windsor outlet mall.

[12] The 1997 Agreement was short-lived. In October 1997, when Heritage received information from a third party that caused it to question the suitability of the Windsor Property for an outlet mall, it decided to sell the Windsor Property to a Consulate-related company for $2.5 million (approximately $110,000 per acre) (the "Sale Agreement").

[13] The Sale Agreement was conditional. It afforded Consulate a three month due diligence period within which to satisfy itself that an acceptable tenancy level could be

achieved for the proposed outlet mall. This deadline was extended by the parties, ultimately affording Consulate until February 22, 1998 to satisfy or waive the due diligence condition.

[14] Two notable events occurred before the expiry of the due diligence condition. First, almost immediately after the execution of the Sale Agreement, Consulate approached Nike Canada, a major retailer, about the possibility of Nike becoming an anchor tenant in the proposed Windsor outlet mall. According to Sorokolit, Nike expressed interest in this proposal. Sorokolit claimed that he informed Amicone of Nike's interest, but also explained that because Consulate was involved in a dispute with an outlet mall developer in Niagara Falls, where Nike hoped to build a store, Sorokolit should not be involved directly in further discussions with Nike about the proposed Windsor outlet mall.

[15] At trial, Amicone denied any knowledge that Sorokolit had contacted Nike prior to the expiry of the Sale Agreement. However, Consulate established that after speaking with Sorokolit in mid-January 1998, Amicone spoke with a Nike leasing agent. It is uncontested that, eventually, a letter of intent was received from Nike concerning the lease of premises in the Windsor outlet mall and that a leasing agreement was negotiated with that company.

[16] Second, Amicone told Sorokolit that he had an agreement in principle to buy out the interests of some of Heritage's minority shareholders for $60,000 per acre – an amount almost fifty per cent less than the agreed per acre price under the Sale Agreement. On Sorokolit's version of events, this disclosure effectively braked any further efforts by Consulate to satisfy the due diligence requirement of the Sale Agreement.

[17] As events unfolded, the Sales Agreement expired without Consulate having waived or satisfied the due diligence condition. As a result, the transaction contemplated under the Sale Agreement never took place.

(2) Alleged JVA

[18] In mid-March 1998, when he visited the Niagara Property, Amicone became interested in and satisfied of the viability of the site's potential for an outlet mall development. He informed Sorokolit of his interest in the Niagara market.

[19] Also in the spring of 1998, Consulate created the name "Windsor Crossing Premium Outlets" and registered it with the applicable authorities as a business name in Ontario. It appears that Heritage began using this name in respect of the proposed Windsor outlet mall in the spring of 1998. Consulate also registered the term "premium outlets" as a trademark in Canada.

[20] During the next several months, the parties exchanged information about the Windsor and Niagara Properties, as well as the Grand Niagara Project. They also met to discuss the terms of a joint venture concerning all three development projects.

[21] Unbeknownst to Heritage, however, Acktion Corporation ("Acktion"), one of Consulate's lenders, held a mortgage on the Niagara Property pursuant to a loan and participation agreement. Under the terms of this agreement, absent a waiver by Acktion of its participation rights, Consulate could not transfer an interest in the Niagara Property to a third party without Acktion's consent as long as Acktion's loan, in the approximate amount of two million dollars, remained outstanding. Moreover, Consulate was precluded from entering into any joint venture without Acktion's prior consent.

[22] Notwithstanding the terms of the Acktion agreement, Consulate wrote to Heritage on June 16, 1998 outlining the terms of a proposed joint venture (the "June Letter"). This document is central to the issues on appeal because Consulate relies on it as constituting the alleged JVA between the parties.

[23] The June Letter contemplated the joint development by Consulate and Heritage of the Windsor Property as a manufacturers' outlet mall to be known as "Windsor Crossing Premium Outlets", and the Niagara Property as a retail commercial development. It also provided for the acquisition by the proposed joint venturers of an interest in the Grand Niagara Project. In the form provided to Heritage, the material terms of the June Letter included:

> (i) Consulate and Heritage (or its nominee, the respondent Amico Contracting & Engineering (1992) Inc. ("Amico")) would form a joint venture, to be known as "Amicon Developments" ("Amicon");
>
> (ii) Heritage would transfer a fifty per cent interest in the Windsor Property, together with a promissory note in the amount of $1.25 million, to Consulate, "upon formation of the Joint Venture";
>
> (iii) Consulate would transfer a fifty per cent interest in the Niagara Property to Heritage "upon formation of the Joint Venture";
>
> (iv) the opening of the Windsor outlet mall would be targeted for April 1999;
>
> (v) Heritage would be responsible for "architectural and engineering drawings, governmental approvals and

> construction management", while Consulate would be responsible for "leasing, marketing and property management". The services rendered by both companies would be provided "at reasonable market rates which are acceptable to the Joint Venture";
>
> (vi) the joint venture – Amicon – would obtain the financing to complete the construction of Phase I of the outlet mall on the Windsor Property;
>
> (vii) Amicon would "continue to develop" the Niagara Property as a retail commercial property;
>
> (viii) Amicon would "secure an interest" in the Grand Niagara Project, described in the June Letter as a 250 acre golf and 400 hotel room resort "being developed … in conjunction with Royco Hotels and Resorts of Calgary, Alberta";
>
> (ix) Amicon would obtain all construction contracts associated with the Grand Niagara Project; and
>
> (x) each of the joint venturers and Amicon would bear prorated shares of the development costs – the "soft costs" – of the Grand Niagara Project, in an amount not to exceed $450,000.

[24] Importantly, para. 8 of the June Letter read:

> 8. Amicon shall be formed upon "Nike" signing a lease or agreement to lease for the [Windsor outlet mall] of no less than 15,000 square feet and both Heritage/Amico and Consulate entering into satisfactory Joint Venture, Management and Trust Agreements governing the activities of their Joint Venture.

[25] The June Letter, which Sorokolit signed on behalf of Consulate, concluded with this language:

> I believe that the above outline fairly reflects our discussions of the past several weeks. If you are in agreement with these terms, or would like to amend, delete or revise same, please

> do so and sign below in acknowledgement and I will proceed to prepare the draft Joint Venture documents for your review.

[26] The June Letter made no mention of the Acktion mortgage or loan and participation agreement. Nor did Consulate or Sorokolit otherwise disclose these matters to the Heritage Group when proposing the joint venture and the land exchanges envisaged by the June Letter.

[27] Heritage did not sign the June Letter immediately. However, Amicone kept Sorokolit informed of progress on issues concerning the development of the Windsor Property throughout the spring and summer of 1998. He provided Sorokolit with copies of relevant documentation, including construction drawings for Phase I of the outlet mall, brochures of the proposed development, and a draft lease agreement that had been forwarded to Nike for review. The trial judge accepted Amicone's evidence that these actions were undertaken because he was "interested in pursuing a joint venture relationship" with Consulate.

[28] Sorokolit and Amicone met in mid-July to discuss the joint venture. In several follow-up letters to Heritage, Consulate pressed for completion of the joint venture arrangements.

[29] In September 1998, Consulate informed Acktion of the proposed "land swap" with Heritage concerning the Windsor and Niagara Properties and sought Acktion's consent to the transfer to Heritage of an interest in the Niagara Property, or the waiver by Acktion of its participation rights. Alternatively, Consulate proposed that Acktion might wish "to participate in both projects". Acktion's security interest in the Niagara Property and its loan and participation agreement with Consulate had still not been disclosed to the Heritage Group.

[30] Acktion rejected Consulate's various proposals, ultimately taking the position that it would relinquish its participation rights only upon payment of its outstanding loan to Consulate. At trial, Sorokolit maintained that Consulate had access to funds sufficient to retire its obligations to Acktion, such that Consulate could complete the land transfers contemplated by the June Letter. The trial judge, however, expressly rejected this evidence.

[31] Apart from the undisclosed issues concerning Acktion, the trial judge also found that Consulate knew when it signed the June Letter that a rezoning application in respect of the Niagara Property had been refused, as had Consulate's application for leave to appeal from that refusal. As a result, Consulate had written to Acktion on June 16, 1998 – the same day that it forwarded the June Letter to Heritage – informing Acktion that the development of the Niagara Property "must be placed 'on hold' indefinitely until such time as [Consulate could] devise an alternate development scheme". It does not appear

that Consulate told the Heritage Group of these impediments to the development of the Niagara Property.

[32] A critical meeting between Sorokolit and Amicone took place on November 14, 1998, when they reviewed the progress of the development of the Windsor outlet mall, including various construction financing proposals for that project. Importantly, Heritage also signed the June Letter. However, para. 8 of that letter, set out in para. 24 of these reasons, was first crossed out and its deletion was initialled by the parties, along with other handwritten changes.[2]

[33] Sorokolit's father, William Sorokolit Sr., was present at the November 14 meeting. It was his unchallenged evidence at trial that, prior to the deletion of para. 8, the parties discussed the absence of any need for the further documentation mentioned in that paragraph. He also stated that he offered to pay fifty per cent of any cash requirement for the development of the Windsor outlet mall and to provide any personal guarantees required by the joint venture's lenders as a condition of construction financing. Finally, he said that after the June Letter was signed by Heritage, the parties shook hands and he remarked that his son and Amicone would be good joint venture partners. His son's testimony at trial was to the same effect.

(3) Subsequent Events

[34] By the time Heritage signed the June Letter, the parties had been engaged in discussions regarding a JVA for many months, focusing initially on the development of the Windsor outlet mall and, subsequently, on the development of the Windsor and Niagara Properties, and the Grand Niagara Project.

[35] Other significant events had also occurred, or were in progress. Sorokolit was actively pursuing major tenants for the Windsor outlet mall, including Adidas, Escada and Nike, the latter of which was expected to deliver a leasing commitment in the near future. As well, Sorokolit had delivered to Amicone drawings for signage at the Windsor outlet mall, and photographs and other documents concerning outlet malls in the United States to assist in formulating the design concept for the Windsor mall. He had also reviewed and advised Heritage on such matters as the site plans, elevation drawings, blueprints, construction specifications, and design and configuration renderings for the Windsor outlet mall.

[36] Consulate relies on these activities, and on the conduct of the parties after Heritage signed the June Letter, as evidence that the parties agreed to a binding JVA on November 14, 1998. In particular, it says that, in accordance with its obligations under the June

[2] All subsequent references in these reasons to the June Letter refer to the amended version of this document, as signed by Heritage on November 14, 1998.

Letter and at the request of or with the concurrence and encouragement of the Heritage Group, it furnished services to the Heritage Group during the period from mid-November 1998 to June 22, 1999 to advance the development of the Windsor outlet mall in furtherance of what it understood was a subsisting JVA.

[37] These services by Consulate included reviewing completed construction drawings and a revised site plan for the Windsor outlet mall; hiring, at its own expense, an experienced leasing agent to assist in securing suitable retail tenants; continued efforts to obtain prospective retail tenants; obtaining a firm leasing commitment from Adidas; and the exploration and proposal of tax-efficient alternatives to the land exchanges outlined in the June Letter. I will return to the relevance of some of these facts in my discussion of the legal issues.

[38] On June 23, 1999 – one day before Phase I of the Windsor outlet mall was scheduled to open – Heritage's solicitors wrote to Consulate, taking the position that the June Letter constituted merely an agreement to agree or a letter of intent, and denying any agreement between the parties to proceed with a joint venture.

[39] In their letter, Heritage's solicitors also stated, "Further, as a result of the delay and the fact that Consulate does not control the [Niagara Property] described in the [June Letter], our client is unwilling to proceed with any joint venture with you." These assertions were based, in part, on an inaccurate title search of the Niagara Property, which suggested that Consulate did not own part of that site. At trial, however, Consulate established that it did own the entirety of the Niagara Property.

[40] Approximately three months later, Consulate sued the Heritage Group, seeking damages for breach of contract, breach of fiduciary duty, breach of duty of confidence, and breach of the duty to bargain in good faith. It also sought an accounting and disgorgement of profits concerning the Windsor outlet mall, and damages or restitutionary relief based on *quantum meruit*, plus ancillary relief.

[41] The Heritage Group defended the action on several grounds, including on the basis that a complete JVA had never been entered into by the parties. In the alternative, they pleaded that if a JVA existed in June 1999, it had been properly rescinded by Heritage.

[42] As I have indicated, the trial judge concluded that the parties did not form a binding JVA and that "the relationship between [the] parties and the manner in which they conducted themselves does not come close to creating the legal situation that flows from a binding [JVA]". She also held that the parties did not expect to be paid "for their efforts to bring the joint venture relationship to fruition". Accordingly, she dismissed Consulate's action, and subsequently awarded costs to the Heritage Group.

III. Issues

[43] The issues on appeal are:

> (1) Did the trial judge err by concluding that no binding JVA was entered into by the parties?
>
> (2) Did the trial judge err by rejecting Consulate's *quantum meruit* claim?

IV. Analysis

(1) Contract Claim

[44] Consulate makes four principal submissions in support of its challenge to the trial judge's holding that the June Letter did not constitute a binding JVA. First, it says that the trial judge misdirected herself as to the applicable test for determining the intention of the parties regarding the June Letter. Second, it submits that the trial judge erred in several respects in her evaluation of the evidence. Third, it argues that the trial judge erred by concluding that the June Letter omitted terms necessary for the creation of a binding JVA. Finally, it maintains that the trial judge's reasons are inadequate and conclusory.

(a) Applicable Legal Test Regarding the Parties' Intention

[45] At para. 2 of her reasons, the trial judge stated:

> The parties agree that a [JVA] is a relational contract and not a transactional one. Accordingly, the intentions of the parties becomes critical in answering the following question: Did they think that the [June Letter] was a completed agreement or did they think that something more was to be done to complete the contract?

[46] Later in her reasons, the trial judge accepted Amicone's evidence that when he signed the June Letter, he thought that he was signing a letter of intent, to be followed by further negotiation.

[47] Consulate argues that these passages reveal that the trial judge improperly focused on subjective, rather than objective, factors in determining the intention of the parties, thereby misdirecting herself as to the applicable legal test for determining the effect of the June Letter.

[48] I disagree. Although it is true that the trial judge referred early in her reasons to the parties' subjective beliefs concerning the effect of the June Letter, in her subsequent analysis of the relevant law she said at para. 42: "The issue to be decided is whether the execution of a formal contract is a prerequisite for an enforceable contract or whether it is merely a step in carrying out an already enforceable contract." Then, at paras. 43 and 44 of her reasons, the trial judge expressly noted that the intention of the parties concerning the June Letter was to be viewed objectively, based on the parties' words or conduct. She applied this principle to the facts as she found them, concluding at para. 45, "*Viewed objectively*, the words and actions of both parties … suggest that they intended their agreement to be a step in the negotiations as opposed to a binding contract." [Emphasis added.]

[49] In the end, the trial judge recognized and applied an objective test to her evaluation of the parties' intention about forming a binding JVA. This ground of appeal therefore fails.

(b) Trial Judge's Evaluation of the Evidence

[50] Consulate argues that the trial judge erred in her evaluation of the evidence: (i) by ignoring evidence of the deletion of para. 8 from the June Letter, of the Sorokolits concerning the events surrounding Heritage's signing of the June Letter, and of the parties' conduct thereafter; and (ii) by taking into account irrelevant considerations. I would reject these arguments.

(i) The 'ignored' evidence

[51] Consulate argues that the deletion of para. 8 of the June Letter was a signal event that confirmed the parties' intention to be bound by the joint venture provided for under that letter, without the necessity of further negotiations or additional documentation. This is supported, Consulate submits, by William Sorokolit Sr.'s evidence of the events surrounding Heritage's execution of the June Letter – including the discussions between the parties when the document was signed – and by the parties' conduct thereafter. The trial judge, Consulate says, ignored this critical evidence when she held at para. 45 of her reasons that: "Viewed objectively, the words and actions of both parties in this case suggest that they intended their agreement to be a step in the negotiations as opposed to a binding contract."

[52] In my opinion, however, the trial judge's reasons indicate that she was cognizant of the relevant evidence of the parties' intention and that she applied the proper legal principles to that evidence. I say this for the following reasons.

[53] First, the trial judge's reasons indicate that she lent her mind, as she was obliged to do, to the language of the June Letter. For example, at para 45 of her reasons she wrote,

"Neither party acted on the agreement as though it was final and binding, *and the wording in the [June Letter] contemplates further negotiation*." [Emphasis added.]

[54] I see no error in this finding. Even after the deletion of para. 8, numerous paragraphs in the June Letter suggest that it relates to a prospective undertaking. In its introductory paragraph, the June Letter states that Consulate "would be interested to proceed as a Joint Venture".[3] In paras. 2 and 3 of the June Letter, reciprocal land exchanges were called for, "upon formation of the Joint Venture". Finally, in the concluding paragraph of the document, Sorokolit indicated that, upon Heritage signing the June Letter, he would "proceed to prepare the draft Joint Venture documents for your review". The wording of this concluding paragraph indicates that further documentation

was required even if amendments were made to the June Letter prior to its execution by Heritage.

[55] Second, as I have said, the trial judge expressly accepted Amicone's evidence that, by striking para. 8, he intended only to delete the condition pertaining to obtaining an executed lease (or agreement to lease) from Nike, and not the companion condition that required the completion of a formal JVA and associated documentation as a prerequisite to the creation of the joint venture. By accepting this evidence, the trial judge implicitly addressed the events of November 14, 1998 surrounding the signing of the June Letter, including the removal of para. 8.

[56] Third, the trial judge clearly understood the importance of the June Letter to Consulate's case. As she observed at para. 18 of her reasons, the June Letter was "pivotal to the theory of Consulate's case".

[57] There is no doubt that the letter to which the trial judge referred in her reasons was the version of the June Letter with para. 8 deleted. Indeed, this version was attached as Schedule "A" to the trial judge's reasons.

[58] In this context, and given the significance attached by Consulate to the removal of para. 8 from the June Letter, I cannot agree that the trial judge ignored that key amendment to the version of the June Letter that was ultimately signed by both parties.

[59] It is true, as Consulate emphasized during oral argument before this court, that the trial judge did not explicitly mention the evidence of the deletion of para. 8, or the Sorokolits' testimony about the discussions between the parties when Heritage signed the June Letter, in her reasons. Given the reliance placed on this evidence by Consulate to demonstrate the alleged existence of an enforceable JVA, it would have been preferable had the trial judge addressed this evidence directly in her reasons.

[3] Notably, Consulate used virtually identical language in an earlier letter to Heritage dated October 31, 1997, which Sorokolit described in his testimony as a "letter of interest" that created no legal obligations.

[60] Nevertheless, in my opinion, properly read, the trial judge's reasons reveal that she concluded on the record as a whole that the evidence of the events of November 14, 1998 fell short of establishing the creation of a binding JVA between the parties. This finding is supportable on the evidence and not open to appellate review.

[61] In addition to those parts of the trial judge's reasons to which I have already referred, this conclusion is bolstered by other passages of her reasons. For example, at para. 35, the trial judge revisited the issue of the completeness of the June Letter. She indicated:

> By the time the parties had signed the letter on November 14, 1998, Mr. Amicone was proceeding with the site work in Windsor. By January 1999, construction had begun. All of this was being paid for from Mr. Amicone's resources. *I accept Mr. Amicone's evidence that he fully expected that Consulate's share of these expenses would be addressed in the continued negotiations that would lead to a final and binding [JVA]*. [Emphasis added.]

[62] Fourth, to the extent that the June Letter can be seen as ambiguous regarding the parties' intention, the parties' post-November 14, 1998 conduct is relevant. Although the trial judge did not refer extensively in her reasons to the parties' conduct after Heritage signed the June Letter, contrary to Consulate's submission, read as a whole, her reasons demonstrate that she was clearly alive to the dealings between them and to events after November 14, 1998 regarding the Niagara Property and the Grand Niagara Project. While I might have approached the analysis of this 'conduct' evidence differently, I see no error by the trial judge in her treatment of this evidence warranting appellate intervention.

[63] In particular, the trial judge's findings that "neither party acted on the agreement as though it was final and binding" and that the parties' conduct "[did] not come close to creating the legal situation that flows from a binding [JVA]" were available on the evidence.

[64] On numerous occasions both before and after Heritage signed the June Letter, Consulate referred in correspondence with Heritage to the need to "formalize" their relationship and to "finalize" the contemplated joint venture by way of the execution of joint venture and other agreements.

[65] Consulate points out that in a letter dated February 1, 1999 to Heritage, Consulate expressly referred to the Amicon joint venture and indicated that it was proceeding to fulfill its leasing obligations under the June Letter. Consulate submits that this express

reference to a subsisting JVA is a clear expression of Consulate's understanding of the effect of the June Letter.

[66] But Consulate also wrote to Heritage on February 19, 1999 referring to the need "to complete our formal documentation *pursuant to our Letter of Intent* dated November 14, 1998, to *formulate* the Amicon Joint Venture". [Emphasis added.] Several subsequent letters from Consulate to Heritage again urged the completion of further documentation to finalize the joint venture.

[67] This correspondence indicates that, notwithstanding the deletion of the condition in para. 8 of the June Letter requiring additional documentation, Consulate itself regarded the requirement of further documentation as continuing. This is completely inconsistent with the suggestion advanced by Consulate that the bargain between the parties was concluded on November 14, 1998.

[68] Nor do I think that the language of Consulate's correspondence with Heritage can be explained away on the basis that Sorokolit, the signatory to the letters, lacked legal training. The trial judge found that Sorokolit was an experienced and sophisticated businessman. He was no stranger to commercial transactions. Thus, the wording of Consulate's numerous letters to Heritage cannot be dismissed as simply careless or inadvertent.

[69] In addition, and significantly, the parties' conduct regarding the progress of the Windsor outlet mall did not suggest that they were conducting themselves as joint venturers in respect of that development. The record indicates that both before and after Heritage's execution of the June Letter, all decisions and arrangements about the development of the Windsor outlet mall were made exclusively by the Heritage group. The trial judge held that Heritage alone developed the Windsor outlet mall, both prior to and after the June Letter.

[70] In particular, prior to November 1998, the Heritage Group had hired an architect and planners, entered into negotiations with municipal authorities regarding zoning, purchased the interests of Heritage's minority shareholders, and designated senior staff to work exclusively on the Windsor outlet mall project. Consulate had no involvement in or responsibility for any of these activities.

[71] This did not change with Heritage's execution of the June Letter. On the findings of the trial judge, notwithstanding various offers of assistance by the Sorokolits on or after November 14, 1998, the Heritage Group undertook the necessary construction and bank financing for the development of the Windsor outlet mall, again with no involvement or assumption of risk by Consulate. It did so in the face of an express provision in the June Letter that the joint venture – Amicon – would obtain the financing required to complete Phase I of the Windsor outlet mall. This clearly indicates that

Heritage was not acting after November 14, 1998 in furtherance of what it understood was a binding JVA.

[72] Moreover, the burden of these financial arrangements, the debt thereby created, and the associated security required were borne solely by Heritage. Notwithstanding the division of responsibilities described in the June Letter, this is inconsistent with the claim that the parties acted in concert to "proceed to develop" the Windsor outlet mall, as called for by the June Letter.

(ii) The "irrelevant" considerations

[73] I would also reject Consulate's assertion that the trial judge erred by considering or over-emphasizing the evidence of the Acktion loan, the evolving nature of the Grand Niagara Project, and Consulate's ability to "close" the land transfers provided for under the June Letter, when evaluating the effect of the June Letter.

[74] The trial judge held that the description of the Grand Niagara Project in the June Letter was inaccurate and misleading because, among other matters, it erroneously suggested that Royco Hotels and Resorts of Calgary was committed to the project when it was not. She also found that the changes to the proposed Grand Niagara Project after November 1998 were "extreme", that Amicone could "barely get through one proposal when he would receive a memo advising of further changes", and that the proposal for the Grand Niagara Project was "in a constant state of flux", evolving into a proposal "that was well beyond anything that … Amicone and his companies were comfortable with".

[75] In respect of Acktion's interest in the Niagara Property, based on Consulate's dealings with Acktion in June 1998 and the fact of Acktion's outstanding loan, the trial judge held that "Sorokolit knew that Consulate was not in a position to complete the land swap and indeed was never in a position to close on the land swap". The trial judge also held that the proposed "land swap" was a fundamental underpinning to the proposed joint venture.

[76] Consulate does not contest these factual findings. Instead, it maintains, in effect, that they are irrelevant to the issue whether the June Letter constituted a binding JVA and, as stated in its factum filed on this appeal, that the consideration of these issues deflected attention away "from the appellant's detailed case of 'conduct' and of services requested and performed".

[77] I disagree. The mutual obligations contained in the June Letter were predicated on the parties being positioned both to undertake and to perform their respective commitments under that letter. Evidence establishing that, from the outset, Consulate was not in a position to undertake these commitments was highly relevant to the question of whether the June Letter had the effect of creating a binding joint venture.

[78] In this respect, I disagree with Consulate's submission that the June Letter may be analogized to an agreement of purchase and sale for the transfer of mortgaged land. Under the latter type of agreement, no question arises at the time of contract formation concerning the vendor's ability to sell the land – all that is required is the discharge of the mortgage on closing in order to deliver clear title to the land sold. By contrast, in this case, when the June Letter was signed, Consulate was not in a position to develop the Niagara Property at all. Nor was it in a position to do so at any point prior to the commencement of this litigation. Moreover, its agreement with Acktion prohibited any form of joint venture concerning the Niagara Property without Acktion's consent, which was never given. Nor could the Grand Niagara Project proceed in the fashion described in the June Letter – Royco Hotels and Resorts of Calgary was not committed to the project.

[79] The facts surrounding the proposed developments of the Niagara Property and the Grand Niagara Project, therefore, were proper considerations. It was not open to Consulate, in my view, to insist upon the enforcement of those parts of the June Letter pertaining to the Windsor outlet mall when it was not positioned to proceed with the development of the Niagara Property or the Grand Niagara Project. To hold otherwise would permit Consulate to bifurcate the June Letter into separate joint ventures regarding each development project. This would violate both the plain language of the June Letter and the fundamental nature of the joint venture contemplated by it.

[80] I conclude, therefore, that a review of the trial judge's reasons does not disclose any error in her evaluation of the evidence warranting appellate intervention. The trial judge's factual findings regarding the language of the June Letter and the intention of the parties, as manifested by their words and conduct, were supported by the evidence.

(c) Omissions from the June Letter

[81] A document that omits essential terms, or that contains vague or incomplete material terms, will not constitute an enforceable contract. See for example, *Bahamaconsult Ltd. v. Kellogg Salada Canada Ltd.* (1976), 15 O.R. (2d) 276 (C.A.) at 277 leave to appeal to the S.C.C. refused, [1976] 2 S.C.R. vii; *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.) at 261.

[82] However, I do not accept Consulate's submission that the trial judge erred by holding that the June Letter lacked terms essential to the formation of an enforceable JVA. The trial judge put it this way at paras. 38 and 39:

> The most obvious omissions are the value to be attributed to the [Windsor Property], the value to be attributed to the Niagara [Property] and how [Heritage] would be compensated for the development of [the Windsor Property.]

…

> Aside from the omissions outlined above, the parties never addressed what would occur if there was a default by either party to the [JVA].

[83] Consulate acknowledged before this court that the June Letter contains a "bundle of obligations". I agree. The bargain contemplated by the parties concerned three development projects, each of which formed an integral part of the proposed joint venture. The June Letter contains no language suggesting that these projects were severable, such that Consulate could enforce a joint venture concerning the Windsor Property while also being relieved of its obligations in respect of the remaining development projects.

[84] Indeed, the trial judge concluded, and Sorokolit acknowledged at trial, that a major incentive for Heritage to sign the June Letter was the prospect that the joint venturers would obtain the construction contracts associated with the Grand Niagara Project, as specified in the June Letter. As Sorokolit pointed out in his testimony, this provision of the June Letter was inserted at the insistence of Amicone. This, together with the reciprocal land exchanges called for under the June Letter, compels the conclusion that the foundation for the proposed joint venture was the mutual advantages to the parties to be realized under all three development projects.

[85] When the June Letter is viewed in this fashion, I agree with the trial judge that it contains significant omissions concerning the proposed 'deal' between the parties. The trial judge identified three omissions that she regarded as material (the value of the Windsor Property; the value of the Niagara Property; and the method by which Heritage would be compensated for the development of the Windsor Property). She described these as the "most obvious omissions". Thus, the trial judge did not purport to exhaustively list the critical omissions from the June Letter.

[86] In my view, there are several key omissions in the June Letter. First, it makes no provision for the nature of the development on the Niagara Property or, in contrast to its provisions concerning the Windsor Property, for the respective responsibilities of the parties in relation to that development. Nor does it mention the encumbrances on that site or how they were to be discharged. Also, in the main, the June Letter is silent on the respective responsibilities of the parties concerning the Grand Niagara Project, including on the matter of the funding for the acquisition of interest contemplated for that development.

[87] On the view that I take of the commercial undertaking envisaged by the June Letter, these omissions, by themselves, render the June Letter unenforceable as a JVA. These are not merely technical or administrative matters. Rather, in my opinion, they are

necessary components of the overall development undertaking provided for under the June Letter. Without specific agreement on these issues, the obligations assumed by the parties in respect of these two projects were unclear and uncertain. Simply stated, the terms of the parties' bargain concerning two-thirds of the undertaking contemplated by the June Letter were never finalized.

[88] In these circumstances, it is unnecessary to address Consulate's submission that the "missing" terms identified by the trial judge were either not required by law or were addressed in the June Letter. It suffices to indicate that terms essential to the formation of a binding JVA in respect of the development undertaking as a whole were omitted from the June Letter.

(d) Adequacy of the Trial Judge's Reasons

[89] Finally, Consulate complains that the trial judge's reasons concerning the alleged JVA fall short of the applicable standard for sufficiency of reasons. See for example, *R. v. Braich* (2002), 162 C.C.C. (3d) 324 (S.C.C.); *R. v. Sheppard* (2002), 162 C.C.C. (3d) 298 (S.C.C.).

[90] Again, I disagree. This is not a case where the trial judge did not give any meaningful reasons. As I have said, the complaint is with the adequacy of the reasons. But there is no doubt in this case as to what the trial judge decided and how she reached her decision. While the trial judge's evaluation of the evidence regarding the intention of the parties could have been elucidated more fully, and with greater prominence, read in their entirety the trial judge's reasons reveal her reasoning process and the evidence accepted by her, and permit meaningful appellate review. No more was required.

(e) Conclusion

[91] Accordingly, I would reject Consulate's challenge to the trial judge's dismissal of its contract claim.

(2) *Quantum Meruit* Claim

[92] I reach a different conclusion, however, concerning Consulate's *quantum meruit* claim.

[93] Consulate argues that the trial judge erred in her analysis of this claim by applying the wrong legal test and by failing to consider the extensive evidence relied upon by Consulate to establish its *quantum meruit* claim. I agree with these submissions.

[94] The trial judge stated at para. 41 of her reasons:

> I keep in mind that claims based on *quantum meruit* have an underlying presumption of an entitlement to be compensated. *In other words, I must find a contractual relationship.* I cannot make such a finding. [Emphasis added.]

[95] With respect, this misstates the test for establishing entitlement to restitutionary relief based on *quantum meruit*. Such a claim is not dependant on the existence of a valid contract. Rather, it is a discrete cause of action, separate and apart from claims grounded in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit: see *Beatrice C. Deglman v. The Guaranty Trust Company of Canada (Administrator of the Estate of Laura Constantineau Brunet, Deceased)*, [1954] S.C.R. 725 at 734-35.

[96] The trial judge also stated at para. 41:

> At its highest, the evidence is that Mr. Sorokolit was providing advice and suggestions hoping that Consulate would get into a binding [JVA]. *The evidence does not support a conclusion that services were provided with the mutual expectation that if Consulate did not get into a [JVA], Mr. Sorokolit would be paid in any event.* [Emphasis added.]

[97] To these statements, the trial judge added in a footnote:

> For this reason, I reject a compromise and alternative position suggested by [counsel for Heritage] in closing submissions. There was one of two outcomes in this case once the parties decided [to] proceed to trial. The suggestion that I award nominal damages to Consulate for its role in procuring the [Adidas] lease and for the estimated number of hours spent by Mr. Sorokolit working on the Windsor [Property] is, to my mind, inherently illogical in law where the assertion is that there was no binding contract. These matter[s] were never discussed by the parties. However, if the parties choose a compromise position, it is not too late for them to do so. I add that I was not provided with any evidence of the number of hours spent on Windsor by Mr. Sorokolit.

[98] There are two difficulties with these comments. First, the authorities make clear that services provided in reliance on "some underlying measure of agreement" and at the request, or with the acquiescence, of the beneficiary of the services are compensable, although a valid enforceable contract between the parties may not exist. Services provided in these circumstances are not viewed as having been given gratuitously, based

on speculation. G.H.L. Fridman, in his leading text *Restitution*, 2d ed. (Toronto: Carswell, 1992), put it this way at 301-02:

> *The decided cases reveal a sharp contrast between situations in which what the plaintiff did was done at the defendant's request or with the knowledge and acquiescence of the defendant and those in which the plaintiff acted in his own supposed interests*. In the latter instances, the plaintiff may have believed that ultimately he would profit from some contract that he hoped or expected would emerge from what was done. In the event, however, no such contract materialised. The plaintiff's behaviour could be characterised as being tantamount to speculation. *Such cases differ from those in which there is some underlying measure of agreement, although not sufficient to constitute a valid, enforceable contract, in virtue of which the plaintiff performs the work or provides the services that are at issue. There must be established some express, or sometimes implied, request to do the work or some encouragement on the part of the defendant of the plaintiff that may be said to have misled the plaintiff into the belief that a contract would result.* At the same time, what the plaintiff does must be a reasonable and foreseeable response to the behaviour of the defendant. Furthermore, the consequence of what the plaintiff has done would seem to be that the defendant obtains a benefit of some kind. In other words, the defendant must be enriched by the plaintiff's acts. [Footnotes omitted and emphasis added.]

[99] Thus, where the claim for restitutionary relief is based on *quantum meruit*, as in this case, an explicit mutual agreement to compensate for services rendered is not a prerequisite to recovery. It suffices if the services in question were furnished at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services. See *Fridman, supra,* at pp. 290-92; *Nicholson v. St. Denis* (1975), 57 D.L.R. (3d) 699 (Ont. C.A.), leave to appeal to S.C.C. refused, [1975] 1 S.C.R. x.

[100] The Heritage Group resists Consulate's *quantum meruit* claim on the basis that the services in question – the provision of which the Heritage Group essentially conceded in

its factum on this appeal – were furnished "between colleagues" without the imposition of restrictions by Consulate, or for the purpose of "working towards a joint venture".[4]

[101] But there was considerable evidence at trial that Consulate's services concerning the Windsor outlet mall were provided either at the request of, or with the encouragement or acquiescence of, Heritage and Amicone, in anticipation or in light of the arrangements reflected in the June Letter. The record is clear that at least some of these services, which pertained to the design, marketing and leasing of the Windsor outlet mall, advanced the development of the Windsor Property. In that important sense, in my view, they benefited the interests of the Heritage Group.

[102] The services furnished by Consulate, without compensation, included:

(i) the provision to Heritage, at Amicone's request, of the business name "Windsor Crossing Premium Outlets", which was adopted and used by Heritage;

(ii) the supply to Heritage of draft signage drawings for the Windsor outlet mall;

(iii) the provision of advice, photographs and other documents regarding the design of the Windsor outlet mall;

(iv) advice, at Amicone's express request, concerning the draft site plan, blueprints and construction specifications for the Windsor outlet mall;

(v) detailed information and advice, again at Amicone's express request, on the contents and production of a leasing brochure;

(vi) the provision of a leasing plan and precedent marketing plans;

(vii) extensive efforts to secure suitable tenants for the Windsor outlet mall, including introductions to and discussions with Escada, Holt Renfrew, Adidas, Nike and others, ultimately resulting in letters of intent or completed leasing agreements with, at least, Escada, Adidas and Nike;

[4] No argument was advanced before this court that Consulate was disentitled by the 'clean hands' doctrine from recovering on the equitable basis of *quantum meruit*: See *Dunlop v. Major*, [1998] O.J. No. 2553 (C.A.).

(viii) advice, also at Amicone's request, regarding the terms of the proposed leasing agreement with Nike; and

(ix) to the knowledge of Amicone, the hiring of a leasing consultant, at Consulate's sole expense, to secure tenant commitments.

[103] The value of these varied services, in my opinion, cannot be discounted – essentially to zero – on the premise that they reflect a free exchange of information "between colleagues". Consulate had no relationship with the Heritage Group prior to the summer of 1997. Thereafter, for a period of about two years, it became closely involved in discussions and activities with the Heritage Group regarding the development of the Windsor Property. In so doing, it is arguable that Consulate provided at least some proprietary information or other assets to the Heritage Group (for example, the registered business name for the outlet mall and Sorokolit's photographs and other documents regarding the proposed design of the mall). Consulate also incurred expenses (for example, the retainer of a leasing consultant) that furthered the progress of the Windsor outlet mall.

[104] Moreover, some of Consulate's efforts bore fruit: the business name it created was used as the name for the Windsor outlet mall; its design suggestions admittedly inspired and appear to have been ultimately reflected in the design of the mall; and, importantly, its work generated several letters of intent and, eventually, some leasing agreements with high-end retail tenants for the mall.

[105] Consulate's claim for restitutionary relief is a claim for compensation for the fair value of the services provided by it to advance the development of the Windsor outlet mall. This is consistent with the terms of the June Letter, which provided that the parties would be compensated for their respective services concerning the Windsor outlet mall "at reasonable market rates which are acceptable to the Joint Venture".

[106] It is also consistent with the earlier inclusion in the 1997 Agreement of a two million dollar break fee in favour of Consulate, should Heritage develop an outlet mall prior to December 1999. The trial judge concluded that the inclusion of the break fee provision in the 1997 Agreement was intended to "test" what Sorokolit viewed as Heritage and Amicone's lack of business experience and sophistication, and that this provision was "wisely removed". Nonetheless, although the 1997 Agreement was eventually overtaken by other events, the break fee is still one indicator, among others, of the course of dealings between the parties, the overall context in which Consulate performed its services in relation to the Windsor outlet mall, and an expectation by Consulate that it would be compensated for its services.

[107] I note, as well, that Heritage appears to have conceded in final argument at trial that at least limited compensation should have been awarded to Consulate for services rendered in respect of the Windsor outlet mall. See footnote 12 of the trial judge's reasons, quoted above at para. 97. The effect of the trial judge's decision is to ignore this concession.

[108] In all these circumstances, I am satisfied that the foundation for restitutionary relief based on *quantum meruit* was made out by Consulate at trial. That the June Letter does not constitute a binding JVA does not diminish the fact that the Heritage Group continued to accept services from Consulate regarding the Windsor outlet mall, without compensation, after November 14, 1998. Some of these services were expressly requested by Amicone or Heritage. Others were provided with the encouragement or acquiescence of the Heritage Group. At no point after Heritage signed the June Letter until June 22, 1999 did the Heritage Group assert that Heritage did not understand, or that it rejected, the June Letter.

[109] Consulate led no evidence at trial about the value of its services to the Heritage Group or the time spent on the services provided. Rather, it led expert evidence about usual fee arrangements in the industry for consultants who contract to provide services. The trial judge made no assessment of this expert evidence, nor any findings about the value of the services actually furnished by Consulate. In these circumstances, a new trial is required to determine the nature, extent and value of the services provided by Consulate concerning the Windsor Property. I note that although the Heritage Group argues that no recovery is available against Amicone in his personal capacity or Amico, as distinct from Heritage, it will be for the trial judge at the new trial to determine which of the respondents is liable for such services.

[110] Finally, although Consulate requested this court to direct the basis upon which the new trial should proceed, I would decline to exercise this court's discretion in the fashion urged. We have not received submissions from the parties on the procedural directions sought by Consulate. In any event, I do not regard it as appropriate to restrict the trial judge's discretion on such matters. In my view, the trial management and procedural issues raised by Consulate, if not otherwise agreed on by the parties, are for the trial judge to determine on motion at the new trial.

V. Disposition

[111] I would allow the appeal and direct a new trial in accordance with these reasons. Consulate is entitled to its costs of this appeal on a partial indemnity basis, fixed in the total amount of $50,000, inclusive of disbursements and GST. The trial judge's costs award is set aside. Consulate shall deliver brief written submissions on the costs of the trial to the Registrar of this court within twenty days from the release of these reasons.

The Heritage Group shall deliver brief responding submissions to the Registrar within twenty days thereafter.

RELEASED:

"MAY -1 2007" "E.A. Cronk J.A."
"KMW" "I agree K.M. Weiler J.A."
"I agree S.T. Goudge J.A."

Tab 13

Davies v. Clarington (Municipality) et al.

Davies v. The Corporation of the Municipality of Clarington et al.

[Indexed as: Davies v. Clarington (Municipality)]

100 O.R. (3d) 66

2009 ONCA 722

Court of Appeal for Ontario,
Goudge, Sharpe and Epstein JJ.A.
October 16, 2009

Civil procedure -- Costs -- Substantial and full indemnity -- Trial judge erring in awarding costs on full indemnity basis against appellants from date of respondent's offer to settle where offer did not fall within Rule 49 of Rules of Civil Procedure and in absence of finding that appellants engaged in reprehensible or egregious behaviour. [page67]

B Inc., one of several defendants, delivered an offer consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. That offer was never revoked. Prior to closing arguments at trial, settlement discussions took place, and the other defendants (the "settling defendants") settled with the plaintiff. B Inc. did not participate in the settlement. The trial judge dismissed the action against B Inc. and ordered the settling defendants to pay its costs in the amount of $509,452.18. Full indemnity costs were ordered for the period following the delivery of B Inc.'s offer to settle. The settling defendants appealed.

Held, the appeal should be allowed.

Elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 where substantial indemnity costs are explicitly authorized. The second involves sanction-worthy behaviour by the losing party. Rule 49 was not applicable to B Inc.'s offer, and the trial judge made no finding that the settling defendants conducted themselves in a reprehensible or egregious fashion. Nor was such a finding warranted in the circumstances of this case. The settling defendants were entitled to advance their position and were not required to settle. They did nothing to abuse the process of the court. Moreover, the costs award was not fair and reasonable. The settling defendants would not have expected that they would be faced with an award of this magnitude, particularly in light of B Inc.'s limited involvement in the proceedings.

Cases referred to

Apotex Inc. v. Egis Pharmaceuticals (1990), 2 O.R. (3d) 126, [1990] O.J. No. 2187, 32 C.P.R. (3d) 559, 24 A.C.W.S. (3d) 76 (Gen. Div.); Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, [1991] O.J. No. 1232, 37 C.P.R. (3d) 335, 28 A.C.W.S. (3d) 26 (Gen. Div.); Beresford-Last (Litigation guardian of) v. Dworak, [2000] O.J. No. 4636, 101 A.C.W.S. (3d) 696 (S.C.J.); Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 132 A.C.W.S. (3d) 15 (C.A.); Marcella v. Integrated Management and Investments Inc., [2007] O.J. No. 1652, 157 A.C.W.S. (3d) 51 (S.C.J.); S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1 O.R. (3d) 243, [1990] O.J. No. 2321, 45 O.A.C. 394, 49 C.P.C. (2d) 234, 24 A.C.W.S. (3d) 597 (C.A.); Scapillati v. A. Potvin Construction Ltd. (1999), 44 O.R. (3d) 737, [1999] O.J. No. 2187, 175 D.L.R. (4th) 169, 122 O.A.C. 327, 46 C (2d) 16, 89 A.C.W.S. (3d) 73 (C.A.), consd

Other cases referred to

131843 Canada Ltd. v. Double "R" (Toronto) Ltd., [1992] O.J. No. 3879, 7 C.P.C. (3d) 15, 31 A.C.W.S. (3d) 907 (Gen. Div.);

Andersen v. St. Jude Medical, Inc. [2006] O.J. No. 508, 264 D.L.R. (4th) 557, 208 O.A.C. 10, 145 A.C.W.S. (3d) 786 (Div. Ct.); Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC (2005), 75 O.R. (3d) 638, [2005] O.J. No. 160, 5 C.P.C. (6th) 258, 136 A.C.W.S. (3d) 647 (C.A.); Davies v. Clarington (Municipality), [2006] O.J. No. 1307, 266 D.L.R. (4th) 375, 147 A.C.W.S. (3d) 151, [2006] O.T.C. 320 (S.C.J.); Dyer v. Mekinda Snyder Partnership Inc. (1998), 40 O.R. (3d) 180, [1998] O.J. No. 2204, 61 O.T.C. 390, 79 A.C.W.S. (3d) 1125 (Gen. Div.); Foulis v. Robinson (1978), 21 O.R. (2d) 769, [1978] O.J. No. 3596, 92 D.L.R. (3d) 134, 8 C.P.C. 198, [1978] 3 A.C.W.S. 309 (C.A.); Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC 210-025, 128 A.C.W.S. (3d) 1111; McBride Metal Fabricating Corp. v. H. & W. Sales Co. (2002), 59 O.R. (3d) 97, [2002] O.J. No. 1536, 158 O.A.C. 214, 19 C.P.R. (4th) 440, 113 A.C.W.S. (3d) 257 (C.A.); Moon v. Sher, [2004] O.J. No. 4651, 246 D.L.R. (4th) 440, 192 O.A.C. 222, 135 A.C.W.S. (3d) 202 (C.A.); [page68]Mortimer v. Cameron (1994), 17 O.R. (3d) 1, [1994] O.J. No. 277, 111 D.L.R. (4th) 428, 68 O.A.C. 332, 19 M.P.L.R. (2d) 286, 45 A.C.W.S. (3d) 1311 (C.A.); Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897, 163 D.L.R. (4th) 21, 111 O.A.C. 242, 41 B.L.R. (2d) 10, 5 C.B.R. (4th) 57, 22 C.P.C. (4th) 235, 81 A.C.W.S. (3d) 319 (C.A.); Rno-Dpt Inc. v. Wonderland Commercial Centre Inc., [2008] O.J. No. 4678, 2008 ONCA 786; St. Louis-Lalonde v. Carlton Condominium Corp. No. 12, [2007] O.J. No. 578, 2007 ONCA 108, 155 A.C.W.S. (3d) 479, affg [2005] O.J. No. 4164, 142 A.C.W.S . (3d) 934 (S.C.J.); Walker v. Richie, [2006] 2 S.C.R. 428, [2006] S.C.J. No. 45, 2006 SCC 45, 273 D.L.R. (4th) 240, 353 N.R. 265, J.E. 2006-1997, 217 O.A.C. 374, 43 C.C.L.I. (4th) 161, 43 C.C.L.T. (3d) 1, 33 C.P.C. (6th) 1, 151 A.C.W.S. (3d) 23, EYB 2006-110276, varg [2005] O.J. No. 1600, 197 O.A.C. 81, 25 C.C.L.I. (4th) 60, 31 C.C.L.T. (3d) 205, 12 C.P.C. (6th) 51, 138 A.C.W.S. (3d) 1156 (C.A.); Young v. Young, [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112, 108 D.L.R. (4th) 193, 160 N.R. 1, [1993] 8 W.W.R. 513, J.E. 93-1766, 34 B.C.A.C. 161, 84 B.C.L.R. (2d) 1, [1993] R.D.F. 703, 18 C.R.R. (2d) 41 p, 49 R.F.L. (3d) 117, 43 A.C.W.S. (3d) 410; Zesta Engineering Ltd.

v. Cloutier, [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161, 118 A.C.W.S. (3d) 341 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, rules 1.03 [as am.], 1.04(5) [as am.], 49 [as am.], 49.02(1), 49.10, [as am.], (1) [as am.], (2) [as am.], 49.13, 57.01 [as am.], (1) [as am.], (4) [as am.]

Authorities referred to

Orkin, M., The Law of Costs, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1993)

APPEAL from the costs order of Ferguson J., [2007] O.J. No. 4474, 161 A.C.W.S. (3d) 697 (S.C.J.).

James M. Regan, for appellants.

Brian J.E. Brock, Q.C., and Roseanna R. Ansell-Vaughan, for respondent.

The judgment of the court was delivered by

[1] EPSTEIN J.A.: -- The primary issue in this appeal involves the limits of the court's discretion to award costs on either a substantial indemnity or full indemnity scale. This court is asked to consider a costs award in the amount of $509,452.18, payable by a number of defendants in this action to a defendant against which the action was dismissed. The award is notable not only for its considerable quantum, but also for the trial judge's decision to fix a large portion of the costs on a full indemnity basis absent a finding of sanction-worthy conduct on the part of the party against which the cost order was made. Specifically, full indemnity costs were ordered for the period following the [page69]delivery of an offer to settle the claims of the plaintiff and other defendants on a without-costs basis.

[2] For the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the costs award below and substitute an award in the amount of $300,000 plus disbursements and Goods and Services Tax.

I. Background Facts

[3] This action, commenced on September 5, 2000, arose out of a train derailment that took place in Bowmanville on November 23, 1999.

[4] On April 10, 2002, Blue Circle Canada Inc., one of the defendants and the respondent in this appeal, delivered a non-severable offer to settle consenting to a dismissal of the claim and all counterclaims and cross-claims, without costs. This offer remained open for acceptance for 30 days. On February 1, 2005, Blue Circle delivered a second offer on the same terms (the "February 2005 offer"). This offer was never revoked and was open for acceptance at the time of trial.

[5] The trial, on the issue of liability only, began in April 2005 and continued for almost 11 weeks [Davies v. Clarington (Municipality), [2006] O.J. No. 1307, 266 D.L.R. (4th) 375 (S.C.J.)]. In this complex action, eight parties advanced claims, counterclaims and cross-claims in contract and in tort. Prior to closing arguments, settlement discussions took place, at the end of which the defendants/appellants in this appeal, the Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, The BLM Group Inc., Timothy Garnham, Apache Specialized Equipment Inc., Apache Transportation Services Inc. and Hydro One Networks Inc. (collectively, the "settling defendants"), settled with the plaintiff.

[6] In the course of the settlement discussions, Blue Circle offered to accept $250,000 from the settling defendants in relation to costs it incurred in defending their cross-claims. It subsequently reduced this amount to $200,000. This offer was not accepted and consequently Blue Circle did not participate in the settlement.

[7] As a result, the trial judge had to determine Blue

Circle's liability, if any, for damages arising from the derailment. On April 5, 2006, after hearing final arguments, the trial judge dismissed the action against Blue Circle.

[8] Blue Circle then sought costs against the settling defendants on a partial indemnity scale from the commencement of the litigation to the February 2005 offer and on a substantial indemnity basis thereafter. [page70]

[9] On November 19, 2007, upon considering written argument, the trial judge ordered the settling defendants to pay Blue Circle's costs in the amount of $509,452.18 plus disbursements of $25,276.77.

II. The Applicable Rules

[10] The award of costs is governed by s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43 and by rules 49 and 57.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[11] The general source of judicial discretion to award costs is found under s. 131 of the Courts of Justice Act, as expanded by rule 57.01.

[12] Section 131 of the Courts of Justice Act says:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[13] Rule 57.01 reads as follows:

> 57.01(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

. . . . .

(c) the complexity of the proceeding;

. . . . .

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

(Emphasis added)

[14] Rule 57.01(4) allows for elevated levels of costs:

57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,

. . . . .

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity

[15] "Substantial indemnity costs" is defined in rule 1.03 as "costs awarded in an amount that is 1.5 times what would [page71]otherwise be awarded in accordance with Part I of Tariff A". This part of Tariff A was once the prescribed grid for "partial indemnity costs", but is no longer in effect. "Full indemnity costs" is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation: see M. Orkin, The Law of Costs, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1993) at para. 219.05.

[16] Rule 49 deals with a specific aspect of costs: it is a self-contained scheme that addresses the manner in which offers to settle are brought into play. Its objective is to promote an offer of compromise and visit a cost consequence upon an offeree who rejects an offer that turns out to be as favourable as or more favourable than the judgment awarded to a plaintiff

at trial. The parts of Rule 49 relevant to this analysis are:

> 49.02(1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle
> . . .
>
> . . . . .
>
> COSTS CONSEQUENCES OF FAILURE TO ACCEPT
>
> Plaintiff's Offer
>
> 49.10(1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.
>
> Defendant's Offer
>
> (2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise. [page72]
>
> . . . . .

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

III. Reasons of the Trial Judge Regarding Blue Circle's Costs

[17] In her endorsement relating to Blue Circle's costs, the trial judge briefly set out the nature and history of the proceedings.

[18] After completing her assessment of Blue Circle's disbursements that were in issue, the trial judge turned to Blue Circle's submissions concerning fees. She noted Blue Circle's two offers to consent to a dismissal of the claims and cross-claims on a without-costs basis and its offers made to the settling defendants during the course of the settlement discussions.

[19] The trial judge identified the principles and authorities upon which Blue Circle relied in support of its claim for partial indemnity costs to the date of the February 2005 offer and substantial indemnity costs thereafter. Blue Circle relied upon the wide discretionary power in s. 131 of the Courts of Justice Act and rules 49.13 and 57.01(1) and (4) of the Rules of Civil Procedure, as well as this court's decisions in S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1 O.R. (3d) 243, [1990] O.J. No. 2321 (C.A.) and the Ontario Court (General Division) decision in Apotex Inc. v. Egis Pharmaceuticals, (1990), 2 O.R. (3d) 126, [1990] O.J. No. 2187 (Gen. Div.).

[20] In her analysis, the trial judge identified the principles established in the two well-known cases of Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.) and Moon v. Sher, [2004] O.J. No. 4651, 246 D.L.R. (4th) 440 (C.A.). The principles are that the fixing of costs is not merely a mechanical exercise; that the result of applying the costs grid must be considered, in particular whether in all the circumstances the result is fair and reasonable; [See Note 1

below] and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor.

[21] At para. 22 of her reasons, the trial judge analyzed the factors set out in rule 57.01(1) that she considered relevant to her determination as to costs:

> I am now going to look at the 57.01(1) factors applicable to this case: [page73]
>
> (0.a) The lawyers were all senior experienced members of the bar -- no doubt the best in this area of law. The rates charged and the hours expended are reasonable. There is no reason why there should not be full indemnity following the service of the offer and partial indemnity of the earlier fees.
>
> (0.b) The amount of costs being sought by Blue Circle would have been reasonably expected by the parties.
>
> (c) The case was very complex. Even the sole issue which had to be determined in the end was very complex.
>
> (e) The conduct of Blue Circle -- I agree that counsel for Blue Circle often played a mediating role. Difficult issues erupted at the trial and usually Mr. Brock, who was not involved in the "erupting" issue, offered some practical and helpful thoughts. I was not present in the settlement discussions but have no doubt that he was an integral part in arriving at the settlement.

[22] Then, in paras. 23 and 24, the trial judge fixed Blue Circle's costs as follows:

(1) "Partial indemnity costs" from the commencement of the action to February 1, 2005, in the amount of $53,867.10; and
(2) "Substantial indemnity costs" from February 1, 2005 to the date of the costs decision, in the amount of $455,585.08.

[23] In her reasons, the trial judge used the terms "substantial" and "full" interchangeably with respect to the

scale of costs. However, the $455,585.08 awarded is the aggregate of all of the invoices Blue Circle paid its counsel for fees incurred after February 2005. Thus, while the trial judge appears to have intended to order Blue Circle its costs on a substantial indemnity basis, the amount awarded was on a full indemnity scale. Although this amounts to an error, it has no bearing on my analysis or the outcome of this appeal. For simplicity, throughout the rest of my reasons I will refer to both full and substantial indemnity costs generically as "elevated costs".

IV. The Issues

[24] The settling defendants appeal on a narrow basis. They take the position that Blue Circle is entitled to its costs throughout, on a partial indemnity basis, and to the disbursements awarded by the trial judge. Their complaint lies in the trial judge's having awarded Blue Circle elevated costs from the February 2005 offer to the date of judgment as well as in the overall amount of the award. [page74]

[25] The settling defendants submit that the trial judge erred in the exercise of her discretion in awarding elevated costs for this period, in two respects:

(a) in effectively treating Blue Circle's February 2005 offer to settle as though it were a rule 49.10 offer; and,

(b) in relying on Strasser in support of her conclusion that Blue Circle was entitled to elevated costs from the February 2005 offer forward.

[26] The settling defendants further argue that the trial judge erred in ordering costs in an amount that is not "fair and reasonable" according to the principles set out in Boucher.

V. Analysis

[27] The parties take no issue with the general principles applicable to appellate review of costs decisions. The Supreme Court has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: see Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, at para. 27.

(1) The costs award on an elevated scale

The jurisprudential framework

[28] The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

[29] In Young v. Young, [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112, at p. 134 S.C.R., McLachlin J. described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties".

[30] The same principle was expanded upon in Mortimer v. Cameron (1994), 17 O.R. (3d) 1, [1994] O.J. No. 277 (C.A.), at p. 23 O.R., where Robins J.A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to Orkin, at para. 219. [page75]

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

> [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. [See Note 2 below]

[31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in McBride Metal Fabricating Corp. v. H. & W. Sales Co. (2002), 59 O.R. (3d) 97, [2002] O.J. No. 1536 (C.A.) where, at para. 39, she said:

> Apart from the operation of rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor and client costs. In the cases in which they were awarded there were specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.

See, also, Walker v. Ritchie, [2005] O.J. No. 1600, 197 O.A.C. 81 (C.A.), at para. 105, vard [2006] 2 S.C.R. 428, [2006] S.C.J. No. 45.

[32] At para. 14 of the [supplementary] reasons [[2007] O.J. No. 4474 (S.C.J.)], the trial judge acknowledges the parties' agreement that Rule 49 was not applicable to Blue Circle's February offer.

[33] This leaves egregious conduct, specifically the question whether in the circumstances of this case the settling defendants engaged in conduct worthy of sanction.

Strasser

[34] This takes me to Strasser, the case upon which the trial judge relied in awarding an elevated scale of costs following the February 2005 offer to settle and upon which Blue Circle heavily relies in this appeal.

[35] In Strasser, the plaintiff had originally claimed $1 million. After discovery, the defendant offered to pay $30,000. The plaintiff then reduced the claim to $70,000. The action was ultimately dismissed. In those circumstances, the trial judge awarded the defendant solicitor-and-client costs, throughout. [page76]

[36] In the plaintiff's appeal of the costs award, Carthy J.A., for the court, noted that although the defendant's offer was not a rule 49.10 offer, the language of rules 49.13 and 57.01 gives the trial judge discretion with respect to costs, and rule 49.13 specifically invites the judge exercising discretion to take into account any offer to settle made in

writing. Carthy J.A. went on, however, to hold that the offer in Strasser could not, standing on its own, justify an award of solicitor-and-client costs. While the trial judge did not identify any evidence of reprehensible conduct, Carthy J.A., in upholding the award, was careful to note that during the costs submissions the trial judge did say "I think this case, in these circumstances, screams for solicitor-and-client costs": p. 246 O.R.

[37] This court sought to clarify Strasser in Scapillati v. A. Potvin Construction Ltd. (1999), 44 O.R. (3d) 737, [1999] O.J. No. 2187 (C.A.), a case in which the defendant had served an offer to settle on the basis that the action be dismissed without costs and the trial judge subsequently dismissed the plaintiff's claim. Purportedly following Strasser, the trial judge awarded party-and-party costs to the date of the offer and solicitor-and-client costs thereafter.

[38] On appeal, this court started its analysis of the defendant's appeal of the costs award by observing, once again, that as the plaintiff's claim had failed, rule 49.10 had no application. Then, at p. 750 O.R., turning to Strasser, Austin J.A. had this to say:

> [T]he principle upon which solicitor and client costs were awarded in Strasser is a very narrow one. The plaintiff had made a claim for $1 million, the defendant made an offer after discovery of $30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in Strasser who said "I think this case, in these circumstances, screams for solicitor and client costs."

[39] Thus interpreting Strasser as a case where egregious conduct was implicitly found, this court allowed the appeal as to costs, set aside the original costs award and substituted an award of costs on a party-and-party basis. For other cases in which comments have been made on the limited application of Strasser, see St. Louis-Lalonde v. Carlton Condominium Corp.

No. 12, [2005] O.J. No. 4164, 142 A.C.W.S. (3d) 934 (S.C.J.), at para. 15, affd [2007] O.J. No. 578, 155 A.C.W.S. (3d) 479 (C.A.); Dyer v. Mekinda Snyder Partnership Inc. (1998), 40 O.R. (3d) 180, [1998] O.J. No. 2204 (Gen. Div.).

[40] In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not [page77]so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in Scapillati, Strasser should be interpreted to fit within this framework -- as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

Application to the facts

[41] Here, the circumstances are similar to those found in Scapillati. There was no rule 49.10 offer and no finding by the trial judge that the settling defendants conducted themselves in a reprehensible or egregious fashion.

[42] Blue Circle submits that notwithstanding the trial judge's failure to make such a finding in her reasons as to costs, her reasons dismissing the claim against it demonstrate that the settling defendants' conduct in relentlessly pursuing their claims against Blue Circle, in the face of the apparent weakness of their position, is conduct that justifiably attracted an elevated scale of costs.

[43] I have considerable difficulty with this argument.

[44] Blue Circle's submission in this respect is contrary to the principle Dubin J.A. expressed in Foulis v. Robinson (1978), 21 O.R. (2d) 769, [1978] O.J. No. 3596 (C.A.), at p. 776 O.R., that "Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action."

[45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In Apotex v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, [1991] O.J. No. 1232 (Gen. Div.), substantial indemnity costs were justified as a means [at para. 8] "to discourage harassment of another party by the pursuit of fruitless litigation . . . particularly where a party has conducted itself improperly in the view of the court". For other examples of abuses of process leading to elevated costs, see Dyer, at pp. 184-85 O.R.

[46] Here, there is no finding or evidence in the record of "harassment . . . by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court. In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court. [page78]

[47] Apotex (1990) does not assist Blue Circle in trying to make out a case for misconduct on the part of the settling defendants. That case involved meritless claims of fraud, deceit and dishonesty based on pure speculation. First, the trial judge did not make such a link between this case and Apotex (1990) on this basis. Second, unsubstantiated allegations of the nature advanced in Apotex (1990) represent a form of egregious conduct commonly accepted as a basis for attracting a higher costs award: see 131843 Canada Ltd. v. Double "R" (Toronto) Ltd., [1992] O.J. No. 3879, 7 C.P.C. (3d) 15 (Gen. Div.); Rno-Dpt Inc. v. Wonderland Commercial Centre Inc., [2008] O.J. No. 4678, 2008 ONCA 786 (award of costs on a substantial indemnity basis warranted only from the point in time when allegations of fraud and dishonesty were made). This is not the nature of the allegations made against the settling defendants.

[48] Before turning to the settling defendants' second argument, I make one final comment. In cases such as Beresford-Last (Litigation guardian of) v. Dworak, [2000] O.J. No. 4636, 101 A.C.W.S. (3d) 696 (S.C.J.) and Marcella v. Integrated Management and Investments Inc., [2007] O.J. No. 1652, 157 A.C.W.S. (3d) 51 (S.C.J.), trial judges have expressed the view that denying elevated costs to defendants who submit an offer to settle, which is later revealed to be more favourable than the result at trial, acts as a disincentive to defendants to make reasonable offers to settle. This view, while understandable, is contrary to the wording, spirit and intent of Rule 49. Rules cannot be incrementally changed through jurisprudence. Any change in the rules to take into account the position of defendants who legitimately try to curtail what turns out to be unnecessary litigation is a matter for the Rules Committee.

[49] In my view, there is no basis to justify anything other than a partial indemnity costs award in favour of Blue Circle.

(2) Whether the costs award is "fair and reasonable"

[50] While this conclusion is sufficient to set aside the costs award, I would add that, in my view, the award was otherwise not fair and reasonable.

[51] In Andersen v. St. Jude Medical, Inc., [2006] O.J. No. 508, 264 D.L.R. (4th) 557 (Div. Ct.), the Divisional Court set out several principles that must be considered when awarding costs [at para. 22]:

(1) The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): Boucher, Moon and [page79]Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC (2005), 75 O.R. (3d) 638, [2005] O.J. No. 160 (C.A.).

(2) A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: Boucher. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual

costs to the successful litigant: Zesta Engineering Ltd. v. Cloutier, [2002] O.J. No. 4495, 118 A.C.W.S. (3d) 341 (C.A.), at para. 4.

(3) The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).

(4) The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 (C.A.), at p. 249 O.R.

(5) The court should seek to balance the indemnity principle with the fundamental objective of access to justice: Boucher.

[52] As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In Boucher, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice".

[53] Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of $509,452.18 her reasons do not indicate that she conducted an assessment, or at least a sufficient one, in accordance the requirements set out in Boucher. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have claimed costs of this magnitude, [page80]she was, according to Boucher, at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs award.

[54] It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions. [See Note 3 below] Further, in considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.

[55] The results of this "fair and reasonable" analysis demonstrate that appellate intervention is warranted.

[56] Turning to quantum, taking into consideration the circumstances of this case and applying to them the relevant factors set out in rule 57.01, and the fair and reasonable test expressed in Boucher, in my view the amount of $300,000 would be appropriate.

VI. Disposition

[57] I would therefore allow the appeal and set aside the trial judge's cost award in relation to fees only and in its place substitute the amount of $300,000.

[58] Upon the agreement of the parties, the settling defendants are entitled to their costs of this appeal and the motion for leave to appeal, fixed in the amount of $10,000, including disbursements and Goods and Services Tax.

Appeal allowed.

Notes

Note 1: The costs grid has since been removed from the rules, but the general point is clear; the result of a cost award formula must be scrutinized for fairness and reasonableness.

Note 2: Note the discrepancy in language between the former terminology, "solicitor and client costs", and the newer terminology of "substantial indemnity". The two terms indicate the same costs scale. Rule 1.04(5) identifies the two terms as follows: "If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs."

Note 3: While the assistance of counsel for Blue Circle in the discussions that led to the settlement among all but Blue Circle is commendable, it is not, in my view, a basis upon which to make the settling defendants pay Blue Circle's costs on an elevated basis.

Tab 14

Dolmage v. HMQ

CITATION: Dolmage v. HMQ, 2013 ONSC 6686
COURT FILE NO.: CV-09-376927CP00
DATE: 20131205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth,** Plaintiffs

AND:

Her Majesty The Queen in Right of the Province of Ontario, Defendant

BEFORE: Conway J.

COUNSEL: *Kirk M. Baert, Celeste Poltak* and *David Rosenfeld*, for the Plaintiffs

Robert Ratcliffe, John Kelly and *Sonal Gandhi*, for the Defendant

HEARD: December 3, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Settlement Approval)

Conway J.

[1] The plaintiffs move for approval of a settlement pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Act**").

[2] At the conclusion of the hearing, I approved the settlement and signed the settlement approval order (the "**Settlement Approval Order**"). I gave brief oral reasons, with written ones to follow. These are those written reasons.

The Action

[3] This action was commenced in 2009 on behalf of residents of the Huronia Regional Centre ("**Huronia**").

[4] Huronia was a provincially operated residential facility for individuals with developmental disabilities. It was intended to provide a residential program of hospital care, activity, educational programs and adult training to individuals of all ages labeled mildly,

moderately, severely and profoundly disabled. Most residents were admitted to Huronia as children. Huronia was founded in 1876 and closed its doors in 2009.[1]

[5] The plaintiffs allege that the defendant (the "**Crown**") was negligent and breached fiduciary duties in its funding, operation, management, administration, supervision and control of Huronia. They claim that the Crown breached standards of care by knowing of and condoning overcrowding and understaffing; failing to implement abuse prevention policies; and deliberately exploiting residents for the Crown's own benefit. They allege that despite receiving reports and recommendations, the Crown failed to take adequate steps to improve the quality of care or living at Huronia or, even if some of the recommendations were followed, those measures were inadequate and failed to meet the standard of care.

[6] The action was certified as a class proceeding by Cullity J. in July 2010. The class is defined as:

> (a) All persons who resided at Huronia between January 1, 1945 and March 31, 2009 who were alive as of April 21, 2007 (the "**Resident Class**"); and
>
> (b) All parents, spouses, children and siblings of persons who resided at Huronia between March 31, 1978 and March 31, 2009, who were alive as of April 21, 2007 (the "**Family Class**").

[7] It is estimated that there were 4337 to 4876 class members alive as of April 21, 2007 and 3470 to 4308 class members alive as of 2013.[2]

[8] Leave to appeal the certification order was denied. The Crown defended the action. It denied that it owed any duty of care to the class, that any abuses occurred or that it was responsible for any abuses that did occur.

[9] The plaintiffs moved to have the action placed on the long trial list in Toronto, on an expedited basis, given the advanced age of the majority of the class members. Moore J. granted the plaintiffs' request and fixed a trial date of September 30, 2013.

[10] The case progressed through the various steps leading up to trial, including significant productions, discoveries, numerous interlocutory motions and case conferences, extensive trial preparation, and mediation/settlement discussions.

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[1] Huronia operated under various names over the years including the Orillia Asylum for Idiots, Ontario Hospital for Idiots, Hospital for the Feeble-Minded, Ontario Hospital School, Orillia, and Huronia. Over time, Huronia's catchment admission area covered the regions of Halton, Peel, York, Simcoe, Muskoka and Parry Sound.

[2] The Crown originally identified 8751 individuals who attended Huronia during the period 1945 to 2009. It noted that 2210 of those individuals had died before April 21, 2007. The Crown retained Mr. Daniel Doyle as an expert in actuarial analysis to estimate the size of the class. Mr. Doyle's estimate of class members alive as of April 21, 2007 was 4337 to 4876 class members. The Crown had prepared an earlier report in which the estimated number of class members still alive as of 2013 was 3470 to 4308.

[11] The trial was set to commence on September 16, 2013 and last for approximately four months. The week prior to the start of trial, the parties attended mediation and on September 17, 2013, executed a settlement agreement dated the same day (the "**Settlement Agreement**"). Prior to agreeing to the terms of the Settlement Agreement, the plaintiffs and their litigation guardians received independent legal advice.

[12] The parties now seek the court's approval of the Settlement Agreement.

The Settlement Agreement

Key Terms

[13] The key terms of the Settlement Agreement include:

- an apology to former residents of Huronia from the Crown. Crown counsel advised the court that if the settlement is approved, the plan is for the apology to be made by the Premier of Ontario;
- a $35 million settlement fund (the "**Settlement Fund**");
- the Crown will pay for the cost of notice to the class and administration of the claims process, in addition to the Settlement Fund;
- the compensation awards will not be subject to tax or government claw-backs;
- the application process is paper-based and does not require former residents to testify or appear in person;
- the maximum compensation that a claimant can receive is $42,000;
- the documents produced in this case will be accessible for scholarly research; and
- commemorative initiatives, including:
    - a commemorative plaque on the grounds of Huronia that will state: "From 1876 to 2009 many thousands of children and adults with developmental disabilities and other conditions resided in the wards, called 'cottages", of this institution. In 2013, the Government of Ontario issued an apology to the former residents for the conditions over time."
    - an opportunity to access the grounds of Huronia up to 6 times over a period of 12 months after the execution of the Settlement Agreement;
    - to create a registry, build a permanent wrought iron boundary fence, erect signage and reasonably maintain the cemetery located at Huronia; and

- an opportunity for scholars to attend and archive artifacts from Huronia.

[14] Class counsel's legal fees, disbursements and taxes (in an amount to be approved by the court) will be deducted from the Settlement Fund before any amounts are paid to the class.[3]

The Compensation Scheme

[15] The Settlement Agreement provides a claims-based compensation scheme with two streams – Section A and Section B claims.

[16] Section A claims only require a claimant to solemnly declare that he or she was harmed at Huronia without providing any further details. Section A claims are eligible to receive up to $2000 in compensation. Section A claims in the aggregate are limited to 20% of the net Settlement Fund.

[17] Section B claims require the claimant to provide details of the harm or abuse suffered while at Huronia. The parties have agreed that the Honourable Ian Binnie will oversee the claims administration process. Mr. Binnie and Crawford Class Action Services ("**Crawford**") will create protocols and procedures for reviewing and evaluating all claims and assigning points to the claims in accordance with the "Points Allocation System" in the Settlement Agreement.[4] Compensation will be based on the number of points allocated to the claim. Claims with the highest number of points will receive $35,000.

[18] If the Section B claims do not exhaust the net Settlement Fund, each claimant will receive an increase of up to 20% of his or her allotted compensation, or until the Settlement Fund is exhausted. The maximum that a claimant can receive is $42,000.

The Claims Process

[19] The claims process is entirely paper-based, so that claimants will not have to testify in order to receive compensation. A claim form can be completed by a class member's personal representative or family member if the class member is unable to do so.

[20] The claim forms are intended to be simple and easy to complete. To that end, class counsel has received input from Kinsella Media LLC (with expertise in plain language communication) and ARCH Disability Law Centre (a legal clinic for persons with disabilities) in preparing these forms.

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[3] The levy owing to the Law Foundation of Ontario, to be determined by the court, will further be deducted from the Settlement Fund.

[4] The Points Allocation System has 6 categories of abuse – Levels 1, 2 and 3 physical assault and Levels 1, 2 and 3 sexual assault.

Remaining Amount in the Settlement Fund

[21] If there are any funds remaining in the Settlement Fund after payment of legal fees and expenses and Section A and B claims, the Crown will make an investment of up to $5 million (Schedule D funding) into programs that will benefit individuals with a developmental disability and their families. The parties have mutually agreed on the types of organizations that will receive this investment.

[22] If there are further amounts remaining in the Settlement Fund after the Schedule D funding is made, those amounts will revert to the Crown.

Non-Monetary Benefits

[23] In addition to the compensation scheme, the Settlement Agreement contains several non-monetary benefits for the class, including an apology pursuant to the *Apology Act*, preservation of the voluminous documents in this action for scholarly research, the waiver of taxes and claw-backs on funds received, and commemorative initiatives.

Law on Settlement Approval

[24] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it.[5]

[25] The test is whether the settlement is fair, reasonable, and in the best interests of the class as a whole, not whether it meets the demands of a particular member. The settlement must fall within the range of reasonableness in order to obtain court approval – it need not be perfect.[6] The "range of reasonableness" test permits that a number of settlement possibilities may be in the best interests of a class when compared to the unpredictable alternative of costly protracted litigation. Compromises are to be expected.[7]

[26] There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's-length and recommended by experienced class counsel.[8]

[27] The "zone or range of reasonableness" is not a static valuation test but one that permits for a whole host of variations depending upon the subject matter of the litigation and the nature of damages for which the settlement is intended to provide compensation.[9]

[28] In determining whether to approve a settlement, courts may consider, among other factors:

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[5] *Dabbs v. Sun Life Assurance Co. of Canada*, (1998) O.J. No. 1598 (Gen. Div.), at para. 30, aff'd (1998), 41 O.R. (3d) 97 (C.A.).
[6] *Dabbs*, at para. 30; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at paras. 69, 70 (S.C.J.).
[7] *Dabbs*, at para. 30; *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968, at para. 21 (S.C.J.).
[8] *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, at paras. 55 and 56.
[9] *Parsons*, at para. 70.

- The likelihood of recovery or success;
- the amount and nature of discovery, evidence or investigation;
- the terms of the settlement;
- the recommendation and experience of class counsel;
- future expenses and likely duration of litigation and its attendant risks;
- the recommendations of neutral parties;
- the number of objections or objectors, if any;
- the presence of good faith, arms-length bargaining and the absence of collusion;
- the degree and nature of communications by counsel and the representative parties with class members during the litigation; and
- information conveying to the court the dynamics of and positions taken by parties during the negotiations.[10]

Analysis

[29] Considering the above factors, I approve the proposed settlement, on the terms set out in the Settlement Agreement.

[30] The Settlement Agreement is multi-dimensional. Its terms reflect the sensitive nature of this litigation and the unique circumstances of the class members in the following ways:

- It provides both financial compensation and non-monetary benefits to class members.
- It recognizes that some class members may not wish to provide details of the harm suffered (Section A claims). For those members who do provide details (Section B claims), the structure reflects the varying levels of harm claimed through the Points Allocation System.
- Importantly, the claims process is a simplified and paper-based one that avoids class members having to provide oral accounts and re-live their experiences.

[10] *Sayers v. Shaw Cablesystems Ltd*., 2011 ONSC 962, at para. 28.

- The apology from the Crown is a vital and extraordinary component of this settlement. The commemorative plaque at the Huronia site will constitute an enduring public record of that apology.

- The numerous other non-monetary benefits recognize the dignity of the Huronia residents and enable the history of Huronia to be recorded and preserved.

[31] The settlement reflects the very real litigation risks the plaintiffs face if this matter proceeds to trial.[11] Class counsel acknowledges that the legal issues are numerous and complex and include (i) whether the Crown owed a duty of care to class members and whether any *prima facie* duty was negated by policy considerations; (ii) what the standard of care was at varying times over a period of 65 years; (iii) whether the Crown breached the standard of care during this period; (iv) whether the Crown owed a fiduciary duty to class members; (v) whether the Crown breached that duty; (vi) whether claims are barred by limitation periods; and (vii) whether damages can be assessed on an aggregate basis (failing which damages would have to be assessed at individual hearings after trial). Class counsel further acknowledges the legal frailties of the Family Class members' monetary claims.

[32] There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated.

[33] The settlement is supported by the plaintiffs, as well as experienced class counsel. The settlement has further received the support of People First of Ontario (a self-advocacy group for persons with intellectual disabilities) and Community Living Ontario (a non-profit, province-wide federation that promotes and facilitates the full participation and inclusion of people who have an intellectual disability).

[34] The process leading to the settlement was adversarial and hard-fought. The parties engaged in over nine days of mediation/settlement discussions with four different mediators/facilitators, including three sitting judges.

[35] I have carefully considered all of the written and oral objections to the settlement.[12] The primary objections are with the amount of the Settlement Fund, the deduction of legal fees from the Settlement Fund and the lack of monetary compensation for Family Class members.[13]

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[11] I note that this settlement occurred at the doorstep of trial, so class counsel had a meaningful opportunity to assess these risks after productions and discovery had been completed.

[12] 19 written objections were filed with the court. 8 objectors (2 of whom had filed written objections) spoke at the hearing.

[13] Three of the written objections were that compensation will not be provided to anyone who was not alive as at April 21, 2007. Cullity J. found that the claims of those who died before that date were statute barred and they were therefore not included in the class: see *Dolmage v. Ontario*, 2010 ONSC 1726, at para. 153. There was also an objection from one class member who lived at Huronia until 1943 and does not come within the class definition

[36] A settlement is a compromise that reflects the risks, delays and expense of continuing litigation: see *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 23.

[37] In my view, this settlement, viewed as a whole, fairly achieves that compromise. It recognizes that class members are entitled to financial compensation but that a discount is appropriate to reflect the realities of continued litigation. At the same time, the significant non-monetary terms will benefit the residents of Huronia and their families. Considering the context in which it was reached, and the interests of those affected by it, the settlement falls within the "zone of reasonableness".

[38] I have concluded that the settlement is fair, reasonable and in the best interests of the class members and I approve it.

Next Steps

[39] The amount of class counsel's legal fees is subject to court approval pursuant to the Act. Class counsel has brought a motion for approval of its legal fees.[14] That motion will be heard on February 24, 2014. Any class member who wishes to object to the amount of legal fees may attend and object at that hearing.[15]

[40] Class counsel suggested to the Crown at the settlement approval hearing that the Crown consider waiving all or any part of the taxes on the legal fees in this proceeding. Crown counsel said that he would have to review this matter. He submitted that the February 24, 2014 hearing would be the appropriate time to address this issue. I agree.

[41] With respect to the implementation of the Settlement Agreement, there are three preliminary, key matters that must be addressed: (a) notice of approval of the settlement; (b) dissemination of that notice to class members; and (c) content of the claim forms.

[42] It is imperative that class members receive notice of their right to make a claim and that the claim forms be understandable and easy to complete. The Settlement Approval Order addresses these issues in two ways:

- The form and content of the notice of approval of settlement, its method of dissemination and the form and content of the claim forms are to be determined by further order of this court in or about January 2014 (paragraph 9).

(starting in 1945). Class counsel suggested that the Crown consider options for including this individual in the settlement as if she was a class member. Counsel can address this issue with me at the next case conference.

[14] It seeks $8.5 million in legal fees, plus disbursements and taxes. Class counsel originally sought approval of both the settlement and legal fees on December 3, 2013, as reflected in the notice of hearing. It subsequently proposed (and the Crown agreed) to deal with these matters on two separate dates and I approved this procedure.

[15] The settlement approval order states that class members who have an objection in respect of legal fees may re-attend on that date to be heard. That was also communicated in court at the settlement approval hearing.

- under the Settlement Agreement all claims must be filed no later than 120 days from the "Court Approval Date".[16] The Settlement Approval Order has re-defined the Court Approval Date (paragraph 1(a)).[17] The effect of this change is that the 120 day claim period will not start to run until this court is satisfied with the form and content of notice to class members, the plan for disseminating that notice and the form and content of the claim forms.[18]

[43] There is a recognized need for class members to receive support and assistance in making claims. The claims administration process (to be overseen by Mr. Binnie) will be conducted by Crawford, a settlement administrator with specific experience in institutional abuse claims. Crawford has provided an affidavit describing the measures it will be taking to assist class members in completing their claims forms at its 40 plus offices throughout Ontario. It will provide additional support including 24-hour telephone assistance, full day workshops and an instructional video on its website.

[44] In addition, class counsel filed affidavits from representatives of Community Living Ontario, ARCH Disability Law Centre and People First Ontario, in which they describe the support that they will be providing to notify class members and assist them in making their claims.

[45] Finally, these and any other issues that arise in implementing the settlement will be subject to the supervision of the court. Under the Settlement Approval Order, the court will retain jurisdiction over the parties and all class members for purposes of implementing, enforcing and administering the Settlement Agreement. The order also requires the plaintiffs and Crawford to report regularly to the court until administration of the Settlement Agreement has been completed.

Honorarium to Representative Plaintiffs

[46] Class counsel sought approval of honorarium payments of $25,000 for each of the representative plaintiffs, to recognize "the significance and difficulty for Ms. Seth and Ms. Slark who have suffered abuse, to come forward on behalf of all other residents, to tell their stories and to confront a painful past".

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[16] The Court Approval Date in the Settlement Agreement is the later of 31 days after the date on which the court issues the order approving the settlement and the disposition of any appeals from that approval order.

[17] The Court Approval Date now means "the later of 31 days after the of the order approving Notice of Approval of the Settlement referred to *infra* in paragraph 9 or the disposition of any appeals from the Notice of Approval of Settlement order".

[18] Counsel recognized that the Crown's lists of class members required updating and cross-referencing to its databases, as many addresses were incomplete or incorrect. I am satisfied that the steps taken to update these lists, combined with the other steps taken by the parties, were adequate to provide notice of the settlement approval hearing to class members so that they could attend or file an objection. However, further updating and cross-referencing will be required to ensure that class members receive notice of when and how to make a claim. This is an ongoing process. The claims period will therefore not start until all notice issues have been addressed and approved by the court.

[47] Ms. Seth and Ms. Slark addressed the court at the settlement approval hearing. They made it clear that they had not asked for the honorarium, that they did not want to take anything away from class members and that they would not accept any payment unless there is money left over after the claims of class members have been satisfied.

[48] On a settlement approval motion, the court has jurisdiction to award honorarium payments to the representative plaintiffs out of the settlement fund.[19] However, honorarium payments are infrequently made. They are reserved to those cases where, considering all of the circumstances, the contribution of the plaintiff has been exceptional.[20]

[49] In the case of Ms. Seth and Ms. Slark, their efforts in advancing this litigation, bringing this case to court, publicizing the story of Huronia and speaking in court at the settlement approval hearing have been exceptional indeed.[21] They have gone well beyond what could ever be expected of representative plaintiffs, in a particularly difficult case.

[50] In particular, Ms. Seth and Ms. Slark have participated in and provided innumerable interviews to raise awareness of this class proceeding. The honorarium to Ms. Seth and Ms. Slark is, in the words of Perell J.,[22] "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[51] I provided in the Settlement Approval Order that each of Ms. Seth and Ms. Slark are to receive the sum of $15,000 as an honorarium, to come from the Settlement Fund remaining after all claims of class members have been paid.

Order

[52] Order accordingly.

[53] I will meet with counsel at a case conference in early January 2014 to address the issues of notice of settlement approval, dissemination of notice, and claim forms. I direct counsel to address these issues in advance with one another, prepare draft materials for me to address at the case conference and send the draft materials to me three days before the case conference.

Conway J.

Date: December 5, 2013

[19] *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039, at para. 95 (S.C.J.); *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at paras. 133–136.
[20] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911, at paras. 26-43.
[21] They described the abuse they alleged in the statement of claim, swore affidavit evidence in support of certification, were cross-examined on those affidavits, attended mediations, motions and strategy meetings with class counsel, and prepared to give oral testimony at the common issues trial.
[22] See *Johnston v. The Sheila Morrison Schools*, [2013] O.J. No. 1126, at para. 43.

Tab 15

Garland v. Enbridge Gas Distribution Inc.

COURT FILE NO.: 94-CQ-50711
DATE: 20061208

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
GORDON GARLAND	)	***W.A. Derry Millar*** -- for the Moving Parties, Fraser Milner Casgrain LLP and Michael McGowan Professional Corporation
Plaintiff	)	
	)	
- and -	)	***Barbara L. Grossman*** -- for the Moving Party/Plaintiff, Gordon Garland
	)	
ENBRIDGE GAS DISTRIBUTION INC. (FORMERLY THE CONSUMERS GAS COMPANY LIMITED)	)	***John Longo*** -- for the Respondent/ Defendant, Enbridge Gas Distribution Inc.
	)	
	)	***Sean Dewart*** -- for Gordon Garland in his personal capacity
Defendant	)	
	)	
	)	
	)	**HEARD:** November 21, 2006

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CULLITY J.

[1] In my endorsement released on September 25, 2006, after the initial hearing of the motion to approve a settlement of this proceeding, I deferred my decision to provide the parties with an opportunity to consider whether they wished to amend the minutes of settlement in certain respects, and to provide further information with respect to the proposed *cy pres* distribution to be administered by the United Way of Greater Toronto ("United Way"). Since then the minutes of settlement have been amended and my requests for information with respect

to the proposed *cy pres* distribution have been adequately addressed. Counsel have also dispelled the concerns I expressed with respect to the method of giving notice of the settlement, and the duration of the obligation of the defendant to continue to contribute to the Winter Warmth Program under paragraph 8 (f) of the proposed implementation order.

[2] Submissions on the amendments to the minutes of settlement were made at a hearing on November 21, 2006.

THE PROPOSED *CY PRES* DISTRIBUTION

[3] The amendments to paragraph 8 (c) (iii) and 8 (d), with a few minor suggestions I made at a case conference before the second hearing, have received the consent of the United Way. These relate to the distribution of surplus in any year, and the application of the funds if the Winter Warmth Program is terminated. Notwithstanding that it is prepared to accept the amendments, the United Way has expressed a preference for the original provisions of the two paragraphs which would provide the organisation with a greater degree of discretion. On this question, I am prepared to defer to the views of the organisation with respect to the most efficient method of benefiting members of the class and other members of the community in like circumstances. In consequence, I will leave it to the United Way to decide whether the original provisions, or those included in class counsel's factum after Schedule B, are to be included in the implementation order. I note that the United Way has indicated that it is not its intention to discontinue the Winter Warmth Program as long as there is a need in the community for such a program, and that - as the need for assistance from the programme far exceeds the current level of funding - it is not anticipated that, after 2007, there will be any surplus.

FEES OF CLASS COUNSEL

[4] In the endorsement, I declined to approve the settlement on the ground that it made the benefits to be provided to the class conditional on the court's approval of the amount requested as fees for class counsel. I indicated that, in insisting on this condition - rather than deferring to the jurisdiction of the court to reduce the fees - counsel were improperly preferring their own interests over those of the class.

[5] In an affidavit filed before the second hearing, Ms Dorothy Fong - one of the solicitors with the class counsel firms - stated that at no time did counsel insist that the condition I considered to be obnoxious was to be included in the settlement agreement. I must accept that clarification but it does not alter the fact that, in accepting the condition and insisting on it in this court, counsel were acting exclusively in their own interests at the expense of those of the class. I remain quite unconvinced by counsel's insistence that they had no option but to accept the mediator's recommendation in respect of their fees with the condition attached. The only interests affected were those of class counsel and the class, and neither the defendant, nor Mr

Garland, could possibly have had any objection to the deletion of the condition in the interests of the class. The fact that the mediator's recommendation was made on a take-it-or-leave-it basis has no relevance. Settlements are made between the parties and a mediator's interests are not involved if a settlement is ultimately reached that, in some particulars, departs from the mediator's recommendations. Subject to my acceptance of Ms Fong's point of clarification, I adhere to the views expressed in the endorsement.

[6] The matter is now moot because, as a consequence of my decision after the first hearing, the minutes of settlement have been amended to provide that, if the fees are reduced by the court in an exercise of its discretion, and the settlement is otherwise approved, the settlement will be binding and the amount payable to the United Way will be increased to the extent of the fee reduction.

[7] It remains now to consider whether the provisions relating to the fees in the settlement, and in the 2006 agreement, should be considered to represent fair and reasonable compensation for counsel for the work they have done throughout this protracted proceeding.

1. The fee agreements

[8] By way of background, the original retainer agreement between class counsel and Mr Garland provided for a fee based on a multiplier to be set by the court. There was a provisional agreement between the parties to a rather complex formula for determining the multiplier that the parties considered would be appropriate in different circumstances.

[9] On October 29, 1998, shortly before the release of the decision in *Garland #1*, the original agreement was amended to substitute a fee that would be determined as a percentage of the damages and interest recovered plus 50 per cent of all party and party costs. Under this agreement - which remained in force for eight years - the solicitors would be entitled now to a fee of $5,247,500, or approximately 52 per cent of the fee they are requesting.

[10] The 1998 agreement was intended to be superseded by the minutes of settlement executed on July 19, 2006 and the original retainer agreement was amended in accordance with the settlement on August 18, 2006. These documents contain the fee agreement that I am asked to approve.

2. Evidence

[11] At each of the hearings, a considerable amount of time was devoted to the circumstances in which Mr Garland agreed to the fees payable pursuant to the settlement. The relevant evidence was provided in instalments by Ms Dorothy Fong - a solicitor with one of the class counsel firms - in affidavits delivered prior to the first hearing, and before the second. Further

information was provided by Mr Dewart on the instructions of his client at the second hearing. After I had reserved my decision, a further affidavit was delivered by Ms Fong.

[12] In view of the decision I have reached on the appropriateness of the fee, it is unnecessary to refer to the evidence in detail. In summary, it appears that discussions between class counsel and Mr Garland on the question of the fee occurred in August and December, 2005 and that, from the outset, Mr Garland agreed that the 1998 fee agreement should be revisited. He did not agree with counsel's proposal for a fee that would reflect a multiplier of 5 - or, indeed, any multiplier - and he proposed a higher percentage of recovery than that in the 1998 agreement.

[13] At the time of these discussions, the parties were preparing for a mediation in an attempt to obtain a settlement of the proceedings. No agreement on an appropriate fee was reached between class counsel and Mr Garland, the question of the fee became part of the mediation and, ultimately, it was addressed in the settlement proposal put to the parties by the mediator, Mr Justice Winkler.

[14] Prior to the mediation, Mr Garland had decided to accept whatever the mediator recommended. After the mediator's proposal had been received, but shortly before the deadline for its acceptance or rejection had passed, Mr Garland retained Mr Dewart to advise him in his personal capacity. Mr Dewart was not retained to advise on the question of the fees. The principal reasons for his retainer were Mr Garland's concerns to obtain compensation for his own efforts in advancing the proceeding, and with respect to certain details of the proposed cy pres arrangement with United Way. Although Mr Dewart could not remember the contents of the 1998 agreement, he assured me that he had discussed it with Mr Garland and had satisfied himself that his client was aware of his rights under it and considered the mediator's proposal to be fair and reasonable. Mr Dewart stated that his advice with respect to the 1998 fee agreement was provided in the context of the leverage it might give Mr Garland on the matters that were his principal concern, and for which Mr Dewart had been retained.

3. Sections 32 and 33 of the CPA

[15] Sections 32 and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (“CPA”) are central to any consideration of a motion to approve class counsel fees. The sections read as follows:

> 32 (1). An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2). An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3). Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4). If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

33 (1). Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into or a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2). For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some all class members; and

(b) a settlement that benefits one or more class members.

(3). For the purposes of subsections (4) to (7),
"base fee" means the result of multiplying the total number of hours worked by an hourly rate;
"multiplier" means a multiple to be applied to a base fee.

(4). An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5). A motion under subsection (4) shall be heard by a judge who has,

> (a) given judgment on common issues in favour of some or all class members; or
> (b) approved a settlement that benefits any class member. ...
>
> (7). On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
>
> (a) shall determine the amount of the solicitor's base fee;
>
> (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
>
> (c) shall determine the amount of disbursements to which the solicitor is entitled,...
>
> (8). In making a determination under clause (7) (a), the court shall allow only a reasonable fee.
>
> (9). In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

[16] Section 32 is concerned with fee agreements - contingent or otherwise - in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under the section appears to be premised and conditioned on the existence of such an agreement.

[17] Section 32 has a wider application. It does not, in its terms, authorize fee agreements. These were always permitted at common law and, since 1909, they have been authorized specifically in sections 15 - 32 of the *Solicitors Act,* R.S.O. 1990, c. S. 15 and their predecessors. Following the decision of the Court of Appeal in *McIntyre Estate v. Ontario (Attorney-General)* (2002), 61 O.R. (3d) 257, the sections were expanded to confirm that contingency fee agreements are permitted in civil proceedings in Ontario. This development was, of course, preceded by the enactment of sections 32 and 33 of the CPA.

[18] Some questions of statutory interpretation that arise under sections 32 and 33 have been considered in this court. In particular, in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (G.D.) and *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (G.D.), it was held that contingency fee agreements that could be approved by the court were not limited to those that contemplated the application of a multiplier to a base fee. In *Nantais,* Brockenshire J. held that an agreement that provided for a

lump sum plus any award of party and party costs could be approved pursuant to section 32, and, in *Crown Bay*, Winkler J. followed that decision in approving an agreement for a fee calculated as a percentage of the settlement proceeds including costs.

[19] If the matter were one of first impression, I would interpret sections 32 and 33 as not intended to displace the general principles and statutory provisions that govern solicitor and client costs, except when a solicitor has moved for approval of an agreement that satisfies the conditions of one of those sections. I would then be inclined to interpret section 32 (4) as limited to cases where, on a motion by a solicitor pursuant to section 32 (2), the court declines to approve an agreement. In the absence of such a motion, the provisions of the *Solicitors Act* would apply including section 21 which applies to fee agreements in general and reads as follows:

> 21. Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement.

[20] The position at common law, and that under the *Solicitors Act,* are discussed in *Clare v. Joseph*, [1907] 2 K.B. 369 (C.A.) and *Fitch v. Fort Frances Pulp and Paper Co*. (1927), 61 O.L.R. 252 (App. Div.). In *Clare*, at page 376, Fletcher Moulton L.J. stated:

> Agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his clients expense. But when it appeared that the agreement was favourable to the client, the courts often held a solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind.

[21] In *Fitch*, Middleton J.A. commented:

> As we understand the decisions of the Court of Appeal in *Clare v. Joseph*, [1907] 2 K. B. 369, and in *Gundry v. Sainsbury*, [1910] 1 K.B 645, it is now established that the provisions of the Solicitors Act in question were intended to confer upon the solicitor the right to make an agreement with his client if he complies with the terms

> of the Act and to invalidate against the solicitor any agreement that does not comply with the provisions of the Act. But the statute does not take from the client the right to rely on any parol agreement which the solicitor may make.

[22] The interpretation of the CPA that I would prefer is, I believe, supported by the fact that section 32 of the CPA does not appear to deal with the possibility that a client, and not the solicitor, might wish to rely on a fee agreement.

[23] It is my understanding that the above interpretation is not consistent with the practice of the court and the understanding of the profession that has developed under the CPA. It appears to be accepted that a motion can be made under section 32 (4) even where the court has not been asked to approve a fee agreement: see, for example, *Hislop v Attorney General of Canada* (2004) 3 C.P.C. (6th) 42 (S.C.J.). On this interpretation – which I believe I should accept and apply - the section would, to at least some extent, replace the common law and statutory rules governing solicitor and client costs in other proceedings with a general statutory discretion. Given the recognition of an inherent jurisdiction to approve a bonus in *Desmoulin v. Blair* (1994), 21 O.R. (3d) 217 (C.A.) and *Walker v. Ritchie*, [2006] S.C.J. No.45, in cases where there is no fee agreement in existence, there may be no significant difference under either approach as to the powers of the court, and the facts that should influence its decision. Where, however, there is such an agreement the difference could be important if it is the client and not the solicitor who wishes to rely on the agreement. It has not, to my knowledge been held that – contrary to the provisions of section 21 of the Solicitors Act – the discretion under section 32 (4) would permit the court to approve a fee in excess of that provided in such an agreement.

[24] The scope of section 32 (4) bears directly on the degree of leverage class counsel will have when an attempt is made, as here, to renegotiate a contingent retainer agreement after the contingent facts have occurred. In such negotiations the question whether the court has power to override the agreement – may be crucial.

4. Negotiation of the 2006 fee agreement

[25] The question of interpretation is relevant to the extent to which Mr Garland was informed of the status of the 1998 agreement during the negotiations with class counsel with respect to the possible amendment of the agreement. While Mr Dewart informed me that he could not remember turning his mind to the provisions of the CPA when he was advising Mr Garland, Mr Millar was emphatic that section 32 (4) gave the court power to override the 1998 fee agreement and to approve a higher fee in the exercise of its discretion. It has been a concern to me that the evidence of the negotiations between Mr Garland and class counsel was more than consistent with the possibility that they were conducted on the basis that counsel had a right to request the court to override the provisions of the 1998 fee agreement pursuant to section 32 (4) of the CPA simply on the ground that a higher fee would be more reasonable. I consider that to be a doubtful proposition but, if it is correct, I cannot believe that a court should

be anything but extremely reluctant to relieve solicitors from the terms of retainers they had freely accepted, if the client wished to enforce them. In attempting to negotiate a fee greater than that they had bargained for in the 1998 contingency fee agreement, counsel were not seeking merely to negate the terms of the agreement – they were actually attempting to obtain additional compensation for the fact that contingencies contemplated in, and to be compensated generously under, the agreement had materialised. The possibility that the litigation would be protracted, and the time expended underestimated, were two of the contingencies. In my opinion, it would be inconsistent with the grounds on which contingent fee agreements are justified to accept the possibility that, on a motion by counsel in circumstances such as these, the court may override their provisions without the consent of the representative party. At the very least, the existence of such an agreement must surely be a highly important factor to be considered in the exercise of the discretion conferred in section 32 (4).

[26] I was particularly concerned with Mr Garland's understanding of the legal position when counsel attempted to obtain his agreement to replace the provisions of the 1998 fee retainer with, initially – according to Ms Fong's first and second affidavits - a multiplier of 4.8 to be applied irrespective of the amount recovered from the defendant. In their factum, counsel stated that there would have been no settlement if they had insisted on "their right to pursue a fee equivalent to a multiplier of 4 or 4.8." (Correspondence filed subsequently discloses that, as late as December 21, 2005, counsel were seeking Mr Garland's agreement to a multiplier of 5.)

[27] To some extent, but not entirely, my concerns were removed by the further affidavits filed before, and after, the second hearing and by the very helpful submissions of Mr Dewart who represented Mr Garland on each occasion. In particular, it is clear that, for at least several months while the parties were preparing for a mediation, Mr Garland had accepted that the manner of determining fees in the 1998 agreement would no longer provide fair and reasonable compensation for counsel.

[28] I continue to have some reservations about Mr Garland's understanding of the limited role of the mediator and his decision, made in advance, to abide by whatever recommendation was made - a decision that ultimately led him to agree to a fee of approximately twice the amount that, a few months earlier, he had considered to represent fair and reasonable compensation. His final acceptance of the mediator's recommendation occurred at a time when his principal concerns related to the compensation he wished to receive and other aspects of the settlement for which Mr Dewart was retained, and on which Mr Garland was evidently not prepared to rely on the advice of class counsel. I am concerned that the dynamics of the settlement discussions and the mediation of the issues with the defendant may have had a significant influence on Mr Garland's decision with respect to the fees. Having failed to reach agreement prior to the mediation, I believe that counsel should have insisted that the question be postponed until after issues with the defendant had been resolved, and the maximum amount it was to pay had been decided. Mr Garland could not subsequently have been compelled to enter into a new fee agreement that, in his opinion, would unduly reduce the amount to be distributed *cy pres*. If he had been given to understand, and was concerned, that, in the absence of a new agreement, the court could override the terms of the 1998 retainer agreement – a proposition

that I have described as doubtful – he was in my opinion under a misapprehension about the likelihood that it would do so without his consent, and about the responsibility of the court to protect the interests of the class.

[29] Mr Garland supports the motion to approve the fees determined pursuant to the settlement, and has not resiled from his opinion that a fee calculated in accordance with the 1998 agreement would not provide counsel with fair and adequate compensation. In view of his position on the motion, I do not think I could properly hold counsel to the terms of the 1998 fee agreement. In these circumstances, it appears that, under the existing practice of the court - and whether or not approval of the 2006 agreement might be withheld in the light of the considerations I have mentioned - the ultimate question to be decided is whether the fee I am asked to approve exceeds an amount that would fairly and reasonably compensate counsel for the services they have provided to Mr Garland and the class. Despite this, I have mentioned the above concerns because, in my judgment, the submissions made by class counsel at the first hearing, and those of Mr Millar at the second, did not give sufficient recognition to the nature and extent of the conflicts of interest that inevitably arise - and the implications of counsel's fiduciary responsibilities - when they are seeking to reopen a binding fee agreement during the course of settlement discussions with another party. I refer to the comments of the Ontario Law Reform Commission in its *Report on Class Actions* (1982), at pages 729-731. The interests of the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party. In my opinion, they should not permit their personal interests – and particularly those that are adverse to the interests of the class - to be involved in the negotiations. This is simply an application of the long-established rule that a fiduciary is not permitted "to put himself in a position where his interest and duty conflict": *Bray v. Ford*, [1896] A.C. 44 (H.L.), at page 51.

[30] I should note that the comments made in the immediately preceding paragraphs, and earlier in these reasons, are intended to indicate my disagreement with legal submissions advanced by, and on behalf of, class counsel and my concern that they may reflect the approach taken by them when they were seeking to renegotiate the fee agreement with Mr Garland. They are not intended to reflect on their professional integrity, or to suggest that any collusion – or appearance of collusion – occurred or arises in the circumstances of this case: see the comments of Cumming J. in *Directright Cartage Ltd. v. London Life Insurance Co.*, [2001] O.J. No. 4073 (S.C.J.), at paras 63 and 64.

5. Approval of the fee

[31] Under the settlement, the gross amount recovered from the defendant will be $22 million. This amount comprises $19,175,000 for damages and interest, $2 million party and party costs and $825,000 in costs already paid by the defendant. If the provisions for fees in the settlement are approved, and if Mr Garland is to receive compensation out of the amount approved as the fees of class counsel, they project that the application of the $22 million would be as follows:

Cy pres distribution	$9,000,000
Class Proceedings Fund levy	$1,917,500
Repayment of disbursements to Class Proceedings Fund	$311,825.30
Disbursements and GST not paid by Class Proceedings Fund	$31,050.55
Counsel fees, (including costs and compensation for the representative plaintiff)	$10,130,469.20
GST	$609,154.95
	$22,000,000

[32] In determining the fee that would provide class counsel with fair and reasonable compensation, I have no hesitation in accepting their submissions with respect to the difficulty of the litigation, and the considerable success they achieved before the settlement discussions began in 2004. While managing to defeat motions for summary judgment at the final appellate level might not always be considered to be an overwhelming victory, there is no doubt that it was a highly significant - and, most probably, a crucial - factor in obtaining the settlement of the proceeding. Counsel's contribution to the success achieved was notable and in view of this, the degree of success, their perseverance and their initial acceptance of a contingent fee retainer, there is no doubt in my mind that they should fairly be compensated at a level significantly in excess of an amount that might be considered to be a reasonable base fee. Notwithstanding this conclusion, it was my initial impression that a fee that exceeded the amount to be applied for the benefit of the class, and that constituted 46% of the gross recovery, was too large.

[33] In the submission of counsel, it would be inappropriate - in the special circumstances of this case - to look merely at the amounts payable under the settlement in measuring the total financial benefits obtained for the class. In her first affidavit, Ms Fong referred to, and included as an exhibit, a letter from Professor Adonis Yatchew, of the Faculty of Economics at the University of Toronto. In the letter Professor Yatchew provided estimates of the present value of the amount saved by class members between 2002 and September 2006 and thereafter over various time frames ranging from 20-30 years. This saving resulted from the reduction of late payment penalties from 5% to 2% in the first of those years and the abolition of illegal penalties in October 2005. On the basis of his calculations, he concluded that the net saving to class members from the abolition of the payments was in the range $73 million to $107 million.

[34] I accept counsel’s submissions, and Professor Yatchew's methodology, with respect to the savings achieved during the class period that ended on October 1, 2005. Only persons who incurred penalties during that period were members of the class. Other persons who would have incurred late payment penalties if they had not been abolished are not members of the class although they are undoubtedly persons that the action was intended, and effective, to benefit. Behavioural modification is one of the goals of class proceedings but members of the public who benefit from it - even those who but for the class-closing date would have been members of the class - are not thereby elevated to the status of class members.

[35] I have no difficulty in accepting on the facts of this case, that the degree of behavioural modification achieved is one of the factors that could properly influence the size of an acceptable fee, but I do not accept that a dollar value that might be placed on the benefit obtained by other customers of Enbridge can be transmuted into an amount recovered for the benefit of the class.

[36] The savings realised before October 2, 2005 were those of class members. When Professor Yatchew's estimates are adapted to accommodate the cut-off date for class membership, the present value of such benefits would be in the vicinity of $32 million. On the basis of what counsel submitted, and the evidence suggests, are reasonable assumptions, the value of the net benefit would be approximately one-half of that amount.

[37] The net savings in the period 2002 to October 1, 2005 were a direct result of the decisions of the Supreme Court of Canada and left class members with funds they would otherwise have paid to the defendant. While a reduction in the damages a person would otherwise have suffered from illegal activities might not ordinarily be considered to be tantamount to an amount recovered, I believe it might properly be so regarded for the purpose of attempting to measure the degree of success achieved, and the amount that would be fair and reasonable compensation for counsel whose efforts were instrumental in obtaining it. The position should be no different than if the defendant had not reduced the penalties in the period 2001 to October 2005 and an additional amount of $16 million had been provided for the class under the settlement.

[38] If the net savings to the class are added to the gross recovery under the settlement, the fee of $10, 130,469.20 requested would be approximately 26.7% of the resulting amount. On that basis – and even if I were to ignore the benefit to customers of Enbridge who were not members of the class - the fee is not excessive and will be approved. I would not have approved it if I had considered that the sole measure of the success achieved was the gross recovery of $22 million under the provisions of the settlement.

[39] The fee would represent an application of a multiplier of 2.78 to the amount that I would determine to be a reasonable base fee if section 33 were applicable. For this purpose, I have reviewed the dockets that record the time expended by counsel since the commencement of the proceedings on April 25, 1994. The time, and the work done, is certainly prodigious as is to be expected in view of the course of the proceedings. For most of that period, however, two firms acted as co-counsel and I am satisfied that - almost inevitably - some otherwise unnecessary duplication of work occurred. The dockets are replete with references to members of one firm reviewing e-mails and material from the solicitors in the other firm. I am also not satisfied that - with the knowledge that the fee would not be charged to their client - counsel were entirely successful in resisting the temptation to be less than completely scrupulous with their time as the parties began to move towards a settlement of the proceeding. In the two years immediately leading up to the settlement, $1,354,122 of time were docketed as compared with $2,682,385 in the preceding 10 years, which included the appeals to the Court of Appeal and the Supreme Court of Canada. I accept that the issues, and the research required, on the question of damages

were complex but I am not satisfied that all of the time docketed could properly be charged to a client. The determination of a reasonable base fee is difficult in a case like this. Although I do not doubt that the dockets record time actually spent, I am of the opinion that a reasonable base fee would be $3,632,857 - reflecting a reduction of 10 per cent from the amount recorded.

REPRESENTATIVE PARTY COMPENSATION

[40] In the earlier endorsement I described this as one of the exceptional cases in which a representative party should receive compensation for his contribution to the success of the litigation. The circumstances in which compensation should be allowed out of settlement proceeds were most fully discussed in *Windisman v. Toronto College Park Ltd*, [1996] O.J. No. 2897 (G.D.) and *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.). Although the amount requested in this case would reduce the fees approved for class counsel, Mr Dewart relied on the principles stated in these cases, and did not suggest that any other approach should be adopted.

[41] In *Windisman,* Sharpe J. awarded a representative plaintiff $4,000 out of the net recovery for the class. His reasoning appears in the following paragraph:

> Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for her class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such award should not be seen as routine. The evidence here is that Ms Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding.

[42] In *Windisman*, the gross recovery for the plaintiff class was $2.6 million including prejudgment interest. In *Sutherland*, the recovery was $2.25 million and the representative plaintiffs had requested $80,000 to be paid out of the amount recovered. In distinguishing *Windisman,* Winkler J. stated:

> In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of Cy-pres distribution. The representative plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in Windisman, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.
>
> While the work of the representative plaintiffs is commendable, to compensate them for the work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of the Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that could be purely compensatory on a quantum meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

[43] My understanding of the analysis in those cases is that compensation is to be awarded only where the representative's contribution is greater than that which would normally be expected of a representative party in the circumstances of the case. Such a contribution must have related to functions necessary for the preparation or presentation of the case and have resulted in a direct financial benefit of the class. It will often be indicated - and, perhaps, usually - by an extraordinary commitment of time and effort, or the application of special expertise.

[44] It may also be relevant, I think, if the contribution is referable to the representative's obligation to fairly and adequately represent the class rather than, for example, to time spent considering and communicating with counsel with respect to the legal issues and tactics and strategies in the litigation. Finally, I note that each of the learned judges would attribute importance to the initiative shown by the representative party in connection with decisions to commence and continue the proceedings. All these factors, in my opinion, must be weighed in the light of the benefit that the class received from the representative's contribution.

[45] In the light of the above considerations, Mr Garland has, in my judgment, made out a strong case for compensation. He took the initiative in seeking legal advice with respect to the legality of late payment penalties and in instructing counsel to commence the proceedings. He was instrumental in keeping the legal team together when members of the class counsel sought to withdraw from the proceedings on the ground of a business conflict, and he accepted a large part of the responsibility for communicating with class members personally or through interviews with representatives of the media. He also played an active part in the settlement negotiations and, in particular, in obtaining agreement to the nature and details of the *cy pres* distribution - one of the matters for which he found it desirable to retain separate counsel.

[46] The litigation was commenced, and continued, by Mr Garland in the public interest and, I am satisfied, that throughout it his primary concern has been to protect and serve the interests of the class. It was on this ground that he firmly opposed counsel's proposal to replace the method of calculating their fee under the 1998 fee agreement with the application of a multiplier to be applicable irrespective of the gross recovery.

[47] The more difficult question relates to the amount of the compensation that should be allowed. Mr Garland has kept track of his time over the past 12 years. His records - in the form of dockets - disclose that he has spent 1584 hours and incurred expenses of $464.93. His counsel, Mr Dewart, has estimated that, if Mr Garland had billed out his time to the clients of his consulting practice, he would have earned an additional income of between approximately $102,960 and $134,640. He seeks $95,000 in compensation to be paid out of the amount I have approved as the fees of class counsel.

[48] There is no precedent for an award of such an amount in this jurisdiction. That, of course, is not determinative as the extent of Mr Garland's special contribution may well be unprecedented. The largest award to my knowledge was the $15,000 approved for one of the plaintiffs in *Hislop* where the claims were said to have a potential value of $81 million but the duration of the proceedings was relatively short.

[49] On the basis of my review of Mr Garland's dockets, and the principles to which I have referred, I would have no difficulty in finding that an order for compensation of $15,000 could be justified. Without further elaboration, the dockets which record substantial amounts of time devoted to meetings, and phone calls, with class counsel are equivocal and insufficient to justify the addition of any further specific amount for the purpose of determining whether Mr Garland was providing necessary assistance to counsel. For that purpose, time recorded simply as spent thinking about the issues in the litigation is even less helpful.

[50] Class counsel have filed an affidavit strongly supporting Mr Garland's request for compensation for the contribution he made as a representative plaintiff - although they do not suggest an appropriate amount. Ms Fong refers to him in the affidavit as a valued member of "our team" and as "an active and effective class representative who always tried to keep the interest of the class at the forefront". She deposes, in particular, to the assistance he gave counsel and various experts in analyzing issues relating to damages, his advice during the settlement negotiations and in the formulation of the terms of the *cy pres* distribution and, generally, to the thoughtful comments he provided to them throughout the proceedings. She confirms, also, Mr Garland's insistence that the class counsel's fees should not unduly consume the settlement funds.

[51] Overall, I am satisfied that Mr Garland did contribute to the success of the proceeding to an extent that exceeded significantly what might properly have been expected of a representative plaintiff in the circumstances of this case. He appears to have been in close communication with counsel on every aspect of the proceeding and, while it is it is impossible to estimate precisely the value of the assistance he provided over a period of 12 years - and the extent to which it provided a direct monetary benefit to the class - I believe that $25,000 is an amount that would represent fair and reasonable compensation for his exceptional contribution. I am not prepared to approve an additional amount for the particular disbursements – relating for the most part to travel expenses – or for the prejudgment interest Mr Garland has claimed, nor for any part of the solicitor and client costs he has incurred in connection with his claim to compensation. On the state of the record – and without having heard submissions on the question - I am inclined to add the part of such costs that are reasonably applicable to the retainer of Mr Dewart for the purpose of finalising the details of the *cy pres* distribution. If class counsel wish to contest either the addition, or the quantum, of such costs, I may be spoken to for such purpose.

[52] In arriving at that result, I have not ignored the comments of Winkler J. with respect to the possible inconsistency between the concept of a *cy pres* distribution and an award of an amount of compensation to a representative plaintiff. I respectfully accept that the inconsistency – and an appearance of a conflict of interest - could arise if such compensation were to be awarded routinely. However, I do not think the problem arises here where the compensation is for the direct benefit Mr Garland has obtained for the class by his special contribution, and where I have approved, as fair and reasonable compensation to class counsel, the amount from which Mr Garland’s compensation is to be paid.

CONCLUSION

[53] For the above reasons, and those in the endorsement of September 25, 2006, there will be an order certifying the proceedings and approving the settlement when the final amount of the compensation to be paid to Mr Garland has been determined.

[54] The forms of notice in Schedule A and Schedule C of the draft implementation order are approved subject to the insertion in the former of a reference to the compensation awarded to Mr Garland.

CULLITY J.

Released: December 8, 2006

COURT FILE NO.: 94-CQ-50711
DATE: 20061208

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GORDON GARLAND

Plaintiff

- and -

ENBRIDGE GAS DISTRIBUTION INC.
(FORMERLY THE CONSUMERS GAS
COMPANY LIMITED)

Defendant

REASONS FOR DECISION

CULLITY J.

Released: December 8, 2006

Tab 16

Johnston v. The Sheila Morrison Schools

CITATION: *Johnston v. The Shelia Morrison Schools*, 2013 ONSC 1528
COURT FILE NO.: 09-CV-379550CP
DATE: March 12, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
GREG JOHNSTON and TIM WILLIAMSON	)	*Celeste Poltak*, and *Jonathan Bida* for the Plaintiffs
Plaintiffs	)	
– and –	)	
THE SHEILA MORRISON SCHOOLS and SCOTT MORRISON	)	*Elizabeth Bowker* for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD:** March 12, 2013

PERELL, J.

REASONS FOR DECISION

I. INTRODUCTION

[1] Greg Johnston and Tim Williamson are the Representative Plaintiffs in a certified class action against The Shelia Morrison Schools and Scott Morrison.

[2] The Plaintiffs bring a motion for an order that the court (a) approve the $4 million settlement of the action; (b) approve Class Counsel's fees of $1 million, (exclusive of disbursements and tax); (c) approve an honorarium payment of $5,000 for each Plaintiff; and (d) dismiss the action without costs.

[3] For the reasons that follow, I grant the relief requested.

II. FACTUAL AND PROCEDURAL BACKGROUND

[4] Mr. Morrison was the headmaster of the Sheila Morrison School, which was a co-educational, residential, and day school located near to the City of Barrie for children been 10-18 years of age who suffered from learning disabilities and behaviour

problems. The school operated from 1977 until, after the commencement of this action, it was closed for the 2009-10 academic year.

[5] Messrs. Johnston and Williamson, who were students at the school, commenced this action in May 2009.

[6] In the action, it is alleged that the Defendants were negligent and in breach of their fiduciary obligations to the students at the school. The Plaintiffs allege that the students were physically, sexually, emotionally, and psychologically abused at the school. They allege that the students were deprived, endangered, exploited, and kept captive and isolated at the school. They allege that the funding for the school was inadequate to meet the needs of the students who resided at the school. They allege that as a result of the defendants' conduct, they and the other class members suffered abuse. The Statement of Claim seeks $20 million in compensatory damages and $10 million in punitive damages.

[7] On June 23, 2009, the Defendants, who were then represented by Redway & Butler LLP, filed a Notice of Intent to Defend.

[8] On August 18, 2009, the Defendant Scott Morrison was granted leave to represent himself and the Sheila Morrison School.

[9] In February 2010, although not initially formally retained, Stieber Berlach LLP, became involved in this action for the Defendants. In April 2010, Stieber Berlach LLP was formally retained to defend the Defendants.

[10] By order dated June 7, 2010, on consent, Messrs. Johnston's and Williamson's action was certified as a class proceeding. See *Johnston v. Sheila Morrison Schools* 2010 ONSC 3334.

[11] Koskie Minsky, LLP is Class Counsel. The action was supported by the Class Proceedings Fund.

[12] The Defendants denied liability. They asserted that they took all reasonable steps to ensure that students were provided with a safe and secure learning environment. They assert that they took reasonable precautions to ensure each employee was properly trained. They also asserted that the claims are barred by the *Limitations Act, 2002* and that, in any event, the damages claimed are unforeseeable, excessive and too remote to be recovered.

[13] Both Defendants are impecunious, and the recovery of any judgment has been a matter of concern to the Plaintiffs from the outset of the proceedings. The only source of recovery is insurance funds, and the availability of insurance coverage has been unclear.

[14] An adequate assessment of available insurance did not occur until after Steiber Berlach LLP became involved, and it was not until April 2012 that Class counsel gained its current understanding of what insurance might be responsive to the claims alleged.

[15] An analysis of the coverage reveals that the Defendants have gaps in their insurance coverage. There are four different insurers, and the insurance limits for

insured years fluctuate, from $1 million in some years to $10 million in others. The insurance limit for one year and for one insurer cannot be used to pay for insured events occurring in other years. It seems to be the case that the Defendants' insurers will only respond for incidents that occurred during the policy periods for which they provided insurance coverage. This means there will be little or no recovery for incidents of abuse that occurred in the eight uninsured years (i.e. 25% of the class period).

[16] Further, Temple Insurance has taken an off-coverage position, and the other insurers have defended pursuant to reservation of rights. Further still, significantly, the policies have various exclusions for abuse claims. Accordingly, depending on the wording of the particular policies, there may be additional years for which there is no insurance. The availability of insurance coverage might have to be litigated if this proceeding is not resolved by settlement.

[17] After the certification, the parties began preparation for the trial of this action, including preparation for documentary production and examinations for discovery. Class Counsel received thousands of documents in some 30 bankers' boxes containing documents of the defendants spanning approximately 32 years.

[18] The examinations for discovery took place over the course of three days in August 2011. Both Greg Johnston and Tim Williamson were examined and answered detailed questions about their personal experiences at the Sheila Morrison School and the abuse they alleged they suffered. This was a difficult experience for both Representative Plaintiffs.

[19] The action was set down for trial in March 2012, potential witnesses were contacted, will-say statements were prepared, and four experts were retained by the Plaintiffs.

[20] The Plaintiffs' experts opined on: (a) the standards for the management, operation and supervision of a private school; (b) the appropriate conditions for the residence and care of persons with developmental disabilities, including learning disabilities and behavioural difficulties; (c) the sort of damages students would suffer from abuse; and (d) the methodology by which damages could be assessed on an aggregate basis.

[21] Whether an aggregate assessment was available was a contentious issue, and in the absence of an aggregate assessment, the common issues trial would have to be followed by individual assessments.

[22] The Defendants responded with several expert reports, leading to a reply report by the Plaintiffs' damages experts.

[23] On December 17, 2012, the parties attended a mediation before Justice John C. Murray.

[24] At the mediation (which the Plaintiffs attended along with the damages experts), all parties engaged in lengthy discussions with the mediator. The mediation resulted in a settlement in principle whereby the Defendants will pay $4 million in full settlement of

the action, without any reversion of settlement funds to the Defendants and without the Defendants' involvement in structuring the claims process.

[25] On February 7, 2013, the parties signed the Settlement Agreement. The highlights of the settlement are as follows:

- The Defendants will pay $4 million to settle all claims in the action, class counsel fees, notice and administration costs, and taxes.
- If there is any residual following the distribution of the settlement fund, there is no reversion to the Defendants.
- The settlement fund is distributed in accordance with a claims process that is similar to the process approved by the court in *Baxter v. Canada*, [2006] O.J. No. 4698 (S.C.J.).
    - The proposed claims process is designed to provide a balance between: (i) compensating class members for their experiences; (ii) ensuring the claims process is efficient, timely and cost effective; and (iii) recognizing that all former students, regardless of personal experiences, ought to receive some compensation for exposure to the adverse environment at the school.
    - Class members file a claim setting out how long they attended the school, whether they stayed in residence, and detailing their experiences, including any alleged abuse by staff or students.
    - The claims administrator will allocate points according to a points allocation system that corresponds to the students' report about their time at the school.
    - Once the claims administrator has determined the points for each claim, it will distribute the settlement funds in proportion to the points awarded, subject to certain restrictions.
    - The claims process excludes claims for a person who was a student at the school for a short period of time (less than two months during the regular school year or less than 4 weeks during the summer) and who does not claim that he or she suffered any abuse.
    - The claims process limits compensation to a maximum of $50,000. This maximum is meant to recognize that the class

members had common experiences in attending the school that may not be easily quantified.

  - This maximum may be increased to up to $100,000 as part of a second allocation if there is a residual amount remaining after the initial allocation among class members.

- Any settlement funds remaining following the initial allocation and the second allocation will be paid equally among: (a) the Hincks-Dellcrest Centre; (b) the Aisling Discovery Child and Family Centre; and (c) the William J. McCordic School; and (d) the Learning Disabilities Association of Ontario, to be used for charitable purposes.

- The Plaintiffs choose these organizations because they provide services similar to the services that the Sheila Morrison School was meant to provide; visualize:

  - The Hincks-Dellcrest Treatment Centre provides mental health services to more than 8,000 infants, children, youth and their families.

  - Aisling Discoveries Child and Family Centre is a United Way Member Agency and is accredited by Children's Mention Health Ontario. Aisling provides free services to children who are experiencing or are at risk of developing social, emotional or behavioural problems.

  - The William J. McCordic School is a special education school in the Toronto District School Board for students with developmental disabilities.

  - The Learning Disabilities Association of Ontario (LDAO) is a registered charity dedicating to improving the lives of children, youth and adults with learning disabilities.

- There is a full release and provisions that bar proceedings against third parties that may claim over from the Defendants.

- The parties will not comment publicly on the action or settlement in a manner that casts the conduct of any party in a negative light.

- Class Counsel's Legal fees, the Class Proceedings Fund Levy of ten percent, the costs of notice and the costs of administration of the claims process are paid out of the settlement funds.

[26] The following chart summarizes the net recovery of the class.

Deductions from Gross Settlement	**Amount**	**Balance**
		$ 4,000,000.00
Reimburse CPC-paid disbursements	$ 163,228.57	$ 3,836,771.43
Unpaid disbursements	$ 4,548.35	$ 3,832,223.08
Counsel Fees (x1.39)	$ 1,000,000.00	$ 2,832,223.08
Tax on fees	$ 130,000.00	$ 2,702,223.08
Administration costs	$ 133,820.00	$ 2,568,403.08
Honorarium to Rep. Plaintiffs	$ 10,000.00	$ 2,558,403.08
Statutory CPC Levy (10% of net)	$ 255,840.31	$ 2,302,562.77
	Net funds to class:	**$ 2,302,562.77**

[27] Class counsel understands that there are likely less than 600 former students of Sheila Morrison School, and it is possible there are as few as 400. Accordingly, the settlement is equal to an average of approximately $7,500 to $10,000 per student.

[28] The claims process provides estimates of compensation. Using four examples: (1) a class member who claimed no abuse at all would receive estimated net compensation of $3,833; (2) a class member who suffered physical assaults without either serious or observable injury would receive estimated net compensation in the range of $7,513 to $13,647; (3) a class member who suffered a serious injury such as a broken arm would receive estimated net compensation of $12,573 to $20,240; and (4) a class member who suffered a sexual assault (level 3 out of 4) would receive estimated net compensation of $20,240 to $24,840.

III. SETTLEMENT APPROVAL

[29] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43.

[30] In determining whether a settlement is reasonable and in the best interests of the class the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arms-length bargaining and the absence of collusion; (h) the information conveying to the

court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada, supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre, supra* at para. 45.

[31] In the case at bar, the Plaintiffs submit that the settlement is fair, reasonable and in the best interests of the class. They submit that a payment of $4 million represents a substantial recovery for class members that is more certain and timely than any judgment on the common issues or subsequent individual assessments.

[32] The Plaintiffs submit that continuing the litigation includes the risks that: (a) liability would not be established; (b) proven damages would be similar to or less than the settlement amount; and (c) there would be little or no recovery because the defendants are impecunious, there is limited insurance, and the insurers may ultimately deny coverage.

[33] In my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members.

[34] Indeed, in my opinion, having regard to very substantial risk factors and the considerably difficulties associated with recovering insurance proceeds, the settlement achieved is a very good result for the class members. The distribution scheme proposed appears to be a good one.

IV. FEE AND HONORARIUM APPROVAL

[35] Turning to the matter of Class Counsel's fee request, the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para 13; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J.), at paras 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para 25.

[36] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd., supra*, at para 28.

[37] Class Counsel has prosecuted this action on behalf of the class and without compensation to the point of the pre-trial and common issues trial. It has incurred

1,701.8 hours in time in prosecuting this action as of February 28, 2013. The total fees docketed as of February 28, 2013 are $720,228 (exclusive of tax).

[38] Class counsel, Koskie Minsky LLP, seeks fees of $1.0 million based on four years of litigation and a base fee of more than $720,000. The requested counsel fees represent 25% of the gross settlement proceeds, or a multiplier of less than 1.4.

[39] The requested fee, representing 25% of recovery and a 1.39 multiplier, is consistent with the success achieved and risks undertaken.

[40] The Representative Plaintiffs, who were actively involved in this litigation, support class counsel's fee request.

[41] In my opinion, Class Counsel`s fee request is more than reasonable and fair and should be approved as asked. Class Counsel are to be commended for taking on the risk of this class action for a small group and seeing the action to a fair settlement.

[42] Class counsel seek honorarium payments of $5,000 for each of Greg Johnston and Tim Williamson.

[43] The honorarium payments are appropriate. Mr. Johnston and Mr. Williamson committed a significant amount of time to directing this litigation. They were involved through pleadings, certification, examinations for discovery, preparation for trial and mediation. In this case, Mr. Johnston and Mr. Williamson were the face of this action, and their personal experiences became public record. Mr. Johnston and Mr. Williamson were required to describe the abuse they allege in the statement of claim, to swear affidavit evidence in support of certification (exposing themselves to potential cross-examination), to discuss that abuse in examinations for discovery and, if the matter proceeded to trial, to give testimony in front of one of their alleged abusers. The honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice.

V. CONCLUSION

[44] For the above reasons, I grant the relief requested.

_____

Perell, J.

Released: March 12, 2013

CITATION: *Johnston v. The Shelia Morrison Schools*, 2013 ONSC 1528
COURT FILE NO.: 09-CV-379550CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GREG JOHNSTON and TIM WILLIAMSON

Plaintiffs

- and -

THE SHEILA MORRISON SCHOOLS and SCOTT MORRISON

Defendants

REASONS FOR DECISION

Perell, J.

Released: March 12, 2013.

Tab 17

John Wink Ltd.
v. Sico Inc.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Aviaco International Leasing Inc. v. Boeing Canada Inc. | 2000 CarswellOnt 3088, [2000] O.J. No. 3284, 48 C.P.C. (4th) 366, 99 A.C.W.S. (3d) 391, [2000] O.T.C. 994 | (Ont. S.C.J., Sep 6, 2000)

1987 CarswellOnt 370
Ontario Supreme Court, High Court of Justice

John Wink Ltd. v. Sico Inc.

1987 CarswellOnt 370, [1987] O.J. No. 5, 15 C.P.C. (2d) 187, 2 A.C.W.S. (3d) 323, 57 O.R. (2d) 705

JOHN WINK LTD. v. SICO INC. *

Reid J.

Heard: October 7 and 8, 1986
Judgment: January 6, 1987
Docket: File No. 21734/84

Counsel: *Erwin P. Reidl*, for plaintiff.
Daphne Jarvis, for defendant.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.i Upon appeal from Master
XXIII.13.i.ii Reversing finding of fact
XXIII.13.i.ii.A Where Master's decision discretionary
Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.d Grounds for requiring security
XXIV.3.d.ii Lack of assets
Headnote
Practice --- Practice on appeal — Powers and duties of appellate Court — Upon appeal from Master — Reversing finding of fact — Where Master's decision discretionary
Practice --- Costs — Security for costs — Grounds for requiring security — Lack of assets
Costs — Security for costs — Grounds for requiring security — Lack of assets — Plaintiff corporation not having sufficient assets to pay costs if ordered to do so — Plaintiff relying upon poverty — Plaintiff's claim not frivolous or groundless — Action to be permitted to proceed to trial — Appeal allowed from order requiring plaintiff to post security for costs — Ontario Rules of Civil Procedure, r. 56.01(d).
The defendant moved for security for costs pursuant to r. 56.01(d). The Master ordered security to be posted, holding that the defendant had established a prima facie case as to the insufficiency of the assets of the plaintiff and that the plaintiff had failed to discharge the onus upon it of establishing that its case was meritorious and that it would be unjust to order security for costs against it. The plaintiff appealed.
Held:
The appeal was allowed.

The onus lay on the defendant to show that there was good reason to believe that the plaintiff had insufficient assets. Thereupon, the onus passed to the plaintiff to show either that it had sufficient assets or that it should be permitted to proceed to trial notwithstanding the lack of them. The defendant in this case having shown a prima facie case of insufficiency of assets, the onus fell upon the plaintiff. The plaintiff chose to rely on its poverty rather than deny it, and also relied on the gross injustice that would be the result if poverty caused by the defendant secured the defendant against a trial.
Where impoverishment was shown or admitted, the claim should be allowed to proceed unless it was plainly devoid of merit. The plaintiff had merely to show that the claim was not almost certain to fail. The Master erred by putting upon the plaintiff the onus of establishing that its case was meritorious and by holding that the plaintiff had failed to establish the proposition that the defendant's acts had contributed to the plaintiff's impecuniosity.

Annotation

One of the significant changes as regards security for costs effected by the new Rules is r. 56.01(d), which provides that security may be ordered where the plaintiff is a corporation with insufficient assets to pay costs if ordered to do so. The decision of Reid J. in this case might appear to frustrate this provision by suggesting that a "shell" corporation need only establish that its claim is not frivolous or totally void of merit in order to avoid the obligation to post security.

It now appears to be settled, by this decision and that of Trainor J. in *Warren Industrial Feldspar Co. v. Union Carbide Can. Ltd.* (1986), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1 (Ont. H.C.), that once the defendant has established a prima facie case for insufficiency of assets, the onus passes to the plaintiff to either show that it has assets or to show why justice demands that it be relieved of the obligation to post security for costs. Where the instant case differs from other recent decisions is the holding that the plaintiff corporation, when relying upon its poverty, need only show that its case is not frivolous in order to avoid the obligation to post security. In *Warren Industrial Feldspar*, supra, and *459433 Ont. Ltd. v. Markborough Properties Ltd.*, Ont. H.C., Doc. No. 8372/82, Henry J., March 6, 1986 (digested 4 W.D.C.P. 136), it was stated that the merits of the case were but one of the circumstances the Court would have regard to when determining whether the discretion to relieve against the obligation to post security should be exercised in favour of the plaintiff.

It is submitted that the holding by Reid J. in the instant case is the correct one, but only when one bears in mind an issue not specifically addressed by his Lordship, namely, that the plaintiff must first prove its impecuniosity. The recent authorities have now established that before the plaintiff can rely upon its poverty it must clearly establish that it is impecunious. Impecuniosity is something more than having no assets. The plaintiff must establish that it and its shareholders cannot sell assets, borrow or otherwise raise the funds to post the security. If impecuniosity is not established to the satisfaction of the Court, the security will be ordered and the Court will not consider further whether the plaintiff should be relieved of this obligation: see *408466 Ont. Ltd. v. Fidelity Trust Co.* (1986), 10 C.P.C. (2d) 278 (Ont. Master), affirmed (1986), 10 C.P.C. 282 (Ont. H.C.); *City Paving Co. v. Port Colborne* (1985), 3 C.P.C. (2d) 316 (Ont. Master); *City Auto Services (Toronto) Ltd. v. T.D. Bank* (1985), 5 C.P.C. (2d) 202 (Ont. Master), reversed, Ont. Div. Ct., White J., December 20, 1985 [motion for leave to appeal to the Divisional Court was dismissed Ont. H.C., Steele J., January 28, 1986]; *Warren Industrial Feldspar Co. v. Union Carbide Can. Ltd.*; *RCVM Enterprises Ltd. v. Int. Harvester Can. Ltd.* (1985), 50 O.R. (2d) 508, 50 C.P.C. 278 (Ont. Master); *Eddie 'N' Me Productions Co. N.V. v. Toronto Star Newspapers Ltd.* (1981), 34 O.R. (2d) 433, 24 C.P.C. 261 (Ont. Master). The rationale for this requirement was simply stated by Smith J. in *408466 Ont. Ltd. v. Fidelity Trust Co.*:

The personal financial position of an officer of a corporate plaintiff who is the sole shareholder of the company, is not irrelevant and embarrassing as claimed by the appellant plaintiff. To hold otherwise could open the door to suits by 'shell' corporations that would start actions without the corresponding obligations or responsibility in the area of costs.

Impecuniosity must be proven by the plaintiff and cannot be established by an admission: see *RCVM Enterprises*, supra.

The Rules do not require an impecunious personal plaintiff to post security unless the action is frivolous and vexatious. If a corporation can establish that it is truly impecunious, and not just a shell company with the shareholders seeking to obtain the benefits of litigation without the corresponding burden of responsibility for costs, there does not appear to be any good reason to draw a distinction between the personal and corporate plaintiff.

Alan H. Mark

Table of Authorities

Cases considered:

Hawaiian Airlines Inc. v. Chartermasters Inc. (1985), 50 O.R. (2d) 575, 50 C.P.C. 224 (Ont. Master) — *considered*

Stoicevski v. Casement (1983), 43 O.R. (2d) 436, 43 C.P.C. 178 (Ont. C.A.) — *referred to*

Warren Industrial Feldspar Co. v. Union Carbide Can. Ltd. (1986), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1 (Ont. H.C.) — *applied*

Rules considered:

Ontario Rules of Civil Procedure —

r. 56.01(d)

APPEAL by plaintiff from order of Master requiring plaintiff to post security for costs.

***Reid J.*:**

1 This is an appeal against an order for security for costs made by Master Garfield under r. 56.01(d). The Rule is still something of a novelty, in that it is a departure from the practice anteceding its introduction in January 1985 with the new Rules. Differing interpretations of its meaning and proper application have arisen. I am reluctant to add yet another view but I am not in complete agreement with all the views that have been expressed and feel constrained to set out my own.

2 Master Garfield gave reasons. They are now set out.

> There is no doubt that the material before me reveals that the defendant has established a prima facie case as to the insufficiency of assets of the plaintiff to pay costs if ordered to do so (see r. 56.01(d)).
>
> It is now incumbent upon the plaintiff to satisfy the onus of establishing that its case is meritorious and that it would be unjust to order security for costs against it.
>
> As to the merits, I agree with counsel for the defendant that it is nigh on impossible at this state of the proceedings with the material I have before me to decide on the merits of this case. It would be mere speculation on my part to conclude that this action will succeed. The plaintiff has not discharged the onus.
>
> The material also fails to support the proposition that the action or rather the supplies (paint) of the defendant contributed to the plaintiff's impecuniosity so that to order security for costs would be unjust. The Dunwoody Report (Exhibit 'H' to the Mitchel Wine affidavit) lists numerous potential causes of the plaintiff's demise other than the alleged defective paint.
>
> The defendant is entitled to security. Counsel have not seriously argued against the applicability of the installment type of order as in *Hawaiian Airline v. Chartermasters* (1985), 50 O.R. (2d) 575, 50 C.P.C. 224 (Ont. Master). Accordingly, only the following items shall be allowed at this stage, as set out in the defendant's draft bill of costs:

Paid to enter		$22.00
Appearance pleadings	$350.00	
Discovery of documents	100.00	
Paid for copies of plaintiff's productions		63.45
Examinations for discovery	2,500.00	
Paid to special examiner		448.65
Motion for security for costs	75.00	
	$3,025.00	534.10


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                                    534.10
                                ----------
                                $3,559.10
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The amount of $3,559.10 shall be paid into court within 60 days of this date. An additional term shall be that the Plaintiff may not set this action dowm for trial until a further order is obtained fixing the amount of further security, if any, that is to be furnished by the Plaintiff, and the motion for such order may be brought by either party.

Costs shall be in the cause.

3 As I read his reasons, Master Garfield held that defendant had shown, prima facie, plaintiff's inability to meet a prospective costs order if its claim should fail. Thus, an onus to show that its claim would succeed arose which plaintiff could not meet because it was impossible to do so. Plaintiff must therefore accept a requirement to pre-pay costs that would, or could, destroy the claim itself. That, with respect, strikes me as a very hard decision indeed.

4 I have had the advantage of extensive argument and the review by counsel not only of the circumstances of the case but the decisions, both reported and unreported, on r. 56.01(d).

5 I agree with Trainor J.'s views on how a motion under r. 56.01(d) should proceed as set out in *Warren Industrial Feldspar Co. v. Union Carbide Can. Ltd.* (1986), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1 (Ont. H.C.). The onus lies on defendant to show that there is good reason to believe that the plaintiff has insufficient assets. Thereupon the onus passes to plaintiff to show either that it has sufficient assets, or that it should be permitted to proceed to trial in spite of the lack of them, with the consequent prospect that a successful defendant will not be able to collect the costs awarded.

6 It is clearly essential to the interests of justice that citizens be reasonably secure against the prospect of being dragged through the Courts by straw claimants. Therefore I think that the onus on a defendant who seeks to secure the advantage of an order under r. 56.01(d) should not be set at too high a level. I agree with the principle inherent in Master Garfield's reasons that the onus on a defendant should not amount to proving an insufficiency of assets, in the sense of establishing it beyond a reasonable doubt. If the framers of the rules had intended that high an onus they would have said so. In my opinion, their careful use of a different phrase indicates an intention to place the onus at a lower level than that. I am satisfied with the Master's expression "prima facie".

7 The defendant having shown a prima facie case, the ball returned to plaintiff's court. Plaintiff chose to rely on its poverty rather than deny it, and rested on the gross injustice that would be the result if poverty caused by the defendant secured the defendant against a trial.

8 There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim, no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.

9 It is thus necessary to consider, where impoverishment has been shown or admitted, whether a claim should be allowed to proceed to trial, notwithstanding the risk to defendant of not being able to collect costs even if successful. Trainor J. says that special circumstances must be shown. Yet to do justice to both parties at this stage is a particularly difficult problem. Some have expressed or espoused the view that the question is to be answered by assessing the merits of plaintiff's claim, i.e. the likelihood of success. The merits, however, are merely a consideration in making "such order for security for costs as is just" and are by no means determinative. I agree with Master Sandler, who observed in *Hawaiian Airlines Inc. v. Chartermasters Inc.* (1985), 50 O.R. (2d) 575, 50 C.P.C. 224 (Ont. Master) that in most cases, coming to a conclusion on the merits of a claim upon a motion for security for costs is likely to be impossible. This was also recognized by Trainor J. in *Warren Industrial Feldspar*

Co. v. Union Carbide Can. Ltd, supra. Although he regarded the merits of plaintiff's case and its prospects of success as relevant considerations in deciding whether to grant relief from posting security for costs, he did not treat them as determinative.

10 The impossibility of making a proper decision regarding the merits of a claim on insufficient information should be so obvious as not to require illustration. Yet an illustration is shown in this case. Five reports prepared by accountants, research foundations and others were placed before Master Garfield by both sides. He chose to rely on a statement in one of them for his conclusion that defendant's acts had not led to the loss of plaintiff's business, as plaintiff claimed. Yet, neither that, nor any other report was cross-examined upon. There was no opportunity, as there would have been at trial, to see and hear the authors. There was as well a basis in the other reports from which the opposite conclusion could be drawn. That is too close, for my comfort, to deciding a vital issue in the lawsuit not only without a trial, but on evidence of a very questionable nature.

11 In my respectful opinion, unless a claim is plainly devoid of merit, it should be allowed to proceed. That is the only "special circumstance" that I would require. While the adoption of this standard might allow some cases to go to trial that the trial will prove should not have proceeded, nevertheless the danger of injustice resulting from wrongly destroying claims that should have been permitted to go to trial is to my mind a greater injustice. In my experience, there are very few claims that are entirely without merit that go to and through a trial. The onus on plaintiff is therefore not to show that the claim is likely to succeed. It is merely to show that it is not almost certain to fail.

12 It might be worth adding that because a party is seeking an indulgence, the usual principle requiring it to be free of misconduct in the pursuit of its claim would apply.

13 I accept that the discretionary order of a Master should be supported unless it is clearly wrong. This principle is subject to the qualification that if the order amounts to a final disposition of an issue of the lawsuit, a Court of Appeal must consider the issue without deference to the order made below: see *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436, 43 C.P.C. 178 (Ont. C.A.). If an order for security stops a plaintiff in its tracks it has disposed of the suit. On either basis I think the order in appeal must be reversed. In my respectful opinion, Master Garfield clearly erred in two ways. The first error consisted in putting upon plaintiff the onus of "establishing that its case is meritorious" when he meant that plaintiff must prove that it was likely to win the lawsuit. The second error consisted in going further and deciding the merits of the action, while claiming not to, by holding that plaintiff had failed to establish the "proposition" that defendant's acts had contributed to plaintiff's impecuniosity.

14 There is nothing before me that persuades me that plaintiff's claim is groundless or frivolous. If the reports placed before Master Garfield had any value at all, the fact that they can be read as supporting both sides suggest there is an issue to be tried.

15 In the circumstances, my opinion is that the action should be permitted to proceed to trial. The appeal is allowed. The order of Master Garfield is wholly set aside, so that it is not necessary for plaintiff to post security for costs and may proceed to trial. I say this because I understand from counsel that the action had already been set down and was on the trial list when the motion was made to Master Garfield. His order that plaintiff may not set it down was inappropriate. Further, the delay that has been caused by the motion makes an order expediting trial appropriate. If there is any difficulty about such an order counsel may speak to me. As presently advised, I would think that an order placing the action first on the trial list would be appropriate.

16 The trial Judge will be in a better position than I to deal with the question of costs. I therefore refer the costs of this motion, and the costs order of Master Garfield, to the Judge hearing the case.

Appeal allowed.

Footnotes

* Leave to appeal Mr. Justice Reid's decision was granted by Austin J. on March 9, 1987. The matter was settled before the appeal was heard.

End of Document

Tab 18

Kerr v. Baranow

Margaret Patricia Kerr *Appellant*

v.

Nelson Dennis Baranow *Respondent*

- and -

Michele Vanasse *Appellant*

v.

David Seguin *Respondent*

INDEXED AS: KERR *v.* BARANOW

2011 SCC 10

File Nos.: 33157, 33358.

2010: April 21; 2011: February 18.

Present: McLachlin C.J. and Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

Family law — Common law spouses — Property — Unjust enrichment — Monetary remedy — Whether monetary remedy restricted to quantum meruit award — Whether evidence of joint family venture should be considered in conferring remedy — Whether mutual benefit conferral and reasonable expectations of parties should be considered in assessing award.

Family law — Common law spouses — Property — Resulting trust — Whether evidence of common intention should be considered in context of resulting trust — Whether resulting trust principles apply to property or monetary award in resolution of domestic cases.

Family law — Common law spouses — Support — Parties separating after living together for more than 25 years — Female partner commencing proceedings for a share of property and support — Whether support should be payable from date of trial or date on which proceedings commenced.

In the *Kerr* appeal, K and B, a couple in their late 60s separated after a common law relationship of more

Margaret Patricia Kerr *Appelante*

c.

Nelson Dennis Baranow *Intimé*

- et -

Michele Vanasse *Appelante*

c.

David Seguin *Intimé*

RÉPERTORIÉ : KERR *c.* BARANOW

2011 CSC 10

N^os^ du greffe : 33157, 33358.

2010 : 21 avril; 2011 : 18 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Abella, Charron, Rothstein et Cromwell.

EN APPEL DES COURS D'APPEL DE LA COLOMBIE-BRITANNIQUE ET DE L'ONTARIO

Droit de la famille — Conjoints de fait — Biens — Enrichissement injustifié — Réparation pécuniaire — Une réparation pécuniaire est-elle restreinte au quantum meruit? — La preuve de coentreprise familiale doit-elle être prise en compte au moment d'accorder une réparation? — Les avantages réciproques et les attentes raisonnables des parties doivent-ils être pris en compte dans l'évaluation de la réparation?

Droit de la famille — Conjoints de fait — Biens — Fiducie résultoire — La preuve de l'intention commune doit-elle être prise en compte dans le contexte de la fiducie résultoire? — Les principes de la fiducie résultoire s'appliquent-ils aux réparations accordées en biens ou en argent dans le cadre de la résolution des litiges familiaux?

Droit de la famille — Conjoints de fait — Aliments — Séparation des conjoints après plus de 25 ans de vie commune — Action de la conjointe réclamant une pension alimentaire et une part des biens — La pension alimentaire est-elle rétroactive à la date du procès ou à la date d'introduction de l'instance?

Dans le pourvoi *Kerr*, K et B, tous deux dans la soixantaine avancée, se sont séparés après plus de 25

than 25 years. They both had worked through much of that time and each had contributed in various ways to their mutual welfare. K claimed support and a share of property in B's name based on resulting trust and unjust enrichment principles. B counterclaimed that K had been unjustly enriched by his housekeeping and personal assistance services provided after K suffered a debilitating stroke. The trial judge awarded K $315,000, a third of the value of the home in B's name that they had shared, both by way of resulting trust and unjust enrichment, based on his conclusion that K had provided $60,000 worth of equity and assets at the beginning of their relationship. He also awarded K $1,739 per month in spousal support effective the date she commenced proceedings. The Court of Appeal concluded that K did not make a financial contribution to the acquisition or improvement of B's property that was the basis for her award at trial, and dismissed her property claims. A new trial was ordered for B's counterclaim. The Court of Appeal further held that the commencement date of the spousal support should be the date of trial.

In the *Vanasse* appeal, it was agreed that S was unjustly enriched by the contributions of his partner, V, during their 12-year common law relationship. For the first four years of cohabitation, both parties pursued their respective careers. In 1997, V took a leave of absence from her employment and the couple moved to Halifax so that S could pursue a business opportunity. Over the next three and a half years, their children were born and V stayed at home to care for them and performed the domestic labour. S worked long hours and travelled extensively for business. In 1998, S stepped down as CEO of the business and the family returned to Ottawa where they bought a home in joint names. In 2000, S received approximately $11 million for his shares in the business and from that time, until their separation in 2005, he participated more with the domestic chores. The trial judge found no unjust enrichment for the first and last periods of their cohabitation, but held that S had been unjustly enriched at V's expense during the period in which the children were born. V was entitled to half of the value of the wealth S accumulated during the period of unjust enrichment, less her interest in the home and RRSPs in her name. The court of appeal set aside this award and directed that the proper approach to valuation was a *quantum meruit* calculation in which the value each

ans de vie commune. Ils avaient travaillé pendant presque toutes ces années et avaient chacun contribué de diverses façons à leur bien-être commun. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et une part des biens détenus au nom de B. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie grâce aux services d'entretien ménager qu'il lui avait rendus et à l'aide personnelle qu'il lui avait apportée après qu'elle eut été victime d'un grave accident vasculaire. Le juge de première instance a accordé à K 315 000 $ et un tiers de la valeur de la maison de B qu'ils avaient partagée, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, car il avait conclu que K avait fourni des capitaux et des actifs d'une valeur de 60 000 $ au début de la relation. Il a également accordé à K une pension alimentaire mensuelle de 1 739 $, rétroactive à la date d'introduction de l'instance. La Cour d'appel a conclu que K n'a pas contribué financièrement à l'acquisition ou à l'amélioration de la maison de B, ce qui constituait le fondement de la réparation accordée à K en première instance, et elle a rejeté ses réclamations fondées sur un droit de propriété. La Cour d'appel a ordonné une nouvelle audition de la demande reconventionnelle de B. Elle a en outre statué que l'ordonnance alimentaire serait rétroactive à la date du début du procès.

Dans le pourvoi *Vanasse*, il a été admis que S s'est injustement enrichi grâce aux contributions de sa conjointe, V, au cours de leur union de fait qui a duré 12 ans. Pendant les quatre premières années de leur relation, les parties ont poursuivi leurs carrières respectives. En 1997, V a pris un congé et le couple a déménagé à Halifax afin que S puisse y développer son entreprise. Au cours des trois années et demie qui ont suivi, S et V ont eu des enfants et V est demeurée à la maison pour s'occuper d'eux et elle s'est occupée des tâches domestiques. S travaillait de longues heures et voyageait fréquemment pour ses affaires. En 1998, S a démissionné de son poste de PDG de l'entreprise et la famille est retournée à Ottawa où ils ont acheté une maison enregistrée en leurs deux noms. En 2000, S a reçu environ 11 millions de dollars en vendant ses actions dans l'entreprise et à compter de ce moment, jusqu'à la séparation en 2005, il s'est acquitté davantage des tâches domestiques. La juge de première instance a conclu qu'il n'y avait pas eu enrichissement injuste au cours des première et dernière périodes de cohabitation, mais a conclu que S s'était injustement enrichi aux dépens de V durant la période au cours de laquelle les enfants sont nés. V a eu droit à la moitié de la valeur de la richesse accumulée par S au cours de la période d'enrichissement injustifié, moins la valeur de sa part dans la résidence familiale et

party received from the other was assessed and set off.

Held: In *Kerr*, the appeal on the spousal support issue should be allowed and the order of the trial judge should be restored. The appeal from the order dismissing K's unjust enrichment claim should also be allowed and a new trial ordered. The appeal from the order dismissing K's claim in resulting trust should be dismissed. The order for a new hearing of B's counterclaim should be affirmed.

Held: In *Vanasse*, the appeal should be allowed and the order of the trial judge restored.

These appeals require the resolution of five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. The second issue is whether the monetary remedy for a successful unjust enrichment claim must always be assessed on a *quantum meruit* basis. The third area relates to mutual benefit conferral in the context of an unjust enrichment claim and when this should be taken into account. The fourth concerns the role the parties' reasonable expectations play in the unjust enrichment analysis. Finally, in the *Kerr* appeal, this Court must also decide the effective date of the commencement of spousal support.

For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. The main legal mechanisms available have been the resulting trust and the action in unjust enrichment. Resulting trusts arise from gratuitous transfers in two types of situations: the transfer of property from one partner to the other without consideration, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. The underlying legal principle is that contributions to the acquisition of a property, which were not reflected in the legal title, might nonetheless give rise to a property interest. In Canada, added to this underlying notion was the idea that a resulting trust could arise based solely on the "common intention" of the parties that the non-owner partner was intended to have an interest. This theory is doctrinally unsound, however, and should

ses REER. La cour d'appel a annulé cette décision et a statué que la réparation devait être établie par un calcul fondé sur le *quantum meruit*, où la valeur que chacune des parties a reçue de l'autre est évaluée et défalquée.

Arrêt : Dans *Kerr*, le pourvoi sur la question de la pension alimentaire est accueilli et l'ordonnance du juge de première instance est rétablie. Le pourvoi en ce qui concerne la décision de la Cour d'appel de rejeter la demande de K fondée sur l'enrichissement injustifié est également accueilli et une nouvelle audition de cette demande est ordonnée. Le pourvoi formé contre la décision rejetant la demande de K relative à une fiducie résultoire est rejeté. L'ordonnance d'une nouvelle audition de la demande reconventionnelle de B est confirmée.

Arrêt : Dans *Vanasse*, le pourvoi est accueilli et l'ordonnance de la juge de première instance est rétablie.

Ces pourvois nous obligent à répondre à cinq questions principales. La première porte sur le rôle de la fiducie résultoire fondée sur « l'intention commune » dans les réclamations présentées par les conjoints de fait. La deuxième question consiste à savoir si l'indemnité pécuniaire pour enrichissement injustifié doit toujours être évaluée en fonction du *quantum meruit*. La troisième question a trait aux avantages réciproques dans le contexte d'une réclamation fondée sur l'enrichissement injuste et au moment auquel ceux-ci doivent être pris en compte. La quatrième question traite du rôle des attentes raisonnables des parties dans l'analyse de l'enrichissement injustifié. Enfin, dans le pourvoi *Kerr*, la Cour doit aussi déterminer la date de prise d'effet de l'ordonnance alimentaire.

En ce qui concerne les conjoints non mariés dans la plupart des provinces de common law, le recours au droit jurisprudentiel est la seule solution permettant de traiter des conséquences financières de la rupture des relations conjugales. La fiducie résultoire et l'action fondée sur l'enrichissement injustifié sont les principaux mécanismes juridiques qui s'offrent aux parties. Les fiducies résultoires découlent de transferts à titre gratuit dans deux types de situations : le transfert d'un bien d'un partenaire à l'autre sans aucune considération, et la contribution des deux partenaires à l'acquisition d'un bien, dont le titre est au nom d'un seul des partenaires. Selon le principe juridique sous-jacent, les contributions à l'acquisition de biens, qui n'étaient pas indiquées dans le titre de propriété, peuvent néanmoins créer un droit de propriété. À cette notion sous-jacente s'ajoutait l'idée, au Canada, qu'une fiducie résultoire pouvait découler de la seule « intention commune » des parties d'accorder un droit au partenaire

have no continuing role in the resolution of domestic property disputes. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, parties have increasingly turned to the law of unjust enrichment and the remedial constructive trust. Since the decision in *Pettkus v. Becker*, the law of unjust enrichment has provided a much less artificial, more comprehensive and more principled basis to address claims for the distribution of assets on the breakdown of domestic relationships. It permits recovery whenever the plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. This Court has taken a straightforward economic approach to the elements of enrichment and corresponding deprivation. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

There are two steps to the juristic reason analysis. First, the established categories of juristic reason must be considered, which could include benefits conferred by way of gift or pursuant to a legal obligation. In their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether particular enrichments are unjust.

The object of the remedy for unjust enrichment is to require the defendant to reverse the unjustified enrichment and may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In most cases, a monetary award will be sufficient to remedy the unjust enrichment but two issues raise difficulties in determining appropriate compensation. Where there has been a mutual conferral of benefits, it is often difficult for the court to retroactively value every service rendered by each party to the other. While the value of domestic services is not questioned, it would be unjust to only consider the contributions of one party. A second

non propriétaire. Cette théorie est toutefois sans fondement sur le plan théorique et ne devrait plus avoir aucun rôle à jouer dans la résolution des litiges familiaux. Si les principes traditionnels de la fiducie résultoire peuvent jouer un rôle dans la résolution des litiges entre partenaires non mariés, les parties ont eu recours de plus en plus au droit de l'enrichissement injustifié et à la fiducie constructoire de nature réparatoire. Depuis l'arrêt *Pettkus c. Becker*, le droit de l'enrichissement injustifié offre un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter les demandes de partage des biens après la rupture des relations conjugales. Il permet le recouvrement dès lors que le demandeur peut prouver trois éléments : un enrichissement du défendeur par le demandeur, un appauvrissement correspondant du demandeur, et l'absence de tout motif juridique de l'enrichissement. Notre Cour a appliqué une analyse économique simple aux éléments d'enrichissement et d'appauvrissement correspondant. Le demandeur doit prouver qu'il a procuré un avantage tangible au défendeur qui a reçu et retenu cet avantage. De plus, l'enrichissement doit correspondre à un appauvrissement du demandeur. Fait important, la prestation de services domestiques peut appuyer une action pour enrichissement injustifié. L'absence d'un motif juridique pour l'enrichissement signifie que ni le droit ni les exigences de la justice ne permettent au défendeur de conserver l'avantage conféré par le demandeur. Ce troisième élément permet aussi de prendre dûment en considération l'autonomie des parties, leurs attentes légitimes et leur droit de régler contractuellement leurs affaires.

L'analyse du motif juridique comprend deux étapes. Premièrement, les catégories établies de motifs juridiques doivent être examinées, par exemple l'avantage conféré par don ou découlant d'une obligation légale. En l'absence de motifs juridiques d'une catégorie, la deuxième étape autorise la prise en considération des attentes légitimes des parties ainsi que des considérations d'intérêt public afin de déterminer si l'enrichissement est injustifié.

La réparation fondée sur l'enrichissement injustifié oblige le défendeur à rembourser ou à annuler l'enrichissement et peut donner lieu soit à une « indemnisation », soit à une « restitution du bien ». Dans la plupart des cas, une réparation pécuniaire suffira à corriger l'enrichissement injustifié, mais deux questions suscitent des difficultés dans la détermination de la réparation adéquate. Dans les cas où les conjoints ont mutuellement tiré des avantages, la cour a souvent de la difficulté à évaluer rétroactivement chaque service rendu par chacune des parties à l'autre partie. Bien que la valeur des services domestiques ne soit pas remise en question, il

difficulty is whether a monetary award must invariably be calculated on a *quantum meruit*, "value received" or "fee-for-services" basis or whether that monetary relief may be assessed more flexibly, on a "value survived basis" by reference to the overall increase in the couple's wealth during the relationship. In some cases, a proprietary remedy may be required. Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, and that a monetary award would be insufficient, a share of the property proportionate to the claimant's contribution can be impressed with a constructive trust in his or her favour.

Three areas in the law of unjust enrichment require clarification. Once the choice has been made to award a monetary remedy, the question is how to quantify it. If a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or to order a monetary remedy calculated on a *quantum meruit* basis. This dichotomy of remedial choice should be rejected, however, as the value survived measure is a perfectly plausible alternative to the constructive trust. Restricting the money remedy to a fee-for-service calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. The basis of all domestic unjust enrichment claims do not fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. Where the contributions of both parties over time have resulted in an accumulation of wealth, the unjust enrichment occurs when one party retains a disproportionate share of the assets that are the product of their joint efforts following the breakdown of their relationship. The required link between the contributions and a specific property may not exist but there may clearly be a link between the joint efforts of the parties and the accumulation of wealth. While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. Second, the remedial dichotomy is inconsistent with the inherent flexibility of unjust enrichment and with the Court's approach to equitable

serait injuste de tenir compte des contributions d'une seule partie. Une deuxième difficulté tient à la question de savoir si une réparation pécuniaire doit invariablement être calculée en fonction du *quantum meruit*, de la « valeur reçue » ou de la « rémunération des services », ou si la réparation pécuniaire peut être évaluée de manière plus souple, selon la méthode fondée sur la « valeur accumulée », soit l'augmentation globale de la richesse du couple pendant l'union. Dans certains cas, il peut être nécessaire d'accorder une réparation fondée sur le droit de propriété. Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, et qu'une réparation pécuniaire serait insuffisante, une part du bien proportionnelle à la contribution du demandeur peut faire l'objet d'une fiducie constructoire en sa faveur.

Trois sujets dans les règles relatives à l'enrichissement injustifié nécessitent des précisions. Une fois que la décision est prise d'accorder une réparation pécuniaire, la question se pose de savoir comment quantifier cette réparation. Si la réparation pécuniaire doit invariablement être quantifiée en fonction du *quantum meruit*, il faut alors, dans les cas d'enrichissement injustifié, se demander s'il faut choisir d'imposer une fiducie constructoire ou d'ordonner une réparation pécuniaire calculée en fonction du *quantum meruit*. Cette dichotomie des mesures de réparation devrait toutefois être rejetée car la réparation fondée sur la valeur accumulée est une alternative tout à fait plausible à la fiducie constructoire. Il est inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflète pas la réalité de nombreux conjoints vivant en union libre. Les fondements de toutes les actions pour enrichissement injustifié intentées par des conjoints de fait n'entrent pas dans deux catégories seulement — celle où l'enrichissement découle de la prestation de services non rémunérés, et celle où il découle d'une contribution non reconnue à l'acquisition, à l'amélioration, à l'entretien ou à la conservation d'un bien en particulier. Lorsque les contributions des deux parties ont, au fil du temps, entraîné une accumulation de la richesse, il y a un enrichissement injustifié quand une partie conserve, après la rupture, une part disproportionnée des biens obtenus grâce à l'effort conjoint des deux parties. Le lien requis entre les contributions et un bien en particulier n'existe peut-être pas, mais il peut y avoir un lien incontestable entre les efforts conjoints des parties et l'accumulation de richesse. Bien que les règles relatives à l'enrichissement injustifié n'entraînent pas une présomption de partage égal et que la cohabitation, en soi, ne confère pas à

remedies. Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development requires recourse to a number of different sorts of remedies depending on the circumstances. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial strait-jacket. What is essential is that there must be a link between the contribution and the accumulation of wealth. Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation. Third, the remedial dichotomy ignores the historical basis of *quantum meruit* claims. Finally, a remedial dichotomy is not mandated, as has been suggested, by the Court's judgment in *Peter v. Beblow*.

Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners have contributed, the monetary remedy should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. Where the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". The law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances". To be entitled to a monetary remedy on a value-survived basis, the claimant must show both that there was a joint family venture and a link between his or her contributions and the accumulation of wealth.

To determine whether the parties have, in fact, been engaged in a joint family venture, the particular circumstances of each particular relationship must be taken into account. This is a question of fact and must

une personne le droit à une part des biens de l'autre personne, les conséquences juridiques de la rupture d'une relation conjugale devraient refléter la façon dont les gens vivent. Deuxièmement, la dichotomie des mesures de réparation est incompatible avec la souplesse inhérente à l'enrichissement injustifié et avec l'approche de la Cour à l'égard des réparations en equity. De plus, la Cour a reconnu que, compte tenu de la grande variété de situations relevant des catégories traditionnelles de l'enrichissement injustifié et de la souplesse de l'approche plus générale et raisonnée, le principe exige qu'on ait recours à différents types de réparation selon les circonstances. Rien ne justifie, en principe, qu'une des catégories traditionnelles d'enrichissement injustifié serve à imposer la réparation pécuniaire dans tous les cas d'enrichissement injustifié entre conjoints de fait. Il est essentiel qu'il y ait un lien entre la contribution et l'accumulation de la richesse. Lorsque ce lien est établi, et qu'une réparation fondée sur le droit de propriété est inappropriée ou inutile, la réparation pécuniaire devrait être adaptée pour refléter la nature véritable de l'enrichissement et de l'appauvrissement correspondant. Troisièmement, la dichotomie des mesures de réparation ne tient pas compte de l'historique des réclamations fondées sur le *quantum meruit*. Enfin, l'arrêt *Peter c. Beblow* n'impose pas, comme il a déjà été donné à penser, la dichotomie des mesures de réparation.

Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié est de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints ont contribué, la réparation pécuniaire devrait être calculée en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Lorsque les conjoints sont des partenaires conjugaux et financiers, il n'est nul besoin d'un « duel de *quantum meruit* ». Les règles relatives à l'enrichissement injustifié, y compris la fiducie constructoire de nature réparatoire, constituent la meilleure façon de remédier aux iniquités susceptibles de survenir au moment de la rupture d'une union de fait puisque la réparation pour enrichissement injustifié « est adaptée à la situation et aux revendications particulières des parties ». Pour avoir droit à une réparation pécuniaire fondée sur la valeur accumulée, le demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existe un lien entre ses contributions à la coentreprise et l'accumulation de la richesse.

Pour déterminer si les parties ont, de fait, été engagées dans une coentreprise familiale, les circonstances particulières de chaque relation doivent être prises en compte. Il s'agit d'une question de fait que l'on peut

be assessed by having regard to all of the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent to which the parties have formed a true partnership and jointly worked towards important mutual goals. The use of parties' funds entirely for family purposes or where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities and enabling him or her to pursue activities in the paid workforce, may also indicate a pooling of resources. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture. The actual intentions of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Another consideration is whether and to what extent the parties have given priority to the family in their decision making, and whether there has been detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. This may occur where one party leaves the workforce for a period of time to raise children; relocates for the benefit of the other party's career; foregoes career or educational advancement for the benefit of the family or relationship; or accepts underemployment in order to balance the financial and domestic needs of the family unit.

The unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits. When the appropriate remedy is a money award based on a fee-for-services provided approach, the fact that the defendant has also provided services to the claimant should mainly be considered at the defence and remedy stages of the analysis but may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of a juristic reason for the enrichment. However, given that the purpose of the juristic reason

apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille. Les efforts conjoints et le travail d'équipe, la décision d'avoir et d'éduquer des enfants ensemble, ainsi que la durée de la relation peuvent tous indiquer la mesure dans laquelle, le cas échéant, les parties constituaient véritablement une association et ont collaboré à la réalisation d'objectifs communs importants. Le fait que les fonds des parties soient entièrement consacrés à la famille ou le fait qu'un conjoint s'acquitte de la totalité, ou de la plus grande partie, des travaux domestiques, libérant l'autre de ces responsabilités et lui permettant de se consacrer à ses activités rémunérées à l'extérieur, peuvent également indiquer une mise en commun des ressources. Plus le niveau d'intégration des finances, des intérêts économiques et du bien-être économique des conjoints est élevé, plus il est probable que ceux-ci se seront engagés dans une coentreprise familiale. Il faut accorder une importance considérable aux intentions réelles des parties; ces intentions peuvent avoir été exprimées par les parties ou inférées de leur conduite. La conduite des parties peut démontrer qu'elles voulaient que leurs vies familiale et professionnelle fassent partie d'un tout, d'une entreprise commune, mais pourrait aussi permettre d'écarter l'existence d'une coentreprise familiale ou étayer la conclusion selon laquelle des biens déterminés devaient être détenus de façon indépendante. Un autre facteur à considérer consiste à savoir si, et dans quelle mesure, les conjoints avaient donné la priorité à la famille dans le processus décisionnel, et si, pour le bien-être de la famille, une des parties ou les deux se sont fiées à la relation à leur détriment. Cela peut survenir lorsqu'une partie quitte le marché du travail pendant un certain temps pour élever les enfants; lorsqu'elle déménage pour aider la carrière de l'autre partie; lorsqu'elle renonce à une carrière ou à une formation pour le bien de la famille ou de la relation; et lorsqu'elle accepte un sous-emploi dans le but d'équilibrer les besoins financiers et domestiques de l'unité familiale.

L'analyse de l'enrichissement injustifié en matière familiale se complique souvent du fait qu'il y a eu des avantages réciproques. Lorsque la réparation appropriée consiste en une indemnité pécuniaire calculée en fonction de la valeur de la rémunération des services rendus, le fait que le défendeur ait aussi fourni des services au demandeur devrait être examiné principalement au stade de la défense ou à celui de la réparation, mais il est aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constitue une preuve pertinente de l'existence (ou de l'absence) d'un motif juridique de

step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose. Otherwise, the mutual exchange of benefits should be taken into account only after the three elements of an unjust enrichment claim have been established.

Claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. It is then open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. Mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step of the juristic reason analysis. In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit that does not fall within the existing categories. The question is whether the parties' mutual expectations show that retention of the benefits is just.

In the *Vanasse* appeal, although not labelling it as such, the trial judge found that there was a joint family venture and that there was a link between V's contribution to it and the substantial accumulation of wealth that the family achieved. She made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of S's substantial contributions. Her findings of fact and analysis indicate that the unjust enrichment of S at the expense of V ought to be characterized as the retention by S of a disproportionate share of the wealth generated from a joint family venture. Several factors suggested that, throughout their relationship, the parties were working collaboratively towards common goals. They made important decisions keeping the overall welfare of the family at the forefront. It was through their joint efforts that they were able to raise a young family and acquire wealth. S could not have made the efforts he did to build up the company but for V's assumption of the domestic responsibilities. Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together, a further indicator

l'enrichissement. Cependant, comme l'analyse du motif juridique vise à déterminer si l'enrichissement était équitable et non à en mesurer l'ampleur, les avantages réciproques ne devraient être pris en considération à cette étape que pour cette fin précise. Autrement, il faut tenir compte des avantages réciproques seulement une fois remplies les trois conditions de l'action pour enrichissement injustifié.

Les demandeurs doivent démontrer qu'aucun motif juridique ne se retrouve dans l'une ou l'autre des catégories établies, par exemple si l'avantage était un don ou s'il découlait d'une obligation légale. Si cette preuve est faite, le défendeur peut alors démontrer qu'un motif juridique différent justifiant l'enrichissement devrait être reconnu, compte tenu des attentes raisonnables des parties et des considérations d'intérêt public. Les avantages réciproques et les attentes raisonnables des parties ont un rôle très limité à jouer dans la première étape de l'analyse du motif juridique. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties peut constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'applique. Les attentes raisonnables ou légitimes des parties jouent un rôle à la deuxième étape de l'analyse du motif juridique, où il incombe au défendeur d'établir qu'il existe un motif juridique de conserver l'avantage n'appartenant pas aux catégories établies. La question est de savoir si les attentes des parties prouvent qu'il est équitable de conserver les avantages.

Dans *Vanasse*, la juge de première instance a conclu qu'il y avait une coentreprise familiale, bien qu'elle ne l'ait pas qualifiée ainsi, et qu'il existait un lien entre la contribution de V à la coentreprise et l'accumulation importante de la richesse familiale. Elle a raisonnablement évalué l'indemnité pécuniaire appropriée pour permettre l'annulation de cet enrichissement injustifié, en tenant dûment compte des contributions importantes de S. Selon ses conclusions de fait et son analyse, l'enrichissement injustifié de S au détriment de V tient à la conservation, par S, d'une part disproportionnée de la richesse générée par une coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Elles ont pris des décisions importantes en gardant le bien-être de la famille au premier plan. Les parties ont été en mesure d'élever une famille et d'acquérir une richesse grâce à leurs efforts communs. S n'aurait pas pu faire tous les efforts qu'il a faits pour développer l'entreprise si V n'avait pas assumé les responsabilités familiales. Il convient de souligner que la période d'enrichissement

that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. There was also evidence of economic integration as their house was registered jointly and they had a joint bank account. Their words and actions indicated that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children. There is a strong inference from the factual findings that, to S's knowledge, V relied on the relationship to her detriment. She left her career, gave up her own income, and moved away from her family and friends. V then stayed home and cared for their two small children. During the period of the unjust enrichment, V was responsible for a disproportionate share of the domestic labour. There was a clear link between V's contribution and the accumulation of wealth. The trial judge took a realistic and practical view of the evidence and took into account S's non-financial contributions and periods during which V's contributions were not disproportionate to S and her judgment should be restored.

The Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment in *Kerr* and in ordering a new hearing on B's counterclaim. On the basis of the unsatisfactory record at trial, which includes findings of fact tainted by clear error, K's unjust enrichment claim should not have been dismissed but a new trial ordered. The Court of Appeal erred in assessing B's contributions as part of the juristic reason analysis and prematurely truncated K's *prima facie* case of unjust enrichment. The family property approach is rejected, and for K to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that B has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. With regard to B's counterclaim, there was evidence that he made very significant contributions to K's welfare such that his counterclaim cannot simply be dismissed. The trial judge also referred to various other monetary and non-monetary contributions which K made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the

injustifié correspond à la période pendant laquelle les parties ont eu leurs deux enfants, un autre indice qu'elles travaillaient ensemble en vue de réaliser des objectifs communs. La durée de la relation est aussi pertinente, et 12 ans de cohabitation se veut une période assez longue. Certains éléments de preuve indiquaient également qu'il y avait intégration économique car la résidence familiale était enregistrée aux deux noms et les parties avaient un compte chèque conjoint. Leurs paroles et leurs actes indiquaient qu'il existait une coentreprise familiale à laquelle le couple a contribué conjointement pour leur bénéfice et le bénéfice de leurs enfants. Il y a de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V s'est fiée sur la relation à son détriment. Elle a renoncé à sa carrière et à son salaire et déménagé loin de sa famille et de ses amis. V est donc restée à la maison et s'est occupée de leurs deux jeunes enfants. Pendant la période d'enrichissement injustifié, V assumait une part disproportionnée des travaux domestiques. Il y avait un lien clair entre la contribution de V et l'accumulation de la richesse. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve et elle a pris en considération les importantes contributions non financières de S et les périodes pendant lesquelles les contributions de V n'étaient pas disproportionnées par rapport à celles de S, et sa décision devrait être rétablie.

Dans *Kerr*, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concerne la fiducie résultoire et l'enrichissement injustifié et d'ordonner une nouvelle audition de la demande reconventionnelle de B. Compte tenu du dossier insatisfaisant en première instance, qui comprend des conclusions de fait clairement erronées, la demande de K fondée sur l'enrichissement injustifié n'aurait pas dû être rejetée mais la tenue d'un nouveau procès aurait dû être ordonnée. La Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique et a prématurément tronqué la preuve *prima facie* d'enrichissement injustifié de K. La méthode fondée sur l'avoir familial est rejetée, et pour démontrer qu'elle a droit à une part proportionnelle de la richesse accumulée pendant la relation, K doit établir que B s'est injustement enrichi à ses dépens, que leur relation constituait une coentreprise familiale et que ses contributions sont liées à l'accumulation de la richesse pendant la relation. Elle devrait ensuite démontrer quelle proportion de la richesse accumulée conjointement correspond à ses contributions. En ce qui concerne la demande reconventionnelle de B, certains éléments de preuve indiquaient que B a contribué de façon importante au bien-être de K de sorte que sa

contributions made by B. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Further, the Court of Appeal ought not to have set aside the trial judge's order for spousal support in favour of K effective on the date she had commenced proceedings. It is clear that K was in need of support from B at the date she started her proceedings and remained so at the time of trial. K should not have been faulted for not bringing an interim application in seeking support for the period in question. She suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with B. B had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

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demande reconventionnelle ne peut simplement pas être rejetée. Le juge de première instance a aussi mentionné diverses autres contributions financières et non financières apportées par K au bien-être et au confort du couple, mais il ne les a pas évaluées et les a encore moins comparées à celles de B. Peu de conclusions de fait sont pertinentes en ce qui concerne la question clé de savoir si la relation des parties constituait une coentreprise familiale. De plus, la Cour d'appel n'aurait pas dû annuler l'ordonnance du juge de première instance accordant à K une pension alimentaire rétroactive à la date d'introduction de l'action. Il est clair que K avait besoin que B lui verse une pension alimentaire à la date où elle a introduit les procédures et qu'elle en avait toujours besoin lors du procès. On a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire dans sa demande de pension alimentaire pour la période en question. Elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait quand elle habitait avec B. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge mettait B dans une situation financière difficile, de sorte que l'ordonnance était inappropriée.

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APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Juriansz and Epstein JJ.A.), 2009 ONCA 595, 252 O.A.C. 218, 96 O.R. (3d) 321, [2009] O.J. No. 3211 (QL), 2009 CarswellOnt 4407, reversing a decision of Blishen J., 2008 CanLII 35922, [2008] O.J. No. 2832 (QL), 2008 CarswellOnt 4265. Appeal allowed.

Armand A. Petronio and *Geoffrey B. Gomery*, for the appellant Margaret Kerr.

Susan G. Label and *Marie-France Major*, for the respondent Nelson Baranow.

John E. Johnson, for the appellant Michele Vanasse.

H. Hunter Phillips, for the respondent David Seguin.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Weiler, Juriansz et Epstein), 2009 ONCA 595, 252 O.A.C. 218, 96 O.R. (3d) 321, [2009] O.J. No. 3211 (QL), 2009 CarswellOnt 4407, qui a infirmé une décision de la juge Blishen, 2008 CanLII 35922, [2008] O.J. No. 2832 (QL), 2008 CarswellOnt 4265. Pourvoi accueilli.

Armand A. Petronio et *Geoffrey B. Gomery*, pour l'appelante Margaret Kerr.

Susan G. Label et *Marie-France Major*, pour l'intimé Nelson Baranow.

John E. Johnson, pour l'appelante Michele Vanasse.

H. Hunter Phillips, pour l'intimé David Seguin.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

[2] In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

[3] As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Dans une série de décisions rendues dans les 30 dernières années, la Cour s'est heurtée aux questions de droits financiers et de droits des biens des parties à la rupture du mariage ou de la relation conjugale. Aujourd'hui, des lois exhaustives en matière de régimes matrimoniaux adoptées à la fin des années 1970 et dans les années 1980 prévoient le cadre juridique applicable aux époux. Cependant, en ce qui concerne les conjoints non mariés dans la plupart des provinces de common law, le recours au droit jurisprudentiel était et demeure la seule solution. Les principaux mécanismes juridiques auxquels les parties et les tribunaux peuvent avoir recours sont la fiducie résultoire et l'action en enrichissement injustifié.

[2] Dans les premières décisions rendues dans les années 1970, les parties et les tribunaux se sont tournés vers la fiducie résultoire. Selon le principe juridique sous-jacent, les contributions à l'acquisition de biens, qui n'étaient pas indiquées dans le titre de propriété, pouvaient néanmoins créer un droit de propriété. À ce principe s'ajoutait l'idée qu'une fiducie résultoire pouvait découler d'une « intention commune » des parties d'accorder un droit au partenaire non propriétaire. La fiducie résultoire s'est vite avérée une solution juridique insatisfaisante dans de nombreux litiges se rapportant aux biens conjugaux, mais des recours sont encore intentés et tranchés sur ce fondement.

[3] À mesure que les problèmes théoriques et les limitations pratiques de la fiducie résultoire se sont précisés, les parties et les tribunaux se sont de plus en plus tournés vers le droit naissant de l'enrichissement injustifié. Au fil de son évolution, l'enrichissement injustifié a conduit à la possibilité d'une fiducie constructoire de nature réparatoire. Pour réussir à établir le bien-fondé d'une action en enrichissement injustifié, le demandeur doit démontrer l'enrichissement du défendeur, son

This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

[4] In the *Kerr* appeal, a couple in their late 60s separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

propre appauvrissement correspondant et l'absence de « motif juridique » de l'enrichissement. Ce recours est devenu le moyen prééminent pour traiter des conséquences financières de la rupture des relations conjugales. Cependant, diverses questions continuent de susciter la controverse, et ces deux pourvois entendus consécutivement donnent à la Cour l'occasion d'y répondre.

[4] Dans le pourvoi *Kerr*, un couple dans la soixantaine avancée s'est séparé après plus de 25 ans de vie commune. Tous deux avaient travaillé pendant presque toutes ces années et avaient chacun contribué de diverses façons à leur bien-être commun. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, M^me^ Kerr a réclamé une pension alimentaire et une part des biens détenus au nom de son conjoint. Le juge de première instance lui a accordé un tiers de la valeur de la résidence du couple au titre de la fiducie résultoire et de l'enrichissement injustifié (2007 BCSC 1863, 47 R.F.L. (6th) 103). Il n'a pas traité, sauf dans une remarque incidente, de la demande reconventionnelle de M. Baranow suivant laquelle M^me^ Kerr se serait injustement enrichie à ses dépens. Le juge a aussi ordonné le paiement d'une pension alimentaire mensuelle élevée à M^me^ Kerr en vertu de la loi, et ce, à compter de la date à laquelle la demande de réparation a été présentée à la cour. Toutefois, la Cour d'appel de la Colombie-Britannique a écarté les conclusions du juge de première instance se rapportant à la fiducie résultoire et à l'enrichissement injustifié (2009 BCCA 111, 93 B.C.L.R. (4th) 201). Les deux tribunaux d'instance inférieure ont examiné le rôle que peuvent jouer l'intention commune et les attentes raisonnables des parties. Le présent pourvoi soulève des questions relatives au rôle du droit des fiducies résultoires dans les litiges de ce genre, ainsi que celle de la mesure dans laquelle l'analyse de l'enrichissement injustifié devrait prendre en compte les avantages réciproques et de l'importance à accorder aux intentions et attentes des parties dans cette analyse. Notre Cour est également appelée à décider si l'ordonnance alimentaire en faveur d'un conjoint devrait prendre effet à la date de la demande, comme l'a conclu le juge de première instance, à la date du procès, comme l'a ordonné la Cour d'appel, ou à une autre date.

[5] In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

[6] These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

[7] The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result,

[5] Dans le pourvoi *Vanasse*, le problème fondamental est de savoir comment déterminer l'indemnité à accorder pour enrichissement injustifié. Il est admis que M. Seguin s'est injustement enrichi grâce aux contributions de sa conjointe, M^me^ Vanasse; ils ont vécu en union de fait pendant environ 12 ans et ils ont eu deux enfants pendant cette période. La juge de première instance a établi la valeur de l'enrichissement en déterminant la proportion de l'avoir de M. Seguin qui était attribuable aux efforts de M^me^ Vanasse, qui avait contribué de manière aussi importante à l'entreprise familiale (2008 CanLII 35922). La Cour d'appel a écarté cette conclusion et, bien qu'elle ait ordonné la tenue d'un nouveau procès, elle a indiqué que la méthode appropriée pour déterminer la valeur de l'enrichissement injustifié consistait à attribuer une valeur pécuniaire aux services fournis à la famille par M^me^ Vanasse, en prenant en considération les contributions de M. Seguin en compensation (2009 ONCA 595, 252 O.A.C. 218). En résumé, la Cour d'appel a conclu que M^me^ Vanasse devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. Dans le présent pourvoi, on conteste cette conclusion.

[6] Les présents pourvois nous obligent à répondre à cinq questions principales. La première porte sur le rôle de la fiducie résultoire fondée sur l'intention commune dans les réclamations présentées par les partenaires vivant en union libre. À mon avis, il est temps de reconnaître que, dans l'examen de la fiducie résultoire, il ne faut plus accorder un rôle à l'« intention commune » lorsqu'il s'agit de trancher les réclamations fondées sur un droit de propriété présentées par des partenaires vivant en union libre au moment de la rupture de leur relation.

[7] La deuxième question porte sur la nature de l'indemnité pécuniaire pour enrichissement injustifié. Selon certains tribunaux, s'il est impossible d'établir un lien entre la contribution d'un demandeur et un bien précis, une réparation pécuniaire doit toujours être évaluée en fonction de la valeur des services rendus. D'autres tribunaux ont adopté une approche plus souple. À mon avis, si les deux parties ont travaillé ensemble dans un intérêt commun et ont fait des contributions importantes,

have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

[8] The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

[9] Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

[10] Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

[11] I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

II. Resulting Trusts

[12] The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of

mais différentes, au bien-être de l'autre et, de ce fait, elles ont accumulé des biens, la réparation pécuniaire pour enrichissement injustifié devrait refléter cette réalité. Dans ces circonstances, la réparation ne devrait pas être fondée sur un calcul détaillé des contributions et des concessions de la vie quotidienne; le demandeur devrait être traité comme un co-entrepreneur plutôt qu'un employé.

[8] La troisième question qui mérite clarification se rapporte aux avantages réciproques. Plusieurs relations conjugales supposent des avantages réciproques, dans le sens que chacune des parties contribue de diverses façons au bien-être de l'autre. La question est de savoir comment et à quel moment de l'analyse de l'enrichissement injustifié ces avantages réciproques devraient être pris en considération. Pour des raisons que je vais exposer plus loin, cette question devrait, à une exception près, être traitée à l'étape de la défense et de la réparation.

[9] La quatrième question concerne le rôle que jouent les attentes raisonnables ou légitimes des parties dans l'analyse de l'enrichissement injustifié. Je suis d'avis qu'elles ont un rôle limité et qu'elles doivent être examinées par rapport à la question de savoir s'il y a un motif juridique de l'enrichissement.

[10] Enfin, il reste la question de la date de prise d'effet de la pension alimentaire. À mon avis, dans l'affaire *Kerr*, la Cour d'appel a commis une erreur en annulant la décision du juge de première instance quant à la date de prise d'effet de la pension dans les circonstances.

[11] Je vais d'abord traiter du droit des fiducies résultoires tel qu'il s'applique à la rupture d'une relation de nature conjugale. Ensuite, j'examinerai le droit relatif à l'enrichissement injustifié dans ce contexte. Enfin, je vais aborder les questions particulières soulevées dans les deux pourvois.

II. Fiducies résultoires

[12] La fiducie résultoire a joué un rôle important dans les premières décisions de la Cour se rapportant aux droits de propriété à la suite de la rupture

intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42, at p. 43. The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

[13] The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A. H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

[14] However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*"), at pp. 430-35; J. Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts", in *Special Lectures of the Law Society of Upper*

d'une relation personnelle. Cela n'est guère surprenant; il est bien établi en droit, depuis au moins 1788 en Angleterre (et probablement bien avant), qu'une fiducie à l'égard d'un domaine légal au nom de l'acheteur ou d'une autre personne est créée au bénéfice de la personne qui fournit le prix d'achat : *Dyer c. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42, p. 43. Par conséquent, la fiducie résultoire semblait être un moyen prometteur de traiter la prétention selon laquelle la contribution d'une partie à l'acquisition d'un bien ne se reflétait pas dans le titre de propriété.

[13] La jurisprudence portant sur la fiducie résultoire en matière de biens familiaux a donné lieu à ce qu'on a appelé [TRADUCTION] « une invention purement canadienne », la fiducie résultoire fondée sur « l'intention commune » : A. H. Oosterhoff, et autres, *Oosterhoff on Trusts : Text, Commentary and Materials* (7e éd. 2009), p. 642. Bien que ce recours ait été largement éclipsé par les règles de l'enrichissement injustifié depuis l'arrêt de notre Cour *Pettkus c. Becker*, [1980] 2 R.C.S. 834, des réclamations fondées sur l'« intention commune » de créer une fiducie résultoire continuent d'être présentées. Par exemple, dans l'affaire *Kerr*, le juge de première instance a justifié l'existence d'une fiducie résultoire, en partie, parce que les parties voulaient toutes les deux que M. Baranow détienne le titre de propriété au moyen d'une fiducie résultoire pour Mme Kerr. La Cour d'appel, tout en infirmant la conclusion de fait du juge de première instance sur ce point, a implicitement accepté la validité de la fiducie résultoire fondée sur l'intention commune.

[14] La fiducie résultoire fondée sur l'intention commune est apparue comme une méthode prometteuse au début, mais les problèmes théoriques et pratiques sont vite devenus évidents et ont suscité les commentaires de la Cour et des auteurs : voir, par exemple, *Pettkus*, p. 842-843; Oosterhoff, p. 641-647; D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005) (« *Waters'* »), p. 430-435; J. Mee, *The Property Rights of Cohabitees : An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), p. 39-43; T. G. Youdan, « Resulting and Constructive Trusts », dans *Special*

Canada 1993 — *Family Law: Roles, Fairness and Equality* (1994), 169, at pp. 172-74.

[15] In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

[16] That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points: see, e.g., *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at pp. 449-50; *Waters'*, at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.

[17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in

Lectures of the Law Society of Upper Canada 1993 — Family Law : Roles, Fairness and Equality (1994), 169, p. 172-174.

[15] Devant notre Cour, depuis l'arrêt *Pettkus*, la fiducie résultoire fondée sur l'intention commune demeure intacte mais inutilisée. Il se pourrait bien que les principes traditionnels de la fiducie résultoire aient un rôle à jouer dans le règlement des litiges concernant les biens entre des partenaires non mariés, mais le moment est venu de reconnaître que la fiducie résultoire fondée sur l'intention commune a perdu sa raison d'être. Pour expliquer cette conclusion, je dois d'abord situer la question dans le contexte de certains principes de base se rapportant aux fiducies résultoires.

[16] Cette tâche n'est pas aussi simple qu'elle devrait l'être; dès que l'on aborde le sujet des fiducies résultoires, on risque la contradiction. Un débat entoure le mode de constitution et de classification de ce type de fiducie, sans compter de nombreuses autres subtilités : voir, par exemple, *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 449-450; *Waters'*, p. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11e éd. 2009), p. 67. Toutefois, il est largement reconnu que la notion sous-jacente de la fiducie résultoire est qu'elle est imposée afin que [TRADUCTION] « la personne qui détient le titre sur le bien le retourne à la personne qui lui a donné et qui détient le droit à titre de bénéficiaire. Ainsi, l'intérêt bénéficiaire "revient" (retourne) au véritable propriétaire » : Oosterhoff, p. 25. De plus, on s'entend de manière générale pour dire que, traditionnellement, les fiducies résultoires prenaient naissance dans les cas où il y avait eu un transfert à titre gratuit ou quand les fins énoncées par une fiducie explicite ou implicite n'avaient pas permis d'épuiser les biens en fiducie : *Waters'*, p. 21.

[17] Les fiducies résultoires découlant de transferts à titre gratuit sont celles qui sont pertinentes en matière familiale. Selon le point de vue traditionnel, elles découlaient de deux types de situations : le transfert à titre gratuit d'un bien d'un partenaire à l'autre, et la contribution des deux partenaires à l'acquisition d'un bien, dont le titre est au nom d'un seul des partenaires. Dans l'un ou l'autre

the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

[18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added).

[19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

[20] The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to

des cas, le transfert est à titre gratuit; dans le premier cas, parce que le transfert du bien s'effectue sans contrepartie, et dans le second cas, parce que la contribution à l'acquisition du bien est faite sans contrepartie.

[18] L'arrêt le plus récent de la Cour en matière de fiducies résultoires confirme l'approche selon laquelle, dans ces situations de transfert à titre gratuit, l'intention réelle du donateur est le facteur déterminant : *Pecore c. Pecore*, 2007 CSC 17, [2007] 1 R.C.S. 795, par. 43-44. Comme le juge Rothstein l'a indiqué au par. 44 de *Pecore*, lorsqu'un transfert à titre gratuit est contesté, « [l]e juge de première instance entamera son instruction en appliquant la présomption appropriée et il appréciera tous les éléments de preuve pour déterminer l'intention réelle de l'auteur du transfert, selon la prépondérance des probabilités » (je souligne).

[19] Comme le fait remarquer le juge Rothstein dans ce passage, les présomptions peuvent entrer en jeu lorsqu'il est question de transferts à titre gratuit. Le droit présume généralement que le donateur avait l'intention de créer une fiducie, au lieu de faire une donation, de sorte que la présomption de fiducie résultoire trouve souvent application. Comme l'a expliqué le juge Rothstein, une présomption de fiducie résultoire est la règle générale applicable aux transferts à titre gratuit. Dans le cas d'un tel transfert, la preuve de l'intention de faire un don incombe à son destinataire. Autrement, le destinataire détient le bien en fiducie au profit de l'auteur du transfert. Cette présomption repose sur le principe que l'equity présume l'existence d'une entente, et non d'une donation (*Pecore*, par. 24).

[20] Cependant, la présomption de fiducie résultoire n'est ni universelle ni irréfutable. Ainsi, par exemple, dans le cas de transferts entre des personnes ayant entre eux une certaine relation (comme celle d'un parent à un enfant mineur), une présomption d'avancement — c'est-à-dire une présomption selon laquelle l'auteur du transfert avait l'intention de faire une donation — au lieu d'une présomption de fiducie résultoire s'applique : voir *Pecore*, par. 27-41. Traditionnellement, la présomption d'avancement s'appliquait aux transferts à l'épouse alors

grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

[21] That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

[22] This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "[a] resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another and where there is evidence of a common intention that the property was to be shared by both parties" (emphasis added).

que la présomption de fiducie résultoire s'appliquait aux transferts à l'époux. Il est fort possible que la question de savoir si la présomption d'avancement s'applique aux couples non mariés soit plus controversée : Oosterhoff, p. 681-682. Bien que, dans *Kerr*, le juge de première instance ait abordé cette question, ni l'une ni l'autre des parties n'invoque la présomption d'avancement et je ne dirai rien de plus sur cette question.

[21] Cela m'amène à la fiducie résultoire fondée sur l'« intention commune ». Elle a eu beaucoup d'importance dans les motifs de la majorité dans l'arrêt *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423. Citant un extrait des motifs de lord Diplock dans *Gissing c. Gissing*, [1970] 2 All E.R. 780 (H.L.), p. 789 et 793, le juge Martland a conclu au nom de la majorité que, en l'absence d'une contribution financière à l'acquisition du bien contesté, une fiducie résultoire ne pouvait prendre naissance « que dans des cas où la cour est convaincue par les paroles ou la conduite des parties que leur intention commune était que la propriété véritable n'appartiendrait pas seulement au conjoint investi de la propriété légale mais serait partagée entre eux selon telle ou telle proportion » : *Murdoch*, p. 438.

[22] Trois ans plus tard, cette approche a été retenue et adoptée par une majorité de la Cour dans *Rathwell*, p. 451-453, bien que la Cour ait aussi conclu à l'unanimité qu'il y avait eu une contribution financière directe de la part de la demanderesse. Dans cet arrêt, les notions de contribution et d'intention commune sont aussi embrouillées; on y mentionne le fait qu'une présomption de fiducie résultoire s'explique parfois par le fait que la contribution prouve l'intention commune de partager le titre de propriété : voir p. 452, le juge Dickson (plus tard Juge en chef); p. 474, le juge Ritchie. Cette confusion ressort aussi des motifs de la Cour d'appel dans *Kerr*, où la cour a affirmé au par. 42 qu'[TRADUCTION] « [u]ne fiducie résultoire est une notion d'equity qui, par effet de la loi, impose une fiducie à une partie qui détient un titre légal afférent à un bien qui lui a été transféré à titre gratuit par une autre partie et dans les cas où des éléments de preuve indiquent l'intention commune qu'avaient les parties de partager le bien » (je souligne).

[23] The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-43. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Pettkus v. Becker* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

[24] This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

[25] First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention" (*Waters'*, at p. 431). The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with

[23] La Cour a cessé d'acquiescer à la notion de fiducie résultoire fondée sur l'intention commune dans l'arrêt *Pettkus*, où le juge Dickson (plus tard Juge en chef) a souligné les « multiples difficultés, mentionnées dans la jurisprudence et les commentaires sur le sujet » ainsi que « le caractère artificiel de la recherche de l'intention commune » dans les fiducies résultoires : p. 842-843. Le juge Dickson a aussi clairement rejeté la notion selon laquelle l'intention commune requise pouvait être attribuée aux parties lorsqu'une telle intention était réfutée par la preuve : p. 847. Par suite de l'arrêt *Pettkus*, les règles de l'enrichissement injustifié, conjuguées aux règles de la fiducie constructoire de nature réparatoire, sont devenues le mécanisme le plus souple et le plus approprié pour résoudre les litiges en matière de biens et les différends financiers en matière familiale. Comme M^me^ Kerr l'affirme dans son mémoire, [TRADUCTION] « l'approche énoncée dans l'arrêt *Pettkus c. Becker* est devenue le paradigme juridique dominant pour la résolution de litiges en matière de biens entre conjoints de fait » (par. 100).

[24] Selon moi, il doit en être ainsi et le moment est venu de dire que la fiducie résultoire à base d'intention commune n'a plus aucun rôle à jouer dans la résolution des litiges familiaux, et ce, pour quatre raisons.

[25] Premièrement, comme le démontrent les abondantes critiques, la fiducie résultoire basée sur l'intention commune est mal fondée sur le plan théorique. Elle est incompatible avec les principes sous-jacents du droit des fiducies résultoires. Dans les cas où la question de l'intention est pertinente pour conclure à l'existence d'une fiducie résultoire, seule l'intention du donateur ou du contributeur compte. Comme l'a dit le professeur Waters, [TRADUCTION] « [e]n imposant une fiducie résultoire au bénéficiaire, l'equity ne s'intéresse jamais à l'intention [commune] » (*Waters'*, p. 431). Les principes sous-jacents du droit des fiducies résultoires s'appliquent mal également aux situations où la contribution du demandeur ne s'est pas faite sous la forme d'un bien ni sous une forme étroitement liée à l'acquisition du bien. Le principe au cœur de la fiducie résultoire est que le demandeur réclame son propre

that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters'*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: ". . . a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

bien, ou la reconnaissance de son intérêt proportionnel dans l'actif acquis par une autre personne grâce à ce bien. Ce raisonnement s'étend artificiellement aux réclamations fondées sur des contributions qui ne sont pas clairement liées à l'acquisition d'un droit de propriété; dans de tels cas, il n'y a pas à toutes fins utiles de [TRADUCTION] « retour » du bien transféré : *Waters'*, p. 432. Ainsi, une fiducie résultoire uniquement fondée sur l'intention, sans transfert de biens, est, comme l'indique Oosterhoff, une impossibilité théorique : [TRADUCTION] « . . . une fiducie résultoire ne peut prendre naissance que lorsqu'une personne a transféré des biens à une autre personne, ou acheté des biens pour elle, sans avoir eu l'intention de lui en faire don » : p. 642. Le dernier problème théorique est qu'il faut déterminer l'intention au moment de l'acquisition du bien. Par conséquent, il est difficile de concevoir comment une fiducie résultoire peut découler de contributions versées au fil du temps dans le but d'améliorer un bien existant, ou de contributions en nature pour son entretien. Comme Oosterhoff l'explique brièvement à la p. 652, une fiducie résultoire est inappropriée dans ces circonstances parce que, dans les faits, elle oblige une partie à renoncer au droit de propriété à titre de bénéficiaire dont elle jouissait avant l'amélioration ou l'entretien du bien.

[26] There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

[26] Ces problèmes théoriques ne sont pas les seuls. La fiducie résultoire fondée sur l'intention commune pose une deuxième difficulté parce que la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. La recherche d'une intention commune peut facilement devenir « un simple moyen ou une formule » pour donner une part dans un actif, sans aucune évaluation réaliste de l'intention réelle des parties. Dans *Pettkus*, le juge Dickson a fait remarquer le caractère artificiel et la malléabilité indue de la recherche de l'intention commune : p. 843-844.

[27] Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting

[27] Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tire son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Comme ce sujet a fait couler beaucoup d'encre, il suffit ici de noter, comme l'a fait le juge Dickson à la p. 842

trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt*, [1970] A.C. 777, and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

de *Pettkus*, que les principes qui ont guidé l'évolution de la jurisprudence relative aux fiducies résultoires fondée sur l'intention commune se trouvent dans les arrêts *Pettitt c. Pettitt*, [1970] A.C. 777, et *Gissing* de la Chambre des lords. Cependant, aucune opinion majoritaire claire ne s'est dégagée dans ces arrêts et quatre des cinq lords juges dans *Gissing* ont parlé de [TRADUCTION] « fiducie résultoire, implicite, ou par interprétation » sans faire de distinction. Les passages ayant eu le plus de retentissement au Canada sur ce point, sous la plume de Lord Diplock, se rapportent en fait aux fiducies constructoires plutôt que résultoires : voir, par exemple, *Waters'*, p. 430-435; Oosterhoff, p. 642-643. J'estime convaincants les commentaires du professeur Waters, expressément acceptés par le juge Dickson dans *Pettkus*, selon lesquels lorsque la recherche de l'intention commune devient simplement un moyen pour atteindre ce que le tribunal considère comme étant un résultat équitable, [TRADUCTION] « [c]'est en fait la fiducie par interprétation qui se déguise en une fiducie par déduction » : D. Waters, Commentaire (1975), 53 *R. du B. can.* 366, p. 368.

[28] Finally, as the development of the law since *Pettkus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

[28] Enfin, comme le montre l'évolution du droit depuis l'arrêt *Pettkus*, les principes de l'enrichissement injustifié, conjugués au recours possible à la fiducie constructoire, fournissent un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales. Il n'est nul besoin de mener une enquête artificielle sur l'intention commune. Les demandes d'indemnisation et les revendications de droits de propriété peuvent être examinées. Les contributions de toute sorte, versées à tout moment, peuvent être équitablement prises en considération. Le tribunal peut analyser l'équilibre particulier de l'affaire dans la transparence et conformément aux principes applicables, au lieu de tenter souvent artificiellement de trouver une intention commune qui appuie ce qu'il considère, pour des raisons inexprimées, être un résultat équitable.

[29] I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*,

[29] Je suis d'avis que la fiducie résultoire créée du seul fait de l'intention commune des parties, telle que décrite par la Cour dans *Murdoch* et *Rathwell*,

no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. *Introduction*

[30] The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

B. *The Legal Framework for Unjust Enrichment Claims*

[31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26.

n'a plus de rôle utile à jouer dans la résolution des litiges relatifs aux droits de propriété et aux finances en matière familiale. Je tiens à préciser que je renvoie uniquement à la fiducie résultoire fondée sur l'intention commune. Je ne traite pas des autres aspects du droit applicable aux fiducies résultoires, et je ne suggère pas non plus qu'une fiducie résultoire par ailleurs validement créée est anéantie en raison de l'existence d'une intention commune.

III. Enrichissement injustifié

A. *Introduction*

[30] Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour partage inéquitable des biens après la rupture d'une relation conjugale. Dans une série de décisions, la Cour a élaboré un cadre solide pour traiter de ces réclamations. Cependant, un certain nombre de questions théoriques et pratiques demandent un examen plus approfondi. Je vais d'abord énoncer brièvement le cadre juridique existant, puis j'exposerai les questions qui, à mon avis, méritent d'être examinées plus attentivement, et, enfin, je proposerai des façons de les aborder.

B. *Le cadre juridique de l'action pour enrichissement injustifié*

[31] Au cœur de la doctrine de l'enrichissement injustifié se trouve la notion de la restitution d'un avantage que la justice ne permet pas à une personne de conserver : *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 788. Pour qu'il y ait recouvrement, il faut que le demandeur ait donné une chose et que la chose donnée ait été reçue et retenue par le défendeur sans motif juridique. Une série de catégories, où la conservation de l'avantage conféré a été jugée inéquitable, a été élaborée. Ces catégories incluaient notamment les avantages conférés par suite d'une erreur de fait ou de droit, sous la contrainte, par nécessité, par suite d'une opération non consommée ou à la demande du défendeur : voir *Peel*, p. 789; voir, en général, G. H. L. Fridman, *Restitution* (2e éd. 1992), ch. 3-5, 7, 8 et 10; et Lord Goff of Chieveley et G. Jones, *The Law of Restitution* (7e éd. 2007), ch. 4-11, 17 et 19-26.

[32] Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

[33] The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettkus*. In applying unjust enrichment principles to domestic claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997).

[34] Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

[32] Toutefois, en droit canadien, les demandes fondées sur l'enrichissement injustifié ne se limitent pas à ces catégories. Le recouvrement est permis quand le demandeur peut prouver trois éléments : un enrichissement ou un avantage pour le défendeur, l'appauvrissement correspondant du demandeur et l'absence de tout motif juridique à l'enrichissement : *Pettkus*; *Peel*, p. 784. En conservant les catégories existantes, tout en reconnaissant que les principes qui sous-tendent l'enrichissement injustifié s'appliquent à d'autres réclamations, le droit peut « évoluer avec la souplesse qui s'impose pour tenir compte des perceptions changeantes de la justice » : *Peel*, p. 788.

[33] L'application des principes de l'enrichissement injustifié aux réclamations présentées par des conjoints de fait s'est heurtée à une certaine résistance jusqu'à ce que la Cour rende sa décision dans *Pettkus* en 1980. En appliquant ces principes aux réclamations présentées par des conjoints de fait, la Cour a pris soin de préciser cependant qu'il n'y a pas et qu'il n'y avait pas lieu d'élaborer une jurisprudence distincte dans les affaires « familiales » dans le cadre des règles relatives à l'enrichissement injustifié. Au contraire, le souci de clarté et d'uniformité de la doctrine dans ce domaine veut que « les principes fondamentaux régissant les droits et les réparations demeurent les mêmes dans tous les cas » (*Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 997).

[34] Bien que les principes juridiques demeurent constants dans tous les domaines, il faut les appliquer en fonction du contexte factuel et social particulier dans lequel les réclamations sont présentées. Dans *Peter*, la Cour a conclu à l'unanimité que les tribunaux « doivent faire preuve de souplesse et de bon sens lorsqu'ils appliquent les principes d'equity à des questions relevant du droit de la famille, tout en tenant bien compte des circonstances particulières de chaque cas » (p. 997, la juge McLachlin (maintenant Juge en chef); voir aussi p. 1023, le juge Cory). Ainsi, bien que les principes juridiques qui sous-tendent les règles relatives à l'enrichissement injustifié soient les mêmes dans tous les cas, les tribunaux doivent appliquer ces principes communs en fonction du contexte particulier dans lequel ils doivent s'appliquer.

[35] It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

C. *The Elements of an Unjust Enrichment Claim*

(1) Enrichment and Corresponding Deprivation

[36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

[37] The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.

[38] For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

[39] Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to

[35] Il est utile de rappeler, brièvement, l'état actuel du droit relativement à chacun des éléments d'une demande fondée sur l'enrichissement injustifié et de signaler les questions particulières que soulèvent les réclamations des conjoints de fait.

C. *Les éléments d'une demande fondée sur l'enrichissement injustifié*

(1) Enrichissement et appauvrissement correspondant

[36] Les première et deuxième étapes de l'analyse de l'enrichissement injustifié portent premièrement sur la question de savoir si le défendeur s'est enrichi grâce au demandeur et, deuxièmement, sur la question de savoir si le demandeur a subi un appauvrissement correspondant.

[37] La Cour a appliqué une analyse économique simple aux deux premiers éléments — enrichissement et appauvrissement correspondant. Par conséquent, d'autres considérations, comme les questions de morale et d'intérêt public, doivent plutôt être examinées à l'étape de l'analyse du motif juridique : voir *Peter*, p. 990, renvoyant à *Pettkus*; *Sorochan c. Sorochan*, [1986] 2 R.C.S. 38; et *Peel*, confirmé dans *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 31.

[38] Pour ce qui est du premier élément — l'enrichissement —, le demandeur doit prouver qu'il a donné quelque chose au défendeur et que ce dernier a reçu et retenu la chose donnée. Il n'est pas nécessaire que l'avantage soit conservé de façon permanente, mais il doit y avoir un avantage qui a enrichi le défendeur et qui peut être restitué *en nature* ou en argent au demandeur. De plus, l'avantage doit être tangible. Il peut être positif ou négatif, « négatif » en ce sens qu'il épargne au défendeur une dépense à laquelle il aurait été tenu (*Peel*, p. 788 et 790; *Garland*, par. 31 et 37).

[39] Pour ce qui est du deuxième élément — l'appauvrissement *correspondant* —, la perte subie par le demandeur n'est pertinente que si le défendeur a reçu un avantage ou qu'il a été enrichi (*Peel*, p. 789-790). C'est la raison pour laquelle le deuxième

establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

[40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

[41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (*Peel*, at p. 803).

[42] A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After

élément oblige le demandeur à prouver non seulement que le défendeur s'est enrichi, mais aussi qu'il a subi un appauvrissement qui correspond à cet enrichissement (*Pettkus*, p. 852; *Rathwell*, p. 455).

(2) Absence de motif juridique

[40] Le troisième élément d'une action pour enrichissement injustifié est qu'il doit y avoir eu un avantage et un appauvrissement correspondant sans motif juridique. En somme, ni le droit ni les exigences de la justice ne permettent au défendeur de conserver l'avantage conféré par le demandeur, rendant la conservation de l'avantage « injuste » dans les circonstances de l'affaire : voir *Pettkus*, p. 848; *Rathwell*, p. 456; *Sorochan*, p. 44; *Peter*, p. 987; *Peel*, p. 784 et 788; *Garland*, par. 30.

[41] L'intention de faire un don (appelée « intention libérale »), le contrat ou la disposition légale peuvent constituer des motifs juridiques de refuser le recouvrement (*Peter*, p. 990-991; *Garland*, par. 44; *Rathwell*, p. 455). Cette dernière catégorie comprend habituellement les cas où la loi prescrit l'enrichissement du défendeur au détriment du demandeur, comme lorsqu'une loi valide empêche le recouvrement (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (1990), p. 46; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Mack c. Canada (Procureur général)* (2002), 60 O.R. (3d) 756 (C.A.)). Cependant, tout comme la Cour n'a pas retenu une approche purement fondée sur des catégories de réclamations pour enrichissement injustifié, elle a aussi refusé de limiter les motifs juridiques à une liste restrictive. Cette troisième étape de l'analyse de l'enrichissement injustifié permet de prendre dûment en considération l'autonomie des parties, y compris des facteurs comme « l'expectative légitime des parties, leur droit de régler contractuellement leurs affaires et le droit des législateurs [. . .] d'agir selon leur bon jugement, sans avoir à craindre de se voir imposer ultérieurement des obligations imprévues » (*Peel*, p. 803).

[42] Dans les réclamations contre le conjoint, une question cruciale consistait au début à savoir si la prestation de services domestiques pouvait appuyer

some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection" (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

[43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory

une action pour enrichissement injustifié. Après certaines hésitations, ce point a été définitivement réglé dans l'arrêt *Peter*, où la Cour a conclu que cela était possible. Généralement, un conjoint de fait n'est pas tenu en common law, en equity ou par la loi de travailler pour son conjoint ou de lui fournir des services. Par conséquent, selon une analyse économique simple, il n'y a aucune raison de distinguer les services domestiques des autres contributions (*Peter*, p. 991 et 993; *Sorochan*, p. 46). Ils constituent un enrichissement parce que de tels services sont fort utiles pour la famille et pour l'autre conjoint; toute autre conclusion dévalue les contributions apportées, principalement par les femmes, aux finances de la famille (*Peter*, p. 993). La prestation non rémunérée de services (y compris de services domestiques) ou le travail non rémunéré peuvent aussi constituer un appauvrissement parce qu'il n'y a aucune difficulté à considérer comme un appauvrissement la contribution à plein temps et sans compensation de son travail et de ses revenus. La Cour a rejeté l'argument selon lequel ces services ne peuvent fonder une action pour enrichissement injustifié parce qu'ils sont offerts par « amour et affection naturels » : (*Peter*, p. 989-995, la juge McLachlin, et p. 1012-1016, le juge Cory).

[43] Dans *Garland*, la Cour a élaboré une analyse en deux étapes de l'absence du motif juridique. Il est important de se rappeler que cela visait à éviter que l'analyse du motif juridique soit « purement subjecti[ve] », ajoutant à l'analyse de l'enrichissement injustifié un « pouvoir discrétionnaire incommensurable » inacceptable qui allait permettre le « cas par cas » : *Garland*, par. 40. La première étape de l'analyse du motif juridique consiste à appliquer les catégories établies de motifs juridiques; en l'absence de motif juridique dans une catégorie, la deuxième étape permet de tenir compte des attentes raisonnables des parties et des considérations d'intérêt public afin de déterminer si le recouvrement devrait être refusé :

> Le demandeur doit d'abord démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie de refuser le recouvrement. [. . .] Parmi les catégories établies susceptibles de constituer un motif juridique, il y a le contrat (*Pettkus*, précité), la disposition légale (*Pettkus*, précité), l'intention libérale (*Peter*, précité) et

obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

[44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

[45] Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in

les autres obligations valides imposées par la common law, l'equity ou la loi (*Peter*, précité). S'il n'existe aucun motif juridique appartenant à une catégorie établie, le demandeur a alors établi une preuve *prima facie* en ce qui concerne le volet « motif juridique » de l'analyse.

La preuve *prima facie* est cependant réfutable si le défendeur parvient à démontrer qu'il existe un autre motif de refuser le recouvrement. En conséquence, le défendeur a l'obligation *de facto* de démontrer pourquoi il devrait conserver ce dont il s'est enrichi. À cette étape de l'analyse, le défendeur peut donc recourir à une catégorie de moyens de défense résiduels qui permettent aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement.

Lorsque le défendeur tente de réfuter la preuve en question, les tribunaux doivent tenir compte de deux facteurs : les attentes raisonnables des parties et les considérations d'intérêt public. [par. 44-46]

[44] Ainsi, à l'étape de l'analyse qui porte sur le motif juridique, si aucune catégorie établie ne s'applique, la cour peut prendre en considération les attentes légitimes des parties (*Pettkus*, p. 849) ainsi que les arguments de morale et d'intérêt public sur la question de savoir si l'enrichissement est injustifié (*Peter*, p. 990). Par exemple, dans *Peter*, c'est à cette étape que la Cour a examiné et rejeté l'argument selon lequel la prestation de services domestiques et de soins des enfants ne devrait pas, dans une relation matrimoniale ou quasi matrimoniale, donner lieu à une réclamation en equity contre l'autre conjoint (p. 993-995). Dans l'ensemble, le critère du motif juridique est souple et les facteurs à considérer varieront en fonction de la situation dont la cour est saisie (*Peter*, p. 990).

[45] Les arguments d'intérêt public touchant l'autonomie personnelle peuvent être soulevés à la deuxième étape de l'analyse du motif juridique. Dans le contexte des actions pour enrichissement injustifié, cela a mené à rechercher comment (et quand) les facteurs relatifs à la façon dont les parties structurent leur union devraient être pris en considération. On a soutenu, par exemple, que la décision du législateur d'exclure les couples non mariés de la protection des lois relatives au partage des biens indique que la cour ne devrait pas appliquer la théorie de l'enrichissement injustifié

Peter rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)

reconnue en equity pour régler les différends en matière de biens et d'actifs. Toutefois, dans *Peter*, la Cour a rejeté cet argument, soulignant qu'on se méprenait sur le rôle de l'equity. Comme l'a dit la juge McLachlin à la p. 994, « [c]'est précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'equity joue un rôle. » (Voir également *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83, [2002] 4 R.C.S. 325, par. 61.)

(3) Remedy

(3) Réparation

[46] Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

[46] Les moyens utilisés pour corriger l'enrichissement injustifié sont de nature réparatoire, en ce que la réparation oblige le défendeur à rembourser ou à annuler l'enrichissement injustifié. Lorsqu'une action pour enrichissement injustifié est accueillie, il y a soit « indemnisation », soit « restitution du bien ». En d'autres termes, le demandeur a droit à une réparation pécuniaire ou fondée sur le droit de propriété (*Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, p. 669, le juge La Forest).

(a) *Monetary Award*

a) *Une réparation pécuniaire*

[47] The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

[47] Il faut toujours considérer la réparation pécuniaire en premier (*Peter*, p. 987 et 999). Dans la plupart des cas, elle suffira à corriger l'enrichissement injustifié. Toutefois, le calcul d'une telle réparation est loin d'être simple. Deux questions ont suscité des désaccords et des difficultés dans le cas des conjoints de fait.

[48] First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane,

[48] D'abord, comme bon nombre d'actions pour enrichissement injustifié découlent de relations où les conjoints ont mutuellement tiré des avantages, il est difficile de déterminer ce qui constitue une réparation adéquate. Bien que la valeur des services domestiques ne soit pas remise en question (*Peter*; *Sorochan*), il est injuste de tenir compte des contributions d'une seule partie au moment de déterminer la réparation appropriée. Ce n'est pas seulement une importante question de principe; en pratique, il est extrêmement difficile pour les parties et le tribunal de [TRADUCTION] « créer, rétroactivement, un registre symbolique où inscrire chaque service

"Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruits*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J. W. Neyers, M. McInnes and S. G. A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

[49] A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also *Matrimonial Property Law in Canada* (loose-leaf), vol. 1, by J. G. McLeod and A. A. Mamo, eds., at pp. 40.78-40.79.

(b) *Proprietary Award*

[50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial

rendu par chacune des parties et en déterminer la valeur » (R. E. Scane, « Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts » (1991), 70 *R. du B. can.* 260, p. 281). Un auteur a judicieusement qualifié ce problème pratique de [TRADUCTION] « duel de *quantum meruit* » (J. D. McCamus, « Restitution on Dissolution of Marital and Other Intimate Relationships : Constructive Trust or Quantum Meruit? » dans J. W. Neyers, M. McInnes et S. G. A. Pitel, dir., *Understanding Unjust Enrichment* (2004), 359, p. 376). La juge McLachlin a également mentionné ce problème pratique dans *Peter*, p. 999.

[49] Une deuxième difficulté tient au fait que, selon certains tribunaux et certains auteurs, l'arrêt *Peter* pose qu'une réparation pécuniaire appropriée doit invariablement être calculée en fonction de la valeur monétaire des services non rémunérés. On parle souvent, dans ce cas, de *quantum meruit*, de « valeur reçue » ou de « rémunération des services ». Ce raisonnement a été suivi dans *Bell c. Bailey* (2001), 203 D.L.R. (4th) 589 (C.A. Ont.). D'autres cours d'appel ont conclu que la réparation pécuniaire pouvait être évaluée de manière plus souple — selon la méthode fondée sur la valeur accumulée — en fonction, par exemple, de l'augmentation globale de la richesse du couple pendant l'union : *Wilson c. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, par. 50; *Pickelein c. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison c. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane c. Smith*, 2003 NBCA 6, 256 R.N.-B. (2e) 108, par. 31-34 et 41-43; *Shannon c. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, par. 37. Quant aux incohérences relevées dans la façon de calculer une réparation personnelle pour enrichissement injustifié, voir aussi *Matrimonial Property Law in Canada* (feuilles mobiles), vol. 1, J. G. McLeod et A. A. Mamo, dir., p. 40.78-40.79.

b) *Réparation fondée sur le droit de propriété*

[50] La Cour a reconnu que, dans certains cas, si une réparation pécuniaire est inappropriée ou insuffisante, il peut être nécessaire d'accorder une réparation fondée sur le droit de propriété. C'est

feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

dans l'arrêt *Pettkus* qu'on a d'abord reconnu un remède important en enrichissement injustifié au Canada : la fiducie constructoire de nature réparatoire. Imposée sans qu'il y ait une intention de créer une fiducie, la fiducie constructoire est un outil général, souple et juste qui permet de déterminer le droit de propriété véritable (*Pettkus*, p. 843-844 et 847-848). Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, une part proportionnelle à l'enrichissement injustifié peut faire l'objet d'une fiducie constructoire en sa faveur (*Pettkus*, p. 852-853; *Sorochan*, p. 50). Il ressort clairement de l'arrêt *Pettkus* que ces principes s'appliquent également aux conjoints non mariés, puisque « [l]e principe d'*equity* sur lequel repose le recours à la fiducie par interprétation [ou fiducie constructoire] est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente » (p. 850-851).

[51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

[51] Quant à la nature du lien exigé entre la contribution et le bien, la Cour a toujours jugé que le demandeur devait démontrer un lien « suffisamment important et direct », un « lien causal » ou un « lien » entre les contributions du demandeur et le bien visé par la fiducie (*Peter*, p. 988, 997 et 999; *Pettkus*, p. 852; *Sorochan*, p. 47-50; *Rathwell*, p. 454). Une contribution mineure ou indirecte ne suffit pas (*Peter*, p. 997). Comme l'a dit le juge en chef Dickson dans *Sorochan*, la question fondamentale est de savoir si les contributions « se rapportent clairement aux biens » (p. 50, citant les notes du professeur McLeod relatives à *Herman c. Smith* (1984), 42 R.F.L. (2d) 154, p. 156). La contribution indirecte d'argent et la contribution directe de labeur peuvent être suffisantes, pourvu qu'un lien soit établi entre l'appauvrissement du demandeur et l'acquisition, la conservation, l'entretien ou l'amélioration du bien (*Sorochan*, p. 50; *Pettkus*, p. 852).

[52] The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the

[52] Le demandeur doit aussi prouver qu'une réparation pécuniaire serait insuffisante dans les circonstances (*Peter*, p. 999). À cet égard, le tribunal peut tenir compte de la probabilité de recouvrement ainsi que de la question de savoir s'il existe

plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

[53] The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. *Areas Needing Clarification*

[54] While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. *Is a Monetary Award Restricted to Quantum Meruit?*

(1) Introduction

[55] As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane*; *Shannon*). If, as some courts have

une raison d'accorder au demandeur des droits supplémentaires découlant de la reconnaissance d'un droit de propriété (*Lac Minerals*, p. 678, le juge La Forest).

[53] La part de propriété devrait être proportionnelle aux contributions du demandeur. Si les contributions sont inégales, les parts seront inégales (*Pettkus*, p. 852-853; *Rathwell*, p. 448; *Peter*, p. 998-999). Comme l'a expliqué le juge Dickson dans *Rathwell*, « [l]e tribunal évaluera les contributions de chaque conjoint et fera un partage juste et équitable selon leur contribution respective » (p. 454).

D. *Sujets nécessitant des précisions*

[54] Bien que les règles relatives à l'enrichissement injustifié constituent un cadre juridique solide pour régler les réclamations présentées par les conjoints vivant en union de fait, trois sujets continuent de susciter la controverse et nécessitent des précisions. Comme je l'ai déjà dit, ce sont le mode de calcul de la réparation pécuniaire lorsqu'une action pour enrichissement injustifié est accueillie, la façon d'examiner le problème des avantages réciproques et le moment pour le faire, ainsi que le rôle des attentes raisonnables ou légitimes des parties. Je vais aborder ces trois sujets à tour de rôle.

E. *Une réparation pécuniaire est-elle restreinte au quantum meruit?*

(1) Introduction

[55] Comme je l'ai fait remarquer précédemment, les réparations en cas d'enrichissement injustifié peuvent être soit fondées sur le droit de propriété (habituellement un recours à la fiducie constructoire), soit personnelles (habituellement une réparation pécuniaire). Une fois que la décision est prise d'accorder une réparation pécuniaire plutôt qu'une réparation fondée sur le droit de propriété, la question de savoir comment quantifier cette réparation pécuniaire se pose. Selon certains tribunaux, la réparation pécuniaire doit toujours être calculée en fonction de la valeur reçue ou du *quantum meruit* (*Bell*), et selon d'autres tribunaux, elle peut aussi

held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in *Peter* was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

[56] I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

(2) The Remedial Dichotomy

[57] As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show

être fondée sur la valeur accumulée (c.-à-d. en fonction de la valeur du bien) (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane*; *Shannon*). Si, comme l'ont conclu certains tribunaux, la réparation pécuniaire doit invariablement être quantifiée en fonction du *quantum meruit*, il faut alors, dans les cas d'enrichissement injustifié, se demander s'il faut choisir d'imposer une fiducie constructoire ou d'ordonner une réparation pécuniaire calculée en fonction du *quantum meruit*. Un auteur a qualifié cette approche de fausse dichotomie entre la fiducie constructoire et le *quantum meruit* (McCamus, p. 375-376). Certains auteurs ont aussi souligné cette incertitude qui règne dans la jurisprudence et ont affirmé qu'une réparation personnelle (*in personam*) fondée sur la valeur accumulée est une alternative plausible à la fiducie constructoire (McCamus, p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), p. 394-395). Comme je l'explique ci-après, on dit que c'est dans l'arrêt *Peter* que ce principe de dichotomie quant au choix de la réparation a été établi. Toutefois, à mon avis, l'arrêt *Peter* portait principalement sur la possibilité de recourir à la fiducie constructoire de nature réparatoire et cet arrêt ne devrait pas être interprété comme limitant le calcul de la réparation pécuniaire au *quantum meruit* dans les cas d'enrichissement injustifié. Lorsque les circonstances s'y prêtent, la réparation pécuniaire peut être fondée sur la valeur accumulée.

[56] Je vais d'abord exposer brièvement la genèse de la restriction à laquelle on voudrait soumettre la réparation pécuniaire. Ensuite, je vais expliquer pourquoi, à mon avis, elle devrait être rejetée. Enfin, je vais exposer mon opinion sur la façon dont il convient de traiter les réparations pécuniaires pour enrichissement injustifié en matière familiale.

(2) La dichotomie des mesures de réparation

[57] Comme je l'ai déjà dit, selon une opinion très répandue, mais non unanime, il y a seulement deux choix de réparation en cas d'enrichissement injustifié : une réparation pécuniaire, évaluée en fonction de la rémunération des services rendus; ou une réparation fondée sur le droit de

that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in *Peter* seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the *Vanasse* appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

(3) Why the Remedial Dichotomy Should Be Rejected

[58] In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in *Peter*. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

(a) *Life Experience*

[59] The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists

propriété (généralement sous la forme d'une fiducie constructoire de nature réparatoire), si le demandeur peut prouver que l'avantage conféré a contribué à l'acquisition, la conservation, l'entretien ou l'amélioration d'un bien en particulier. Quelques brefs commentaires formulés dans *Peter* semblent être à l'origine de cette idée, laquelle est reflétée dans un certain nombre de décisions rendues par des cours d'appel. Par exemple, dans *Vanasse*, la Cour d'appel de l'Ontario a adopté le raisonnement suivant : puisque M^me^ Vanasse ne pouvait pas prouver que ses contributions étaient liées à un bien en particulier, sa réclamation devait être quantifiée en fonction de la rémunération des services rendus. En toute déférence, je ne souscris pas à l'opinion selon laquelle les réparations pécuniaires en cas d'enrichissement injustifié doivent toujours être calculées de cette façon.

(3) Pourquoi rejeter la dichotomie des mesures de réparation?

[58] À mon avis, il est inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflète pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il est incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tient pas compte de l'historique des réclamations fondées sur le *quantum meruit*. Enfin, l'arrêt *Peter* ne l'impose pas. Pour ces raisons, la dichotomie des mesures de réparation devrait être rejetée. L'analyse qui suit concerne seulement la quantification d'une réparation pécuniaire en cas d'enrichissement injustifié; les règles servant à déterminer dans quels cas une réparation fondée sur le droit de propriété devrait être accordée sont bien établies et demeurent inchangées.

a) *Expérience de vie*

[59] La dichotomie des mesures de réparation serait appropriée si, dans les faits, les fondements de toutes les actions pour enrichissement injustifié intentées par des conjoints de fait entraient dans deux catégories seulement — celle

of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

[60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

[61] There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), ". . . the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. . . . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by

où l'enrichissement découle de la prestation de services non rémunérés, et celle où il découle d'une contribution non reconnue à l'acquisition, à l'amélioration, à l'entretien ou à la conservation d'un bien en particulier. Certes, ces deux fondements sur lesquels reposent les actions pour enrichissement injustifié existent. Cependant, tous les cas d'enrichissement injustifié ne se répartissent pas nettement entre ces deux catégories.

[60] Il est facile de dégager au moins une autre catégorie d'enrichissement injustifié, soit celle où les contributions des deux parties ont, au fil du temps, entraîné une accumulation de la richesse. Il y a un enrichissement injustifié quand une partie conserve, après la rupture, une part disproportionnée des biens obtenus grâce à l'effort conjoint des deux parties. Le lien requis entre les contributions et un bien en particulier n'existe peut-être pas, de sorte qu'il est inapproprié d'accorder une réparation fondée sur le droit de propriété. Or, il peut y avoir un lien incontestable entre les efforts conjoints des parties et l'accumulation de richesse; en d'autres termes, un lien entre la « valeur reçue » et la « valeur accumulée » comme la juge McLachlin l'a dit dans *Peter*, p. 1000-1001. Ainsi, si une relation peut être décrite comme étant une « coentreprise familiale » et les efforts conjoints des parties sont liés à l'accumulation de la richesse, on peut considérer qu'il y a enrichissement injustifié lorsqu'une partie quitte avec une part disproportionnée des avoirs acquis conjointement.

[61] Il n'y a rien de nouveau à propos de la notion d'entreprise familiale où les deux parties contribuent à leur enrichissement global. C'est la reconnaissance de cette réalité qui a donné lieu à la réforme législative globale des régimes matrimoniaux à la fin des années 1970 et au début des années 1980. Comme l'a expliqué la Cour dans *Clarke c. Clarke*, [1990] 2 R.C.S. 795, à la p. 807 (relativement à la *Matrimonial Property Act* de la Nouvelle-Écosse), « [l]a Loi appuie donc l'égalité des deux parties dans un mariage et reconnaît la contribution solidaire des conjoints, qu'elle soit financière ou autre, à cette entreprise. [. . .] En conséquence, la Loi est de nature réparatrice. Elle

women to the economic survival and growth of the family was not recognized" (emphasis added).

[62] Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

[63] This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were "consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

[64] A similar recognition is evident in *Pettkus* and *Peter.*

[65] In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed

a été rédigée pour pallier les inéquités du passé, quand la contribution faite par les femmes à la survie économique et à la croissance de la famille n'était pas reconnue » (je souligne).

[62] Les règles relatives à l'enrichissement injustifié n'entraînent pas une présomption de partage égal, comme c'est le cas de nombreux textes législatifs relatifs aux régimes matrimoniaux. Cependant, elles peuvent et devraient tenir compte de la réalité sociale cernée par le législateur selon laquelle beaucoup de relations conjugales sont, de manière plus réaliste, considérées comme des coentreprises auxquelles contribuent conjointement les deux parties.

[63] La Cour a reconnu cette réalité à maintes reprises et dans de nombreux contextes. Par exemple, dans *Murdoch*, le juge Laskin (plus tard Juge en chef), en dissidence, aurait imposé une fiducie constructoire, au motif que les faits étaient « compatibles avec une mise en commun, par les conjoints, d'efforts » destinés à réaliser leur établissement dans une exploitation d'élevage (p. 457), et que les conjoints avaient travaillé ensemble pendant quinze ans dans le but d'améliorer « leur sort en faisant des acquisitions toujours plus grandes de biens de ranch » (p. 446). De même, dans *Rathwell*, les juges majoritaires ont convenu que M. et M^{me} Rathwell avaient uni leurs efforts pour accumuler une richesse. Le juge Dickson a souligné que les parties avaient décidé ensemble « de faire de l'agriculture » (p. 444) et que seuls un « effort conjoint » et un « travail d'équipe » ont permis à M. Rathwell d'acquérir en son propre nom des propriétés (p. 461).

[64] C'est également ce qu'a reconnu la Cour dans *Pettkus* et dans *Peter.*

[65] Dans *Pettkus*, les parties avaient mis sur pied une exploitation apicole prospère, dont les profits avaient servi à acquérir des immeubles. Le juge Dickson, rédigeant pour la majorité, a souligné les faits qui indiquaient une relation conjugale et financière entre partenaires. Il a fait remarquer qu'« ils sont tous deux partis de rien; chacun a travaillé continuellement, assidûment et diligemment

to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

[66] I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

[67] The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*" (p. 1001).

[68] The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that,

à l'entreprise conjointe » (p. 853); que chacun a contribué « à la réussite de l'entreprise commune » (p. 838); que la juge Wilson (plus tard juge de notre Cour) de la Cour d'appel avait conclu que leur richesse avait été accumulée grâce à un « effort conjoint » et à un « travail d'équipe » (p. 849); et enfin, que « [l]eur vie et leur bien-être économique étaient entièrement intégrés » (p. 850).

[66] Je suis d'accord avec le professeur McCamus pour dire que la Cour, dans *Pettkus*, était [TRADUCTION] « convaincue que les parties participaient à une entreprise commune et s'attendaient à partager les avantages découlant de la richesse qu'elles ont créée ensemble » (p. 367). Autrement dit, M. Pettkus ne s'est pas injustement enrichi parce que M^me^ Becker s'attendait précisément à obtenir un droit sur certains biens, mais plutôt parce qu'ils étaient en réalité partenaires d'une entreprise commune.

[67] Le fait que les biens aient été acquis grâce à un effort conjoint était encore une fois au premier plan de l'analyse dans *Peter*. Dans cette affaire, les parties ont vécu en union de fait pendant 12 ans. Bien que M. Beblow ait généré la majeure partie du revenu familial et ait aussi contribué à l'entretien de la propriété, M^me^ Peter s'est chargée des travaux domestiques (y compris l'éducation des six enfants des deux familles réunies), elle a aidé à l'entretien et elle s'est occupée de la propriété toute seule lorsque M. Beblow était absent. La juge McLachlin a reconnu la réalité de leur coentreprise lorsqu'elle a écrit : « En effet, cette coentreprise familiale n'est pas différente de la ferme qui a été grevée d'une fiducie dans l'arrêt *Pettkus c. Becker* » (p. 1001).

[68] La Cour a clairement reconnu la coentreprise familiale à trois autres reprises dans *Peter*. Premièrement, au sujet de la justesse de la méthode de calcul de l'indemnité fondée sur la « valeur accumulée », la juge McLachlin fait remarquer qu'« un couple s'attendra davantage à participer à la richesse générée par la relation qu'à être indemnisé des services rendus pendant la durée de la relation » (p. 999). Deuxièmement, et aussi en ce qui concerne l'indemnité à accorder

in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

[69] Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) *Flexibility*

[70] Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

[71] The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,

pour enrichissement injustifié, la juge McLachlin a souligné que, lorsque les deux parties contribuent à la « coentreprise familiale », il faut examiner l'ensemble de l'avoir familial, et non un seul bien, pour déterminer la valeur approximative de la contribution du demandeur à l'avoir familial (p. 1001). Troisièmement, la justification de la Cour au sujet de la confirmation de la valeur des services domestiques reposait, en partie, sur le raisonnement voulant que ces services soient souvent rendus dans le contexte d'une entreprise commune (p. 993).

[69] Les relations de cette nature sont chose commune dans notre société. Dans de nombreux cas, la seule conclusion raisonnable est de considérer le couple comme une entreprise conjointe, de sorte qu'il est hautement artificiel en théorie et extrêmement difficile en pratique de faire un bilan détaillé des contributions apportées et des avantages reçus en fonction de la rémunération des services rendus. Bien entendu, chaque relation est particulière et on ne peut rien présumer dans un sens ou dans l'autre. Cependant, les conséquences juridiques de la rupture d'une relation conjugale devraient refléter la façon dont les gens vivent. Elles ne devraient pas les forcer à recourir à une approche comptable artificielle, qui ne reflète pas la véritable nature de leur relation.

b) *Souplesse*

[70] Maintenir une dichotomie stricte des mesures de réparation est incompatible avec l'approche de la Cour à l'égard des réparations en equity en général et à l'égard de l'élaboration de réparations en cas d'enrichissement injustifié en particulier.

[71] La Cour a souvent souligné la souplesse des réparations en equity et la nécessité d'établir des réparations raisonnées et réalistes, adaptées aux diverses situations. Par exemple, à propos de l'indemnité en equity en matière d'abus de confiance, le juge Binnie a affirmé que « la Cour a largement compétence pour établir la réparation appropriée à partir de la gamme complète des réparations disponibles, dont une indemnité pécuniaire adéquate » : *Cadbury Schweppes Inc. c. Aliments FBI Ltée*,

[1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: ". . . the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *L.M.C.L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[72] Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

[73] Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or the other of the two

[1999] 1 R.C.S. 142, par. 61. Au paragraphe 24, il a souligné l'approche libérale à l'égard des réparations en equity dans les cas d'abus de confiance adoptée par la Cour dans *Lac Minerals*. Ce faisant, il a cité et approuvé l'extrait suivant : « . . . la réparation à accorder [une fois qu'un motif de responsabilité est établi] devrait donc être celle qui est la plus appropriée compte tenu des faits de l'affaire plutôt qu'une réparation résultant du passé ou d'une multiplication des catégories » (tiré de J. D. Davies, « Duties of Confidence and Loyalty », [1990] *L.M.C.L.Q.* 4, p. 5). De même, dans le contexte d'une fiducie constructoire, la juge McLachlin (maintenant Juge en chef) a dit que « [l]es réparations reconnues en *equity* sont souples; elles sont accordées en fonction de ce qui est juste compte tenu de toutes les circonstances de l'espèce » : *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 34.

[72] Quant aux réparations pour enrichissement injustifié, je reprends les propos du juge Binnie dans *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575, au par. 13. Il a fait remarquer que l'enrichissement injustifié, qui se fonde sur des principes clairement définis, « offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience ». De plus, la Cour a reconnu que, compte tenu de la grande variété de situations relevant des catégories traditionnelles de l'enrichissement injustifié et de la souplesse de l'approche plus générale et raisonnée, le principe suppose, et en fait exige, qu'on ait recours à différents types de réparation selon les circonstances : voir *Peter*, p. 987; *Sorochan*, p. 47.

[73] Ainsi, la réparation devrait refléter la souplesse inhérente au principe de l'enrichissement injustifié, de façon à permettre à la cour de trouver une réponse appropriée au problème dont elle est saisie. Cela signifie qu'une réparation pécuniaire doit correspondre, autant que possible, à la mesure de l'enrichissement injustifié du défendeur. Il n'y a aucune raison de penser que le vaste éventail des situations pouvant donner ouverture à l'action pour enrichissement injustifié tomberont nécessairement

remedial options into which some have tried to force them.

(c) *History*

[74] Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), vol. I, at §4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) *Peter v. Beblow*

[75] *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

dans l'une ou l'autre des deux catégories de réparations possibles, où d'aucuns ont voulu les faire entrer.

c) *Historique*

[74] Imposer une dichotomie stricte des mesures de réparation est aussi incompatible avec l'évolution historique du principe de l'enrichissement injustifié, lequel a été élaboré à partir de catégories particulières de cas, dont le *quantum meruit*, qui est à l'origine de la réparation fondée sur la rémunération des services rendus. Le *quantum meruit* tire son origine d'une demande d'indemnisation en common law pour les avantages conférés en vertu d'une entente qui, malgré qu'elle semblait lier les parties, est devenue inopérante pour une raison reconnue en common law. La portée du recours a été élargie au fil du temps, et l'appréciation du *quantum meruit* était souple. Il peut équivaloir, par exemple, à ce qu'il en coûte au demandeur pour fournir le service, à la valeur marchande de l'avantage ou encore à la valeur que le bénéficiaire accorde à l'avantage : P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (éd. feuilles mobiles), vol. I, §4:200.30. Cependant, il est important de souligner que le *quantum meruit* n'est qu'une des catégories établies d'action pour enrichissement injustifié. Rien ne justifie, en principe, qu'une catégorie traditionnelle d'enrichissement injustifié serve à imposer la réparation pécuniaire dans tous les cas d'enrichissement injustifié entre conjoints de fait.

d) *L'arrêt Peter c. Beblow*

[75] L'arrêt *Peter* ne commande pas une stricte adhésion à la méthode du *quantum meruit* pour le calcul de la réparation en matière d'enrichissement injustifié. Il faut se rappeler que cette affaire portait essentiellement sur la question de savoir si les contributions de la demanderesse lui donnaient droit à une fiducie constructoire à l'égard de l'ancienne demeure familiale. Bien que les juges McLachlin et Cory, auteurs des motifs concourants de l'arrêt, aient supposé qu'une réparation pécuniaire serait établie en fonction du *quantum meruit*, ce point n'était pas en litige et n'a pas davantage fait l'objet d'une conclusion.

[76] There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

[77] Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

[78] This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the

[76] En fait, seules deux phrases dans les jugements paraissent appuyer le point de vue selon lequel cette règle devrait toujours s'appliquer. À la page 995, la juge McLachlin a affirmé : « [i]l y a deux réparations possibles : une indemnité calculée en fonction de la valeur des services rendus, c'est-à-dire le *quantum meruit* et celle accordée par le juge de première instance, soit le titre de propriété sur la maison, fondée sur une fiducie par interprétation ». À la page 999, elle a écrit que « [d]ans le cas du versement d'une indemnité, il convient d'utiliser la méthode fondée sur la "valeur reçue" ». Comme l'arrêt portait sur la question de savoir si une réparation fondée sur le droit de propriété était appropriée, ces deux courts passages ne posent pas, à mon avis, comme règle absolue qu'une réparation pécuniaire doit toujours être calculée en fonction de la rémunération des services rendus.

[77] De plus, la juge McLachlin a souligné que le principe de l'enrichissement injustifié s'appliquait à diverses situations et que différentes réparations avaient été accordées, selon les circonstances. Seule l'une d'elles était le paiement pour services rendus sur la base du *quantum meruit* : p. 987. Rien dans ses propos n'indique que la Cour ait décidé d'opter pour une réparation pécuniaire universelle, surtout lorsqu'une telle approche serait contraire à la souplesse des règles de l'enrichissement injustifié et des réparations correspondantes, que la Cour a maintes fois reconnue.

[78] Cette interprétation restrictive de l'arrêt *Peter* n'est pas compatible avec la nature sous-jacente de l'action fondée sur les principes énoncés dans *Pettkus*. Comme l'a dit le professeur McCamus, les affaires de type *Pettkus* reposent sur le droit du demandeur de partager la richesse créée par un effort conjoint et un travail d'équipe. Ainsi, une réparation fondée sur des honoraires théoriques pour des services rendus n'est pas adaptée à la nature sous-jacente de la demande : McCamus, p. 376-377. À mon avis, ce raisonnement est convaincant, que l'effort conjoint ait donné lieu à l'accumulation de biens en particulier, auquel cas une fiducie constructoire de nature réparatoire peut être appropriée selon les principes bien établis dans

latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

[79] Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well suited to domestic situations, which are more often than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

(4) The Approach to the Monetary Remedy

[80] The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and

ce domaine du droit des fiducies, ou que l'effort conjoint ait donné lieu à l'accumulation de richesse en général. Dans le second cas, lorsque la situation s'y prête, il n'y a en principe aucune raison de refuser une réparation pécuniaire basée sur l'enrichissement et l'appauvrissement correspondant. À mon avis, il est essentiel, dans l'un et l'autre cas, qu'il y ait un lien entre la contribution et l'accumulation de la richesse ou, pour reprendre les propos de la juge McLachlin dans *Peter*, entre la « valeur reçue » et la « valeur accumulée ». Lorsque ce lien est établi, et qu'une réparation fondée sur le droit de propriété est inappropriée ou inutile, la réparation pécuniaire devrait être adaptée pour refléter la nature véritable de l'enrichissement et de l'appauvrissement correspondant.

[79] Le professeur McCamus a avancé que la réparation en equity que constitue la reddition de compte relative aux profits pourrait s'avérer un remède approprié : p. 377. Bien que je ne nie pas cette possibilité, je doute que la complexité et les subtilités procédurales de cette réparation soient adaptées aux situations familiales, lesquelles sont, la plupart du temps, assez simples. Le principe de l'enrichissement injustifié est fondamentalement souple et, à mon avis, le calcul d'une indemnité pécuniaire pour enrichissement injustifié devrait être tout aussi souple. Cela est nécessaire pour répondre à l'enrichissement en question, dans la mesure où une somme d'argent peut le faire. À mon sens, le professeur Fridman avait raison de dire que [TRADUCTION] « dans les cas où le demandeur a démontré l'enrichissement injustifié, la cour peut accorder la réparation la plus appropriée de manière à faire en sorte que le demandeur obtienne ce à quoi il a droit, indépendamment de la question de savoir si la situation aurait été du ressort de la common law ou de l'equity ou si elle aurait autrefois donné ouverture à une réparation personnelle ou fondée sur le droit de propriété » (p. 398).

(4) L'approche applicable en matière de réparation pécuniaire

[80] L'étape suivante de l'évolution jurisprudentielle devrait consister à s'éloigner de la fausse dichotomie entre le *quantum meruit* et la fiducie

constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

[81] In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

[82] This flexible approach to the money remedy in unjust enrichment cases is fully consistent with

constructoire, pour revenir aux principes qui sous-tendent les règles relatives à l'enrichissement injustifié. Ces principes portent principalement sur la qualification appropriée de la nature de l'enrichissement injustifié à l'origine de la réclamation. Comme je l'ai déjà dit, tous les enrichissements injustifiés entre conjoints non mariés ne se rangent pas aisément dans la catégorie de la « rémunération des services rendus » ou dans celle relative à « une partie d'un bien déterminé ». Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié est de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre de ce que la juge McLachlin a appelé, dans *Peter* (p. 1001), une « coentreprise familiale » à laquelle les deux conjoints ont contribué, la réparation pécuniaire devrait refléter ce fait.

[81] Dans de tels cas, le fondement de l'enrichissement injustifié est la rétention d'une part excessivement disproportionnée de la richesse par une partie quand les deux parties ont participé à une coentreprise familiale et qu'il existe un lien évident entre les contributions du demandeur et l'accumulation de la richesse. Indépendamment du titulaire du titre de propriété sur certains biens déterminés, on peut considérer que les parties, dans de telles circonstances, [TRADUCTION] « créent la richesse dans le cadre d'une entreprise commune qui les aidera à maintenir leur relation, leur bien-être et leur vie de famille » (McCamus, p. 366). La richesse créée durant la période de cohabitation sera considérée comme étant le fruit de leur relation conjugale et financière, sans nécessairement que les deux parties y aient contribué en parts égales. Comme les conjoints sont des partenaires conjugaux et financiers, il n'est nul besoin d'un « duel de *quantum meruit* ». Dans de tels cas, l'allégation d'enrichissement injustifié naît de ce que la partie qui quitte avec une part disproportionnée de la richesse prive le demandeur d'une part raisonnable de la richesse accumulée pendant la relation grâce à leurs efforts conjoints. Il faudrait évaluer la réparation pécuniaire en déterminant la contribution proportionnée du demandeur à l'accumulation de la richesse.

[82] Cette souplesse dans la détermination de la réparation pécuniaire dans les cas d'enrichissement

Walsh. While that case was focused on constitutional issues that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

[83] A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly — and flatly — rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

[84] It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

[85] I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts

injustifié est tout à fait conforme à l'arrêt *Walsh*. Même si cette affaire soulevait des questions constitutionnelles dont nous ne sommes pas saisis en l'espèce, le jugement majoritaire ne cherchait manifestement pas à figer les règles relatives à l'enrichissement injustifié en matière familiale; l'arrêt indique que ces règles, y compris la fiducie constructoire de nature réparatoire, constituent la meilleure façon de remédier aux iniquités susceptibles de survenir au moment de la rupture d'une union de fait puisque la réparation pour enrichissement injustifié « est adaptée à la situation et aux revendications particulières des parties » (par. 61). En résumé, tout en soulignant l'importance du respect de l'autonomie, la Cour a reconnu que les règles relatives à l'enrichissement injustifié devaient toujours évoluer pour s'adapter à la myriade de formes et fonctions des unions de fait.

[83] Une approche semblable a été appliquée dans *Peter*. Monsieur Beblow soutenait que les conjoints non mariés ne devaient pas se voir attribuer une part des biens en vertu des règles de l'enrichissement injustifié parce que le législateur avait choisi de ne pas leur accorder les droits conférés aux conjoints mariés en vertu de la législation sur les biens matrimoniaux. La Cour a laconiquement — et catégoriquement — rejeté cet argument en affirmant que c'est « précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'*equity* joue un rôle » : p. 994.

[84] Les règles relatives à l'enrichissement injustifié ne visent pas à reproduire, pour les conjoints non mariés, la présomption législative voulant que les conjoints mariés soient associés dans une coentreprise familiale. Cependant, rien ne s'oppose en principe à ce que les réparations applicables en cas d'enrichissement injustifié ne tiennent pas compte de cette réalité dans la vie et les relations des conjoints non mariés.

[85] Je conclus donc que les règles de la common law relatives à l'enrichissement injustifié devraient reconnaître et prendre en compte cette réalité, à savoir que certaines ententes conjugales conclues entre conjoints non mariés sont des partenariats; dans de tels cas, la réparation devrait remédier à la

with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

[86] Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

(5) Identifying Unjust Enrichment Arising From a Joint Family Venture

[87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

[88] It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship.

rétention disproportionnée des avoirs acquis avec une autre personne grâce aux efforts conjoints. Évidemment, ce genre de partage ne doit pas être présumé, non plus qu'il sera présumé que la richesse accumulée grâce à l'effort des deux conjoints sera partagée également. Suivant les règles de la common law relatives à l'enrichissement injustifié, la cohabitation, en soi, ne confère pas à une personne le droit à une part des biens de l'autre personne ou à toute autre forme de réparation. Toutefois, lorsqu'une certaine richesse a été accumulée grâce à un effort conjoint, comme en témoigne la nature de la relation des parties et leurs rapports réciproques, le droit de l'enrichissement injustifié devrait refléter cette réalité.

[86] Par conséquent, le rejet de la dichotomie des mesures de réparation nous amène à examiner les circonstances dans lesquelles un enrichissement injustifié peut être considéré comme le résultat d'un partage inéquitable des biens acquis grâce aux efforts conjoints des parties. Il faudra certes raffiner cette approche, mais voici un aperçu des cas où cette qualification sera appropriée.

(5) Enrichissement injustifié découlant d'une coentreprise familiale

[87] Selon moi, quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convient de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour appliquer cette approche, il faut d'abord déterminer si les parties ont, de fait, été engagées dans une coentreprise familiale. Dans la partie précédente, j'ai passé en revue les nombreuses occasions où l'existence d'une coentreprise familiale a été reconnue. De cet ensemble de faits bien étoffé, à quoi peut-on reconnaître les marques distinctives d'une telle relation?

[88] Il est essentiel de souligner que les couples qui cohabitent ne forment pas un groupe homogène. Par conséquent, l'analyse doit tenir compte des circonstances particulières de chaque relation.

Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

[89] In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) *Mutual Effort*

[90] One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

[91] Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s

De plus, comme je l'ai déjà dit, on ne peut pas présumer l'existence d'une coentreprise familiale. Il s'agit donc d'attacher des conséquences équitables à la façon dont les parties ont vécu, de ne pas les traiter comme si elles auraient dû vivre autrement ou établir leur relation sur une base différente. L'existence d'une coentreprise familiale ne peut être reconnue par la cour que lorsqu'elle est, en fait, bien appuyée par la preuve. L'accent devrait porter sur la façon dont les parties ont réellement vécu, et non sur leurs allégations *ex post facto* ou sur l'opinion de la cour quant à la façon dont elles auraient dû vivre.

[89] Pour procéder à cette analyse, il peut être utile d'examiner la preuve sous quatre rubriques principales : l'effort commun, l'intégration économique, l'intention réelle et la priorité accordée à la famille. De toute évidence, il y a un chevauchement des facteurs qui pourraient se révéler pertinents sous ces rubriques et la liste de ces facteurs n'est pas définitive. Ce qui suit n'est pas une liste des conditions requises pour pouvoir conclure (ou ne pas conclure) que les parties étaient engagées dans une coentreprise familiale. Ces rubriques, et les facteurs qui y sont regroupés, servent simplement à faciliter l'analyse globale de la preuve et à donner quelques exemples d'éléments à prendre en considération pour décider si les parties étaient engagées dans une coentreprise familiale. L'absence de ces facteurs, et plusieurs autres considérations pertinentes, pourrait fort bien écarter cette conclusion.

a) *Effort commun*

[90] Le premier ensemble de facteurs porte sur la question de savoir si les parties collaboraient en vue d'atteindre des buts communs. Les efforts conjoints et le travail d'équipe, la décision d'avoir et d'éduquer des enfants ensemble, ainsi que la durée de la relation peuvent tous indiquer la mesure dans laquelle, le cas échéant, les parties constituaient véritablement une association et ont collaboré à la réalisation d'objectifs communs importants.

[91] Les contributions conjointes, ou les contributions à un fonds commun, peuvent constituer la preuve d'un effort conjoint. Par exemple, dans

constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, e.g., *Birmingham v. Ferguson*, 2004 CanLII 4764 (Ont. C.A.); *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54, at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.); *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382, at para. 27).

(b) *Economic Integration*

[92] Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson*; *Panara*).

[93] The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over

Murdoch, le fait que les parties avaient uni leurs efforts dans le but de réaliser leur établissement dans une exploitation d'élevage était au cœur de l'analyse du juge Laskin sur la fiducie constructoire. Les contributions conjointes sont aussi un aspect important des analyses de la Cour dans *Peter*, *Sorochan* et *Pettkus*. La mise en commun des efforts et des ressources, à titre de capital ou de revenu, a également été soulignée dans des affaires jugées en appel (voir, par exemple, *Birmingham c. Ferguson*, 2004 CanLII 4764 (C.A. Ont.); *McDougall c. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54, par. 14). Le fait que les fonds des parties soient entièrement consacrés à la famille peut indiquer une mise en commun des ressources : *McDougall*. On peut aussi affirmer que les parties mettent leurs ressources en commun quand un conjoint s'acquitte de la totalité, ou de la plus grande partie, des travaux domestiques, libérant l'autre de ces responsabilités et lui permettant de se consacrer à ses activités rémunérées à l'extérieur (voir *Nasser c. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (C.A. Ont.), et *Panara c. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382, par. 27).

b) *Intégration économique*

[92] Le deuxième ensemble de facteurs, liés à ceux du premier ensemble, a trait au degré d'interdépendance et d'intégration économiques caractérisant la relation des parties (*Birmingham*; *Pettkus*; *Nasser*). Plus le niveau d'intégration des finances, des intérêts économiques et du bien-être économique des conjoints est élevé, plus il est probable que ceux-ci soient considérés comme ayant été engagés dans une coentreprise familiale. Par exemple, l'existence d'un compte de banque conjoint utilisé comme une « bourse commune », ainsi que le fait que l'unité familiale exploitait la ferme, constituaient des facteurs clés dans l'analyse effectuée par le juge Dickson dans *Rathwell*. Le partage des dépenses et la mise en commun des économies peuvent aussi être des facteurs pertinents (voir *Wilson*; *Panara*).

[93] La conduite des parties peut aussi indiquer un sentiment d'appartenance, de réciprocité et de priorité du bien-être de l'unité familiale par rapport

the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, e.g., *Pettkus*, at p. 850).

(c) *Actual Intent*

[94] Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

[95] Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Pettkus* v. *Becker*: Quantifying Relief for Unjust Enrichment" (1993), 43 *U.T.L.J.* 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus*; *Peter*; *Sorochan*). In some cases, courts have explicitly labelled the relationship as a "partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser*; *Sorochan*; *Birmingham*). When parties have lived together in a stable relationship for

aux intérêts individuels de chacun des membres (McCamus, p. 366). Ces facteurs, parmi d'autres, peuvent indiquer que le bien-être économique et la vie des parties sont bien intégrés (voir, par exemple, *Pettkus*, p. 850).

c) *Intention réelle*

[94] Un souci du respect de l'autonomie des parties sous-tend les règles relatives à l'enrichissement injustifié, et il s'agit d'un élément particulièrement important dans les unions libres. Les conjoints de fait peuvent décider de ne pas se marier pour une foule de raisons, mais l'une d'elles peut être le choix délibéré de ne pas être financièrement liés. Par conséquent, pour savoir s'il existe une coentreprise familiale, il faut accorder une importance considérable aux intentions réelles des parties. Ces intentions peuvent avoir été exprimées par les parties ou inférées de leur conduite. Cependant, ce qui importe, c'est que l'on recherche leur intention réelle, expresse ou inférée, et non ce que, selon la cour, des parties « raisonnables » *auraient dû* vouloir dans les mêmes circonstances. Les tribunaux doivent, en invoquant l'intention inférée, veiller à ne pas imposer leurs points de vue dans le but d'arriver à un certain résultat.

[95] Les tribunaux peuvent déduire de la conduite des parties qu'elles avaient l'intention de partager la richesse qu'elles ont créée ensemble (P. Parkinson, « Beyond *Pettkus* v. *Becker* : Quantifying Relief for Unjust Enrichment » (1993), 43 *U.T.L.J.* 217, p. 245). La conduite des parties peut démontrer qu'elles voulaient que leurs vies familiale et professionnelle fassent partie d'un tout, d'une entreprise commune (*Pettkus*; *Peter*; *Sorochan*). Dans certains cas, les tribunaux ont expressément défini la relation comme étant une [TRADUCTION] « association » d'un point de vue social et économique (*Panara*, par. 71; *McDougall*, par. 14). De même, l'intention de s'engager dans une coentreprise familiale peut être déduite quand les parties ont reconnu que leur relation était [TRADUCTION] « équivalente au mariage » (*Birmingham*, par. 1), ou quand les parties se présentaient auprès d'autrui comme un couple marié (*Sorochan*). La stabilité de la relation peut constituer un facteur pertinent, tout comme

a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall*; *Nasser*).

[96] The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

[97] The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) *Priority of the Family*

[98] A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare

la durée de la cohabitation (*Nasser*; *Sorochan*; *Birmingham*). Si les parties ont vécu une relation stable pendant une longue période, il est presque impossible de soupeser précisément les avantages conférés dans le cadre de la relation (*McDougall*; *Nasser*).

[96] Le titre de propriété peut aussi refléter une intention de partager équitablement la richesse, ou une partie de celle-ci. Ce peut être le cas lorsque les parties possèdent des biens en commun. Même quand le titre est enregistré au nom d'une des parties, d'autres aspects de la conduite des parties peuvent indiquer que la richesse sera partagée. Par exemple, les parties peuvent être très peu intéressées par tout ce qui entoure le titre et l'état des sommes dépensées pour la résidence, les rénovations, les taxes, les assurances et tout le reste. Les plans de répartition des biens au décès, que ce soit dans un testament ou une déclaration verbale, peuvent aussi indiquer que les parties se considéraient comme des partenaires conjugaux et économiques.

[97] L'intention réelle des parties pourrait aussi permettre d'écarter l'existence d'une coentreprise familiale ou étayer la conclusion selon laquelle des biens déterminés devaient être détenus de façon indépendante. Encore une fois, c'est l'intention réelle des parties, expresse ou inférée de la preuve, qui est le facteur pertinent.

d) *Priorité accordée à la famille*

[98] Le dernier ensemble de facteurs à considérer pour déterminer si les parties participaient à une coentreprise familiale consiste à savoir si elles avaient donné la priorité à la famille dans le processus décisionnel, et ce, dans quelle mesure. Une question pertinente est de savoir si, dans une certaine mesure, une des parties ou les deux se sont fiés sur la relation à leur détriment, mais pour le bien-être de la famille. Comme l'indique le professeur McCamus, la question est de savoir si les parties ont [TRADUCTION] « [a]gi en sachant ou en supposant qu'elles mèneraient une vie commune, peu importe que cela ait été dit ou non » (p. 365). L'accent est mis sur les contributions au partenariat domestique et financier, et particulièrement sur les

of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

sacrifices financiers consentis par les parties pour le bien-être de l'unité collective ou familiale. Que les rôles des parties correspondent à la répartition traditionnelle des tâches entre le salarié et la femme au foyer, ou que les deux parties aient un emploi et partagent les responsabilités domestiques, il arrive souvent qu'une des parties se fie à la réussite et à la stabilité de la relation pour en assurer la sécurité économique, à son propre détriment économique (Parkinson, p. 243). Cela peut survenir de nombreuses façons, notamment lorsqu'une partie quitte le marché du travail pendant un certain temps pour élever les enfants; en déménageant pour aider la carrière de l'autre partie (et, par conséquent, en abandonnant son emploi et les réseaux liés à l'emploi); en renonçant à une carrière ou à une formation pour le bien de la famille ou de la relation; et en acceptant un sous-emploi dans le but d'équilibrer les besoins financiers et domestiques de l'unité familiale.

[99] As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

[o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256]

[99] Selon moi, accorder la priorité à la famille n'est pas exclusivement le fait du conjoint le plus dépendant financièrement. Le conjoint ayant le revenu le plus élevé peut aussi faire des sacrifices financiers (par exemple, en renonçant à une promotion au profit de la vie familiale), ce qui peut indiquer que les parties considéraient la relation comme un partenariat domestique et financier. Comme l'indique le professeur Parkinson, il y a une coentreprise familiale quand

[TRADUCTION] [u]ne partie a encouragé l'autre à se fier à elle à son détriment en quittant le marché du travail ou en renonçant à d'autres possibilités d'avancement pour le bien de la relation, et la rupture la laisse dans une situation pire que si elle n'avait pas agi de cette façon à son détriment économique. [p. 256]

(6) Summary of *Quantum Meruit* Versus Constructive Trust

[100] I conclude:

1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.

(6) *Quantum meruit* plutôt que fiducie constructoire : résumé

[100] En conclusion :

1. La réparation pécuniaire pour enrichissement injustifié ne se limite pas à une indemnité calculée en fonction de la rémunération des services rendus.

2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.

3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.

4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. *Mutual Benefit Conferral*

(1) Introduction

[101] As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

[102] The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth

2. Dans les cas où l'enrichissement injustifié est, de façon très réaliste, défini comme étant le fait pour une partie de conserver une part disproportionnée des biens provenant d'une coentreprise familiale, et qu'une réparation pécuniaire est appropriée, il faut calculer cette réparation en fonction de la part de ces biens qui est proportionnelle aux contributions du demandeur.

3. Pour avoir droit à une réparation pécuniaire de cette nature, le demandeur doit prouver : a) qu'une coentreprise familiale existait effectivement, et b) qu'il existe un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse.

4. La question de savoir s'il existait une coentreprise familiale est une question de fait et on peut l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs : a) à l'effort commun, b) à l'intégration économique, c) à l'intention réelle et d) à la priorité accordée à la famille.

F. *Avantages réciproques*

(1) Introduction

[101] Comme je l'ai déjà mentionné, l'analyse de l'enrichissement injustifié en matière familiale se complique souvent du fait qu'il y a eu des avantages réciproques; dans presque tous les cas, chaque partie confère des avantages à l'autre partie : Parkinson, p. 222. Bien entendu, le demandeur ne peut pas s'attendre tout à la fois à récupérer quelque chose qu'il a donné au défendeur et à conserver une chose que lui a donnée le défendeur : Birks, p. 415. L'analyse doit tenir compte de cette proposition sensée. Comment et à quel moment dans l'analyse faut-il prendre en compte les avantages réciproques?

[102] La réponse est assez simple si l'allégation d'enrichissement injustifié veut essentiellement qu'une partie ait quitté la relation avec une part disproportionnée des avoirs accumulés grâce aux efforts conjoints. C'est le cas des coentreprises familiales dans lesquelles les efforts communs des parties ont permis d'accumuler une richesse. La réparation consiste en une part de cette richesse

proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

[103] Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

[104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court,

proportionnée aux contributions du demandeur. Une fois que le demandeur a démontré sa contribution à la coentreprise familiale ainsi que le lien entre cette contribution et l'accumulation de la richesse, les contributions respectives des parties sont prises en considération pour déterminer la part proportionnelle du demandeur. Bien que le calcul des contributions proportionnelles des parties ne soit pas une science exacte, il n'est généralement pas nécessaire d'effectuer un examen détaillé des contributions et des concessions quotidiennes. Il faut plutôt porter un jugement raisonné à la lumière de l'ensemble de la preuve.

[103] Cependant, les avantages réciproques entraînent des problèmes pratiques particuliers lorsque la réparation appropriée consiste en une indemnité pécuniaire calculée en fonction de la valeur de la rémunération des services rendus. Le fait que le défendeur ait aussi fourni des services au demandeur peut être considéré comme un facteur pertinent à toutes les étapes de l'analyse de l'enrichissement injustifié. Certains tribunaux ont examiné les avantages reçus par le demandeur dans le cadre de l'analyse des avantages et des désavantages (par exemple, la Cour d'appel dans *Peter c. Beblow* (1990), 50 B.C.L.R. (2d) 266). D'autres ont considéré les avantages réciproques comme un aspect de l'analyse du motif juridique (par exemple, *Ford c. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), et le jugement de la Cour d'appel dans l'affaire *Kerr*). D'autres encore ont examiné les avantages réciproques tant à l'étape de l'analyse du motif juridique qu'à celle de la réparation (par exemple, tel que proposé dans *Wilson*). De toute évidence, une certaine clarté et une certaine cohérence s'imposent sur ce point.

[104] À mon avis, il y a beaucoup à dire sur la méthode d'analyse des avantages réciproques élaborée par la juge Huddart de la cour d'appel dans l'affaire *Wilson*. Plus particulièrement, je ferais miennes ses conclusions selon lesquelles les enrichissements mutuels devraient être examinés principalement au stade de la défense ou à celui de la réparation, mais qu'il est aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constitue une preuve pertinente de l'existence (ou de

and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

[105] At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376, at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

[106] In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: [1988] B.C.J. No. 887 (QL).

[107] The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266, set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had

l'absence) d'un motif juridique justifiant l'enrichissement (par. 9). Cette approche est conforme à la jurisprudence de notre Cour, et elle offre un moyen simple et juste de faire en sorte que l'octroi d'avantages réciproques soit dûment pris en considération sans court-circuiter l'analyse de l'enrichissement injustifié. Je vais expliquer brièvement pourquoi, à mon avis, cette approche est bien fondée.

[105] D'entrée de jeu, toutefois, je souligne que l'arrêt *Peter* de notre Cour n'exige pas que l'on prenne en considération les avantages réciproques à l'étape de l'analyse du motif juridique : voir, par exemple, *Ford*, par. 14; *Thomas c. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376, par. 18. Au contraire, il ressort clairement de *Peter* qu'on ne devrait généralement pas tenir compte des avantages réciproques au stade de l'analyse avantages-désavantages; la Cour a aussi approuvé la décision du juge de première instance de prendre en considération les avantages réciproques au moment de déterminer la réparation à accorder au titre de l'enrichissement injustifié.

[106] Dans *Peter*, le juge de première instance a conclu que les trois éléments de l'enrichissement injustifié avaient été prouvés. Avant que M. Beblow n'habite avec M^me^ Peter, il avait une aide ménagère qu'il payait 350 $ par mois. Lorsque M^me^ Peter a emménagé chez lui avec ses enfants et qu'elle a assumé les tâches ménagères en plus de s'occuper des enfants, l'aide ménagère n'était plus nécessaire. Le juge de première instance a déterminé la valeur de la contribution de M^me^ Peter en partant du montant que M. Beblow donnait à l'aide ménagère, puis en en soustrayant la moitié pour refléter les avantages que M^me^ Peter a reçus en retour. Le juge de première instance a ensuite utilisé ce montant réduit pour déterminer la valeur des services rendus par M^me^ Peter pendant les 12 années qu'a duré la relation : [1988] B.C.J. No. 887 (QL).

[107] La Cour d'appel, dans (1990), 50 B.C.L.R. (2d) 266, a écarté cette conclusion au motif que M^me^ Peter n'avait pas réussi à prouver qu'elle avait subi un appauvrissement correspondant aux avantages qu'elle avait conférés à M. Beblow. La cour a conclu que, bien qu'elle ait rendu les services d'une aide ménagère et d'une personne au foyer, elle avait

received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

[108] This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

(2) The Correct Approach

[109] As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should

reçu une compensation parce que ses enfants et elle vivaient chez M. Beblow sans avoir à payer de loyer et que celui-ci contribuait plus qu'elle à payer l'épicerie.

[108] Notre Cour a infirmé la décision de la Cour d'appel et a rétabli la décision du juge de première instance. La Cour a décidé à l'unanimité que M^me^ Peter avait prouvé tous les éléments de l'enrichissement injustifié, y compris l'appauvrissement. Le juge Cory (la juge McLachlin partageait son avis sur ce point) est passé rapidement sur la prétention de M. Beblow selon laquelle M^me^ Peter n'avait pas démontré l'appauvrissement. Il a fait remarquer que, « [e]n règle générale, si l'on constate que le défendeur s'est enrichi du fait des efforts de la demanderesse, cette dernière subira presque certainement un appauvrissement » : p. 1013. La Cour a aussi confirmé à l'unanimité l'approche du juge de première instance selon laquelle il faut tenir compte des avantages reçus par M^me^ Peter au moment de déterminer la réparation à accorder. Comme je l'ai déjà indiqué, le juge de première instance avait réduit de moitié le montant mensuel utilisé pour calculer la somme accordée à M^me^ Peter pour refléter les avantages que celle-ci avait reçus de M. Beblow. La juge McLachlin n'a pas rejeté cette approche, concluant à la p. 1003 que le montant auquel était arrivé le juge reflétait bien la valeur de la contribution de M^me^ Peter à l'avoir familial. À la page 1025, le juge Cory a qualifié l'approche du juge de première instance de « façon équitable de calculer le montant dû à l'appelante ». Ainsi, la Cour a souscrit à l'approche selon laquelle il faut, dans l'analyse, tenir compte de la question des avantages réciproques à l'étape de la réparation. L'arrêt *Peter* n'étaye donc pas le point de vue selon lequel il convient, dans l'analyse, d'examiner les avantages réciproques à l'étape de l'examen des avantages et des désavantages ou à celle du motif juridique.

(2) La bonne approche

[109] Comme je l'ai déjà dit, je suis d'avis que les avantages réciproques peuvent être pris en considération à l'étape de l'analyse du motif juridique, mais seulement dans la mesure où ils offrent une preuve pertinente de l'existence d'un tel motif. Autrement, il faut en tenir compte à l'étape de la défense ou de

be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

[110] I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

[111] An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf ed.), vol. II, at §13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Q.B. *en banc*). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

la réparation. Il est important de souligner que cela peut, et devrait, avoir lieu peu importe que le défendeur ait présenté une demande reconventionnelle formelle ou invoqué la compensation.

[110] Je vais d'abord expliquer pourquoi les avantages réciproques ne devraient pas être examinés, dans l'analyse, à l'étape de l'examen des avantages et des désavantages. À mon avis, refuser de traiter de la question des avantages réciproques à cette étape est conforme à la notion du *quantum meruit* dont l'approche fondée sur la rémunération des services rendus tire son origine et aussi à l'analyse économique simple des avantages et des désavantages, que notre Cour a toujours utilisée.

[111] L'action pour enrichissement injustifié fondée sur la rémunération des services rendus est analogue à la réclamation traditionnelle fondée sur le *quantum meruit*. Dans ces réclamations, le fait que le défendeur ait conféré un avantage au demandeur est pris en considération pour réduire le recouvrement du demandeur du montant de l'avantage ainsi reçu. Par exemple, s'agissant d'une réclamation fondée sur le *quantum meruit* où le demandeur cherche à recouvrer les sommes payées en vertu d'un contrat inexécutable alors qu'il a déjà reçu un avantage du défendeur, la réclamation sera accueillie, mais l'indemnité sera réduite du montant correspondant à la valeur de cet avantage : Maddaugh et McCamus (éd. feuilles mobiles), vol. II, §13:200. Les auteurs citent, à titre d'exemple, l'affaire *Giles c. McEwan* (1896), 11 Man. R. 150 (B.R. *in banco*). Dans cette affaire, deux employés avaient présenté une réclamation fondée sur le *quantum meruit* afin de recouvrer la valeur des services rendus au défendeur en vertu d'un contrat inexécutable, mais le montant de l'indemnité a été réduit pour refléter la valeur des avantages conférés par le défendeur. Ainsi, prendre en considération à l'étape de la réparation les avantages conférés par le défendeur est conforme aux principes généraux s'appliquant aux réclamations fondées sur le *quantum meruit*. Bien entendu, si le défendeur a déposé une demande reconventionnelle ou a invoqué la compensation, la question des avantages mutuels doit être tranchée au moment de considérer ce moyen de défense ou cette demande.

[112] Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112. The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. . . . We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court declined to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

[112] Suivant l'analyse économique simple des avantages et des désavantages que la Cour a toujours utilisée, il faut refuser de prendre les avantages réciproques en considération à cette étape. L'arrêt *Garland* en offre un bon exemple. Dans un recours collectif, les demandeurs réclamaient la restitution, pour enrichissement injustifié, des pénalités pour paiement en retard imposées mais que notre Cour (dans une décision antérieure) avait déclaré constituer des intérêts à un taux criminel : voir *Garland c. Consumers' Gas Co.*, [1998] 3 R.C.S. 112. L'entreprise a soutenu qu'elle ne s'était pas enrichie parce que ses taux étaient fixés par un mécanisme de réglementation indépendant, et que les taux auraient été encore plus élevés si l'entreprise n'avait pas reçu les pénalités pour paiement en retard à titre de recettes. Cet argument a été accepté par la Cour d'appel, mais a été rejeté lors du pourvoi devant notre Cour. Le juge Iacobucci, rédigeant pour la Cour, a conclu que les paiements, dans le cadre de l'« analyse économique simple » adoptée dans *Peter*, constituaient un avantage : par. 32. Voici ce qu'il a affirmé au par. 36 : « Il n'y a simplement aucun doute que Consumers' Gas a reçu les sommes d'argent représentées par les [pénalités pour paiement en retard] et qu'elle pouvait utiliser cet argent pour exploiter son entreprise. [. . .] À ce stade, nous ne nous intéressons pas à la question de savoir où est passé cet avantage dans le cadre de l'application du régime de réglementation. » La Cour a conclu que l'entreprise invoquait en fait le moyen de défense fondé sur « le changement de situation » (c.-à-d., le moyen de défense que peut faire valoir « un défendeur innocent démontre qu'à la suite d'un enrichissement il a modifié sa situation à un point tel qu'il serait inéquitable de l'obliger à rendre l'avantage qu'il a reçu » : par. 63). Ce moyen de défense est pris en considération seulement une fois remplies les trois conditions de l'action pour enrichissement injustifié : par. 37. La Cour a donc refusé de procéder, à l'étape de l'examen des avantages et des désavantages, à un examen détaillé des prétentions du défendeur selon lesquelles il n'avait bénéficié d'aucun avantage à cause du régime de réglementation.

[113] While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists

[113] L'arrêt *Garland* portait sur le paiement d'une somme d'argent, mais j'estime qu'il faut appliquer la même méthode quand l'enrichissement

of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

[114] As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

[115] The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

[116] I conclude that mutual benefits may be considered at the juristic reason stage, but only to

allégué consiste en des services. Dans la mesure où ils confèrent un avantage tangible au défendeur, les services constituent généralement un enrichissement et un appauvrissement correspondant. La question de savoir si l'appauvrissement était contrebalancé par des avantages conférés au demandeur par le défendeur ne devrait pas être traitée aux deux premières étapes de l'analyse. J'examinerai maintenant le rôle limité que peuvent jouer les avantages réciproques à l'étape de l'analyse du motif juridique.

[114] Comme je l'ai déjà dit, le motif juridique est la troisième des trois parties de l'analyse de l'enrichissement injustifié. Comme l'a dit la juge McLachlin à la p. 990 de l'arrêt *Peter*, « [c]'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont "injustes" ». L'analyse du motif juridique vise à indiquer si le défendeur est justifié de conserver l'enrichissement, et non pas à en déterminer la valeur ou à déterminer s'il convient d'opérer compensation après examen des avantages réciproques : *Wilson*, par. 30. Selon *Garland*, les demandeurs doivent démontrer qu'aucun motif juridique ne se retrouve dans l'une ou l'autre des catégories établies, par exemple si l'avantage était un don ou s'il découlait d'une obligation légale. Si cette preuve est faite, le défendeur peut alors démontrer qu'un motif juridique différent justifiant l'enrichissement devrait être reconnu, compte tenu des attentes raisonnables des parties et des considérations d'intérêt public.

[115] Le fait que les parties se soient mutuellement conféré des avantages peut constituer une preuve pertinente de leurs attentes raisonnables, ce qui peut devenir pertinent au moment où le défendeur essaie de prouver que ces attentes appuient l'existence d'un motif juridique que l'on ne retrouve dans aucune des catégories établies. Cependant, comme l'analyse du motif juridique cherche à déterminer si l'enrichissement était équitable et non à en mesurer l'ampleur, les avantages réciproques ne devraient être pris en considération à cette étape que pour cette fin précise.

(3) Résumé

[116] Je conclus que les avantages réciproques peuvent être examinés à l'étape de l'analyse du motif

the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. *Reasonable or Legitimate Expectations*

[117] The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable expectations played an important role in the juristic reason analysis, the development of the law, and particularly the Court's judgment in *Garland*, has led to a more limited and clearly circumscribed role for those expectations.

[118] In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in *Pettkus*, when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in *Sorochan*, at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

[119] In these cases, central to the Court's concern was whether it was just to require the defendant to pay — in fact to surrender an interest in property — for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given

juridique, mais seulement dans la mesure où ils fournissent une preuve pertinente relativement aux attentes raisonnables des parties. Sinon, ils doivent être pris en considération au stade de la défense ou à celui de la réparation. J'en dirai davantage dans la prochaine partie sur la façon dont les avantages réciproques et les attentes raisonnables des parties peuvent entrer en jeu dans l'analyse du motif juridique.

G. *Attentes raisonnables ou légitimes*

[117] Le dernier point qui requiert quelques précisions concerne le rôle des attentes raisonnables des parties en matière familiale. Je conclus que, bien que les attentes raisonnables des parties aient joué un rôle important dans l'analyse du motif juridique dans les premières affaires familiales d'enrichissement injustifié, avec l'évolution du droit, et en particulier depuis l'arrêt *Garland* de notre Cour, l'importance que l'on accorde à ces attentes est plus limitée et clairement circonscrite.

[118] Dans les premières affaires où l'enrichissement injustifié était allégué en situation familiale, les attentes raisonnables du demandeur et le fait que le défendeur connaissait ces attentes étaient au cœur de l'analyse du motif juridique. Par exemple, dans *Pettkus*, quand le juge Dickson est arrivé dans son analyse à l'étape de l'examen du motif juridique, il a affirmé que « lorsqu'une personne, liée à une autre dans une relation qui équivaut à une union conjugale, se cause un préjudice dans l'expectative raisonnable de recevoir un droit de propriété et que l'autre personne accepte librement les avantages que lui procure la première, alors qu'elle connaît ou devrait connaître cette expectative, il serait injuste de permettre au bénéficiaire de conserver cet avantage » (p. 849). De même, dans *Sorochan*, à la p. 46, exactement le même raisonnement a été suivi pour montrer qu'il n'y avait aucun motif juridique justifiant l'enrichissement.

[119] Dans ces affaires, la question de savoir s'il était équitable d'obliger le défendeur à payer — en fait de céder un droit de propriété — pour des services qu'il n'avait pas expressément demandés constituait l'une des préoccupations majeures de la Cour. La Cour a répondu qu'il serait effectivement

that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

[120] The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

[121] The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. *Garland*, as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the

injuste pour le défendeur de conserver les avantages, étant donné qu'il avait continué à accepter les services alors qu'il savait ou aurait dû savoir que le demandeur les rendait dans l'expectative raisonnable de recevoir une récompense.

[120] La prise en considération par la Cour des attentes raisonnables et de la connaissance qu'en avait, dans ces affaires, le défendeur rejoint le principe de l'« acceptation libre ». On a eu recours à la notion d'acceptation libre pour étendre la portée du recouvrement aux fins de restitution au-delà des catégories traditionnelles de demandes fondées sur le *quantum meruit* où l'on faisait valoir que des services avaient été demandés ou fournis en vertu d'une entente inexécutable. La réticence traditionnelle de la common law à accorder une réparation dans les cas où il n'y a eu aucune demande reposait sur le principe qu'une personne n'est généralement pas tenue de payer les services qu'elle n'a pas demandés, et ne voulait peut-être pas. Toutefois, cette préoccupation revêt une importance bien moindre quand la personne qui reçoit les services savait qu'ils étaient rendus, n'avait aucun motif raisonnable de penser qu'il s'agissait d'une donation et a tout de même continué à les accepter librement : voir P. Birks, *Unjust Enrichment* (2e éd. 2005), p. 56-57.

[121] La nécessité de procéder à cette analyse des attentes raisonnables du demandeur et de la connaissance qu'en avait le défendeur relativement aux services domestiques est à mon avis dépassée du fait de l'évolution du droit. L'arrêt *Garland*, comme je l'ai indiqué plus haut, a établi une méthode en deux étapes pour guider l'analyse du motif juridique. La première étape oblige le demandeur à prouver que l'avantage ne correspond pas à l'une des catégories établies de motifs juridiques. Il importe de souligner que le fait que le défendeur ait aussi rendu des services au demandeur n'entre dans aucune de ces catégories établies de motifs juridiques, pas plus que le fait que les services aient été fournis conformément aux attentes raisonnables des parties. Cependant, le fait que les parties s'attendaient raisonnablement à ce que les services soient fournis peut constituer une preuve pertinente relativement à la question de savoir si l'affaire entre dans une des catégories traditionnelles, par exemple, un contrat ou une donation.

first step in the juristic reason analysis set out in *Garland*.

[122] However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which "courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

[123] It will be helpful in understanding how *Peter* and *Garland* fit together to apply the *Garland* approach to an issue touched on, but not resolved, in *Peter*. In *Peter*, an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

[124] To summarize:

1. The parties' reasonable or legitimate expectations have little role to play in deciding whether

Sinon, les avantages réciproques et les attentes raisonnables des parties ont un rôle très limité à jouer dans la première étape de l'analyse du motif juridique énoncée dans *Garland*.

[122] Cependant, des considérations différentes entrent en jeu à la deuxième étape. Suivant les arrêts *Peter* et *Garland*, les attentes raisonnables ou légitimes des parties jouent un rôle essentiel quand le défendeur cherche à établir un nouveau motif juridique, que ce soit au cas par cas ou à l'égard d'une catégorie. Comme le dit le juge Iacobucci dans *Garland*, cela introduit des situations résiduelles qui permettent « aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement » (par. 45). Plus particulièrement, c'est à cette étape que le tribunal devrait tenir compte des attentes raisonnables des parties et des considérations d'intérêt public.

[123] Pour comprendre de quelle façon les arrêts *Peter* et *Garland* vont de pair, il sera utile d'appliquer la méthode énoncée dans *Garland* à une question abordée, mais non réglée, dans *Peter*. Dans *Peter*, on cherchait à savoir si une demande fondée sur la prestation de services domestiques pouvait être rejetée au motif que les services avaient été fournis dans le cadre d'une entente intervenue entre les parties lorsqu'elles ont décidé de vivre ensemble. Bien que la Cour ait conclu que la demande n'était pas fondée dans les faits, elle n'a pas statué qu'une telle demande était vouée à l'échec dans tous les cas : p. 991. Il me semble que, au vu de l'arrêt *Garland*, lorsque l'existence d'une « entente » qui ne constitue pas un contrat obligatoire est alléguée, la question sera examinée à l'étape à laquelle le défendeur tente de prouver qu'il existe un motif juridique justifiant l'enrichissement qui n'entre dans aucune des catégories existantes; il invoquera que l'« entente » représente les attentes raisonnables des parties, et une preuve relative à ces attentes sera une preuve pertinente de l'existence (ou de l'absence) d'une telle entente.

[124] En résumé :

1. Les attentes raisonnables ou légitimes des parties jouent un rôle négligeable au moment

the services were provided for a juristic reason within the existing categories.

2. In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.

3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

[125] I will now turn to the two cases at bar.

IV. The *Vanasse* Appeal

A. *Introduction*

[126] In the *Vanasse* appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant

de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie.

2. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties peut constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'applique. On pourrait citer comme exemple l'existence d'un contrat stipulant la prestation des avantages. Cependant, en général, l'existence d'avantages conférés par le défendeur au demandeur ne sera pas prise en considération à l'étape de l'analyse qui porte sur l'examen du motif juridique.

3. Les attentes raisonnables ou légitimes des parties jouent un rôle à la deuxième étape de l'analyse du motif juridique, où il incombe au défendeur d'établir qu'il existe un motif juridique de conserver l'avantage n'appartenant pas aux catégories établies. Ce sont les attentes mutuelles ou légitimes des deux parties qui doivent être prises en considération, et non uniquement les attentes du demandeur ou celles du défendeur. La question est de savoir si les attentes des parties prouvent qu'il est équitable de conserver les avantages.

[125] Je vais maintenant examiner les deux présents pourvois.

IV. Le pourvoi *Vanasse*

A. *Introduction*

[126] Dans le pourvoi *Vanasse*, la principale question consiste à savoir comment établir la valeur d'une indemnité pécuniaire pour enrichissement injustifié. La juge de première instance a accordé une part de l'augmentation nette de la richesse familiale pendant la période de l'enrichissement injustifié. La Cour d'appel a conclu que ce n'était pas la bonne façon de procéder et que la juge de première instance aurait dû effectuer un calcul fondé sur le *quantum meruit* où la valeur que

Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

[127] In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?

2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

[128] In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

B. *Brief Overview of the Facts and Proceedings*

[129] The background facts of this case are largely undisputed. The parties lived together in

chacune des parties a reçue de l'autre est évaluée et défalquée. Il fallait évaluer les contributions non financières du défendeur M. Seguin, ce qui, selon la Cour d'appel, n'a pas été fait par la juge de première instance. Comme le dossier ne permettait pas à la cour d'appliquer aux faits les principes juridiques appropriés, elle a ordonné la tenue d'une nouvelle audience relativement à la question de l'indemnité et de la modification corrélative de la pension alimentaire.

[127] Devant notre Cour, l'appelante M^me^ Vanasse soulève deux questions :

1. La Cour d'appel a-t-elle commis une erreur en imposant une approche stricte fondée sur le *quantum meruit* (c.-à-d. la « valeur reçue ») pour établir la valeur de l'indemnité pécuniaire pour enrichissement injustifié?

2. La Cour d'appel a-t-elle commis une erreur en concluant que la juge de première instance avait omis de tenir compte d'éléments de preuve pertinents aux contributions de M. Seguin?

[128] À mon avis, il convient d'accueillir le pourvoi et de rétablir la décision de la juge de première instance. Pour les motifs exposés ci-dessus, j'estime qu'il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du *quantum meruit*. En l'espèce, la juge de première instance a conclu qu'il y avait une coentreprise familiale, bien qu'elle ne l'ait pas qualifiée ainsi, et qu'il existait un lien entre la contribution de M^me^ Vanasse à la coentreprise et l'accumulation importante de la richesse familiale. À mon avis, la juge de première instance a raisonnablement évalué l'indemnité pécuniaire appropriée pour permettre l'annulation de cet enrichissement injustifié, en tenant dûment compte des contributions incontestées et importantes de M. Seguin.

B. *Bref aperçu des faits et des décisions des juridictions inférieures*

[129] Le contexte de l'espèce n'est essentiellement pas contesté. Les parties ont vécu en union de

a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

[130] During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

[131] In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately $11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

[132] After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

[133] The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about $40,000 at the time she and Mr. Seguin started living together, to about $332,000 at the time of separation; Mr. Seguin had come into the relationship with about $94,000, and his net worth at the time of separation was about $8,450,000.

[134] Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child

fait pendant environ 12 ans, de 1993 à mars 2005. Ensemble, ils ont eu deux enfants qui étaient âgés de 8 et 10 ans au moment du procès.

[130] Pendant environ les quatre premières années de leur relation (de 1993 à 1997), les parties ont diligemment continué leur carrière respective, M^me^ Vanasse avec le Service canadien du renseignement de sécurité (« SCRS ») et M. Seguin avec Fastlane Technologies Inc., où il commercialisait un système d'exploitation de réseau qu'il avait mis sur pied.

[131] En mars 1997, M^me^ Vanasse a pris un congé pour pouvoir s'installer avec M. Seguin à Halifax, où Fastlane avait déménagé pour des raisons d'affaires importantes. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants. Madame Vanasse s'occupait des travaux domestiques pendant que M. Seguin se consacrait à la croissance de Fastlane. La famille est revenue à Ottawa en 1998, où M. Seguin a acheté une maison qu'il a enregistrée au nom des deux parties en tant que copropriétaires. En septembre 2000, Fastlane a été vendue et M. Seguin a reçu environ 11 millions de dollars. Il a placé les fonds dans une société de portefeuille, grâce à laquelle il a continué de profiter d'occasions d'affaires et de placement.

[132] Après la vente de Fastlane, M^me^ Vanasse a continué de s'acquitter de la plupart des obligations familiales, bien que M. Seguin ait été davantage disponible pour l'aider. Il a continué de gérer les finances.

[133] Les parties se sont séparées le 27 mars 2005. À ce moment-là, leur situation financière était diamétralement opposée : l'avoir net de M^me^ Vanasse était passé d'environ 40 000 $ au début de leur vie commune à près de 332 000 $ au moment de la séparation; M. Seguin avait environ 94 000 $ au début de la relation et son avoir net s'élevait à environ 8 450 000 $ au moment de la séparation.

[134] Madame Vanasse a intenté une action devant la Cour supérieure de justice. En plus de demander une pension alimentaire et la garde des

custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

[135] Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately $44,000 in Registered Retirement Savings Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

[136] The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportionate.

enfants, elle a invoqué l'enrichissement injustifié. Elle a soutenu que M. Seguin s'était injustement enrichi parce qu'il avait conservé la quasi-totalité de la somme provenant de la vente de Fastlane, bien qu'elle ait contribué à son acquisition grâce aux avantages qu'elle conférait sous forme de services domestiques et de soins des enfants. Elle a affirmé que ses contributions ont permis à M. Seguin de consacrer la majeure partie de son temps et de son énergie à l'entreprise. Elle a invoqué l'existence d'une fiducie constructoire sur la moitié de la résidence familiale revenant à M. Seguin et un intérêt bénéficiaire de moitié dans les placements de la société de portefeuille de M. Seguin.

[135] Monsieur Seguin a contesté la demande pour enrichissement injustifié. Il a admis s'être enrichi pendant la période d'environ trois ans où il travaillait à temps plein à l'extérieur de la maison et que M^{me} Vanasse restait à la maison à temps plein (de mai 1997 à septembre 2000), mais il a soutenu qu'il n'y avait pas eu un appauvrissement correspondant parce qu'il lui avait donné la moitié de la résidence familiale et environ 44 000 $ dans des régimes enregistrés d'épargne-retraite (« REER »). À titre subsidiaire, M. Seguin a fait valoir qu'une fiducie constructoire était inappropriée en raison de l'absence de lien entre les contributions de M^{me} Vanasse et la propriété de Fastlane.

[136] En première instance, la juge Blishen a conclu que la relation des parties pouvait se diviser en trois périodes distinctes : (1) du début de la cohabitation en 1993 jusqu'en mars 1997 quand M^{me} Vanasse a laissé son emploi au SCRS; (2) de mars 1997 à septembre 2000, période pendant laquelle les deux enfants sont nés et Fastlane a été vendue; et (3) de septembre 2000 à la séparation des parties en mars 2005. Elle a conclu que ni l'une ni l'autre des parties ne s'était injustement enrichie au cours de la première et de la troisième périodes; elle était d'avis que leurs contributions à la relation pendant ces périodes avaient été proportionnées. Durant la première période, les parties n'avaient pas d'enfant et elles se concentraient sur leur carrière; durant la troisième période, les deux parents étaient à la maison et leurs contributions étaient proportionnées.

[137] In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

[138] The trial judge found as a fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

> Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane. [Emphasis added.]

Again at para. 137, the trial judge found that

> Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. . . . Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success. [Emphasis added.]

[137] Cependant, durant la deuxième période, la juge de première instance a conclu que M. Seguin s'était injustement enrichi grâce à M^me^ Vanasse. Cette dernière s'occupait des travaux domestiques, ainsi que de leurs deux enfants. Elle n'était pas une [TRADUCTION] « gouvernante/femme de ménage » et, comme l'a dit la juge de première instance, elle a « contribué au moins autant à la coentreprise familiale » pendant la relation. La juge de première instance a conclu que les contributions de M^me^ Vanasse pendant la deuxième période « avaient grandement avantagé M. Seguin et n'étaient pas proportionnées » (par. 139).

[138] La juge de première instance a conclu que les efforts déployés par M^me^ Vanasse pendant cette deuxième période étaient directement liés au succès professionnel de M. Seguin. Elle a affirmé ce qui suit au par. 91 :

> [TRADUCTION] Monsieur Seguin s'était enrichi du fait que M^me^ Vanasse gérait la maisonnée, s'occupait de deux jeunes enfants et veillait à prendre tous les rendez-vous nécessaires pour ceux-ci et à répondre à tous leurs besoins. Monsieur Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités. Monsieur Seguin a tiré un avantage des efforts de M^me^ Vanasse, car il a été en mesure de concentrer son temps, son énergie et ses efforts sur Fastlane. [Je souligne.]

Encore au par. 137, la juge du procès a conclu comme suit :

> [TRADUCTION] Monsieur Seguin s'était injustement enrichi et M^me^ Vanasse s'est appauvrie pendant trois ans et demi de leur relation, période pendant laquelle M. Seguin travaillait souvent jour et nuit et voyageait fréquemment quand ils habitaient à Halifax. Monsieur Seguin n'aurait pas pu avoir le même succès et développer l'entreprise comme il l'a fait si M^me^ Vanasse n'avait pas assumé la majeure partie des responsabilités parentales et domestiques. Il n'aurait pas pu consacrer son temps à Fastlane si M^me^ Vanasse n'avait pas assumé ces responsabilités. [. . .] Monsieur Seguin a bénéficié des efforts déployés par M^me^ Vanasse puisqu'il était en mesure de concentrer toute son énergie et son talent sur la réussite de Fastlane. [Je souligne.]

[139] The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

[140] With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about $8.4 million dollars over the 12 years of the relationship. Although she noted that the most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about $700,000 per year. Starting with the $2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under $1 million.

[141] Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

[139] La juge du procès a conclu qu'une indemnité pécuniaire était appropriée, compte tenu de la capacité de payer de M. Seguin et de l'absence d'un lien suffisamment direct et important entre les contributions de M^me^ Vanasse et Fastlane ou la société de portefeuille de M. Seguin, comme cela est requis pour imposer une fiducie constructoire de nature réparatoire.

[140] Quant au montant de cette indemnité, la juge Blishen a fait remarquer que M^me^ Vanasse avait reçu une part de 50 pour cent dans la résidence familiale, mais a conclu que cela ne constituait pas une compensation adéquate pour ses contributions. Après avoir comparé les avoirs nets des parties, elle a décidé que M^me^ Vanasse avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de M. Seguin pendant la période de l'enrichissement injustifié. Selon elle, son avoir net avait augmenté d'environ 8,4 millions de dollars au cours des 12 années de la relation. Elle a certes souligné que l'augmentation la plus importante a eu lieu quand Fastlane a été vendue vers la fin de la période de l'enrichissement injustifié, mais elle a tout de même réparti l'augmentation sur les 12 années qu'a duré la relation, arrivant à un montant d'environ 700 000 $ par année. En commençant avec l'augmentation de 2,45 millions de dollars attribuable à la période de trois ans et demi d'enrichissement injustifié, la juge de première instance a accordé à M^me^ Vanasse la moitié de ce montant, moins la valeur de sa part dans la résidence familiale et ses REER. Le montant accordé était donc d'un peu moins de 1 million de dollars.

[141] En appel, M. Seguin n'a pas attaqué la conclusion de la juge Blishen relative à l'enrichissement injustifié et a admis cet enrichissement entre 1997 et 2000. Par conséquent, les conclusions de la juge de première instance, suivant lesquelles il y a eu enrichissement injustifié durant cette période et non durant les autres périodes, ne sont pas en cause. La seule question que notre Cour est appelée à trancher concerne la justesse de l'indemnité pécuniaire accordée pour l'enrichissement injustifié.

C. *Analysis*

(1) Was the Trial Judge Required to Use a *Quantum Meruit* Approach to Calculate the Monetary Award?

[142] I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

[143] The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

[144] The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family

C. *Analyse*

(1) La juge du procès était-elle tenue d'appliquer une méthode fondée sur le *quantum meruit* pour calculer l'indemnité pécuniaire?

[142] Je suis d'accord avec l'appelante pour dire qu'il n'est pas nécessaire, en principe, de toujours calculer l'indemnité pécuniaire pour enrichissement injustifié en fonction de la valeur des services. Comme je l'ai déjà dit, la meilleure façon de définir l'enrichissement injustifié est de considérer ce qui se produit lorsqu'une partie quitte la relation avec une part disproportionnée de la richesse accumulée grâce aux efforts communs des parties. Il y a un enrichissement injustifié quand les parties étaient engagées dans une coentreprise familiale et qu'il existe un lien entre les contributions du demandeur et l'accumulation de la richesse. Quand c'est le cas, il convient d'évaluer la valeur de l'enrichissement en déterminant la contribution proportionnelle du demandeur à cette richesse. Selon la juge de première instance, telle était la situation de M^me^ Vanasse et de M. Seguin.

(2) Existence d'une coentreprise familiale

[143] Après un procès de six jours, la juge de première instance a conclu que [TRADUCTION] « M^me^ Vanasse n'était ni une gouvernante ni une femme de ménage ». La juge était d'avis que M^me^ Vanasse avait « contribué au moins autant à la coentreprise familiale » pendant la relation et que, pendant la période d'enrichissement injustifié, ses contributions « avaient grandement avantagé M. Seguin » (par. 139).

[144] Évidemment, la juge de première instance n'a pas examiné la preuve en fonction des rubriques qui, selon moi, permettront de reconnaître l'existence d'une coentreprise familiale, à savoir « l'effort commun », « l'intégration économique », « l'intention réelle » et « la priorité accordée à la famille ». Toutefois, selon ses conclusions de fait et son analyse, l'enrichissement injustifié de M. Seguin au détriment de M^me^ Vanasse tient à la conservation, par M. Seguin, d'une part disproportionnée de la

venture. The judge's findings fit conveniently under the headings I have suggested.

(a) *Mutual Effort*

[145] There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

[146] Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial

richesse générée par la coentreprise familiale. Les conclusions de la juge entrent parfaitement dans les rubriques que j'ai suggérées.

a) *Effort conjoint*

[145] En l'espèce, plusieurs facteurs donnent à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Premièrement, comme je l'ai déjà mentionné, la juge de première instance a conclu que M^me^ Vanasse n'avait pas un rôle de [TRADUCTION] « gouvernante ni de femme de ménage », mais qu'elle avait contribué au moins autant pendant la relation. Les parties ont pris des décisions importantes en gardant le bien-être de la famille au premier plan : la décision de déménager à Halifax, la décision de revenir s'établir à Ottawa et la décision selon laquelle M^me^ Vanasse ne retournerait pas travailler après la vente de Fastlane en sont des exemples clairs. Les parties ont uni leurs efforts pour le bien-être de l'unité familiale. Comme l'a conclu la juge de première instance, pendant la deuxième étape de leur relation de mars 1997 à septembre 2000, la répartition des tâches était telle que M^me^ Vanasse était presque entièrement responsable de la maison et des enfants, alors que M. Seguin travaillait de longues heures et gérait les finances familiales. La juge de première instance a conclu que les parties ont été en mesure d'élever une famille et d'acquérir une richesse grâce à leurs efforts communs. Pour reprendre ses propos, [TRADUCTION] « M. Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités » (par. 91). Bien que les longues heures de travail et les déplacements de M. Seguin aient quelque peu diminué en septembre 1998 quand les parties sont retournées à Ottawa, la répartition fondamentale des tâches est demeurée la même.

[146] Il convient de souligner que la période d'enrichissement injustifié correspond à la période pendant laquelle les parties ont eu leurs deux enfants (en 1997 et 1999), un autre indice qu'elles travaillaient ensemble dans le but de réaliser des objectifs communs. La durée de la relation est aussi pertinente, et 12 ans de cohabitation se veut

judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) *Economic Integration*

[147] The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) *Actual Intent*

[148] The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

[149] While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse

une période assez longue. Enfin, la juge de première instance a décrit l'entente entre les parties comme une [TRADUCTION] « entreprise familiale », à laquelle M^me^ Vanasse « contribuait au moins autant » (par. 138-139).

b) *Intégration économique*

[147] La juge du procès a conclu que [TRADUCTION] « [c]e n'était pas une situation d'interdépendance économique » (par. 105). Cela dit, il y avait une mise en commun des ressources. Madame Vanasse ne travaillait pas et ne contribuait pas financièrement à la famille après la naissance des enfants; elle était donc financièrement dépendante de M. Seguin. La résidence familiale était enregistrée aux deux noms et les parties avaient un compte chèque conjoint. Comme l'a dit la juge de première instance, [TRADUCTION] « [e]lle était "PDG des enfants" et il était "PDG des finances" » (par. 105).

c) *Intention réelle*

[148] Dans une relation conjugale, il faut accorder beaucoup d'importance à l'intention réelle des parties, exprimée par elles ou inférée de leur conduite, au moment de déterminer s'il existait une coentreprise familiale. Un certain nombre de conclusions de fait indiquent que ces parties considéraient leur relation comme une coentreprise familiale.

[149] Bien qu'une promesse de mariage ou un projet de mariage ne soit absolument pas une condition préalable pour conclure à l'existence d'une coentreprise familiale, en l'espèce, les intentions des parties à l'égard du mariage portent fortement à croire qu'elles se considéraient elles-mêmes comme un couple marié. Monsieur Seguin a demandé M^me^ Vanasse en mariage en juillet 1996 et ils ont échangé des anneaux. Bien qu'ils aient été [TRADUCTION] « très attachés l'un à l'autre et en amour », ils n'ont jamais fixé une date de mariage (par. 14). Monsieur Seguin a soulevé à nouveau le sujet du mariage quand M^me^ Vanasse a su qu'elle était enceinte de leur premier enfant. Ils ne se sont jamais mariés, mais la juge de première instance a conclu que les parties [TRADUCTION] « entendaient

as "my future wife", and she was viewed by the outside world as such (para. 33).

[150] The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

> Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

> After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

[151] While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) *Priority of the Family*

[152] There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career,

[se marier] pendant les premières années de leur relation de 12 ans » (par. 64). Monsieur Seguin a continué d'appeler M^me^ Vanasse [TRADUCTION] « ma future femme » et c'est ainsi que les autres la percevaient (par. 33).

[150] La juge de première instance a aussi fait référence à certaines déclarations de M. Seguin qui donnaient fortement à penser que lui-même estimait qu'il existait une coentreprise familiale. Comme l'a dit la juge de première instance au par. 28, après la vente de Fastlane,

> [TRADUCTION] M. Seguin est devenu riche. Il a affirmé à M^me^ Vanasse qu'ils n'auraient jamais à se préoccuper de leurs finances comme c'était le cas de leurs parents; leurs enfants pourraient fréquenter les meilleures écoles et ils pourraient mener une belle vie sans soucis financiers.

Et au par. 98 :

> [TRADUCTION] Après la vente de l'entreprise, M. Seguin a affirmé qu'ils pouvaient prendre leur retraite, que les enfants pourraient fréquenter les meilleures écoles et que la famille serait bien traitée. La famille a voyagé, roulé en voitures de luxe, acheté un grand bateau de croisière pour les vacances d'été ainsi que des condominiums à Mont-Tremblant.

[151] La juge de première instance était d'avis que, à cause des promesses et des paroles rassurantes de M. Seguin, M^me^ Vanasse s'attendait raisonnablement à profiter de l'augmentation de l'avoir net pendant la période d'enrichissement injustifié, mais à mon avis, ces remarques reflètent davantage le fait qu'il existait une coentreprise familiale à laquelle le couple a contribué conjointement pour leur bénéfice et le bénéfice de leurs enfants.

d) *Priorité accordée à la famille*

[152] Il y a de fortes raisons d'inférer des conclusions de fait que, à la connaissance de M. Seguin, M^me^ Vanasse s'est fiée sur la relation à son détriment. Comme l'a dit la juge de première instance, M^me^ Vanasse a renoncé, en 1997, à une carrière lucrative et excitante au SCRS, où elle était en formation pour devenir agente du renseignement, afin de suivre M. Seguin à Halifax. À bien des

gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence supporting the conclusion that the parties were, in fact, operating as a joint family venture.

[153] As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

égards, elle a fait un sacrifice : elle a quitté sa carrière, renoncé à son salaire et déménagé loin de sa famille et de ses amis. Monsieur Seguin s'était installé à Halifax dans le but d'y relocaliser Fastlane pour des raisons d'affaires. Madame Vanasse est donc restée à la maison et s'est occupée de leurs deux jeunes enfants. Comme je l'ai déjà expliqué, pendant la période d'enrichissement injustifié, M^me^ Vanasse assumait une part disproportionnée des travaux domestiques. Ce sont ces contributions domestiques qui ont permis, en partie, à M. Seguin de se concentrer sur son travail avec Fastlane. Plus tard, en 2003, la [TRADUCTION] « famille a décidé » que M^me^ Vanasse allait rester à la maison après la fin de son congé du SCRS (par. 198). La situation financière de M^me^ Vanasse au moment de leur rupture indique qu'elle s'est fiée sur la relation à son détriment économique. Tous ces éléments de preuve étayent la conclusion que les parties formaient, dans les faits, une coentreprise familiale.

[153] Enfin, je renvoie aux arguments de M. Seguin, qui ont été acceptés par la Cour d'appel, selon lesquels la juge de première instance n'a pas accordé l'importance qui convenait aux sacrifices faits par M. Seguin au bénéfice de la relation. Plus loin dans mes motifs, je vais aborder la question de savoir si la juge de première instance a effectivement commis une erreur à cet égard. Cependant, les points soulevés par M. Seguin pour appuyer cet argument servent en fait à renforcer la conclusion selon laquelle il existait une coentreprise familiale. Monsieur Seguin mentionne expressément un certain nombre de facteurs, y compris : accepter de démissionner de son poste de PDG de Fastlane en septembre 1997 pour se rendre plus disponible pour M^me^ Vanasse, créant ainsi des frictions avec ses collègues et ses partenaires et réduisant sa rémunération; accepter de déménager à Ottawa en 1998 à la demande de M^me^ Vanasse; et redoubler d'efforts pour travailler plus souvent à la maison et voyager moins souvent après le déménagement à Ottawa. Ces faits révèlent un accord mutuel dans la relation sociale et financière des parties. En résumé, ils appuient l'existence d'une coentreprise familiale.

(e) *Conclusion on Identification of the Joint Family Venture*

[154] In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

[155] The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

[156] I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

[157] Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

[158] The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that

e) *Conclusion sur l'existence de la coentreprise familiale*

[154] À mon avis, dans ses conclusions de fait, la juge de première instance montre clairement que M^me^ Vanasse et M. Seguin étaient engagés dans une coentreprise familiale. Il reste à savoir s'il y avait un lien entre les contributions de M^me^ Vanasse à la coentreprise et l'accumulation de la richesse.

(3) Lien avec l'accumulation de la richesse

[155] La juge de première instance a clairement conclu qu'il y avait un lien entre les contributions de M^me^ Vanasse et l'accumulation de la richesse familiale.

[156] J'ai déjà fait état, d'une manière assez détaillée, des conclusions de la juge de première instance à cet égard. Je reprends toutefois ses propos particulièrement clairs au par. 91 de ses motifs :

[TRADUCTION] Monsieur Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités [liées à l'entretien de la maison et à l'éducation des enfants]. Monsieur Seguin a tiré un avantage des efforts de M^me^ Vanasse, car il a été en mesure de concentrer son temps, son énergie et ses efforts sur Fastlane.

[157] Compte tenu de cette conclusion et d'autres semblables, je conclus que non seulement ces parties étaient engagées dans une coentreprise familiale, mais aussi qu'il y avait un lien clair entre la contribution de M^me^ Vanasse et l'accumulation de la richesse. Il convient donc de considérer qu'il y a enrichissement injustifié du fait que M. Seguin quitte la relation avec une part disproportionnée de la richesse accumulée grâce à leurs efforts conjoints.

(4) Calcul de l'indemnité

[158] Le pourvoi visait principalement à savoir s'il aurait fallu calculer l'indemnité en fonction du *quantum meruit*. Devant notre Cour, la façon dont la juge de première instance a déterminé la part proportionnelle de la richesse accumulée des parties a été très peu débattue. J'estime que l'approche

the trial judge's approach was reasonable in the circumstances, but I stress that I do not hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

[159] Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

[160] Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of

adoptée par la juge de première instance était raisonnable dans les circonstances, mais je souligne qu'il ne s'agit pas nécessairement d'un modèle à suivre. Selon les principes juridiques que j'ai exposés, il y a peut-être de nombreuses façons de quantifier raisonnablement une indemnité. Je préfère ne pas faire d'autres commentaires généraux sur le processus de quantification dans le contexte du présent pourvoi, sauf celui-ci. Dans la mesure où les bons principes juridiques sont appliqués, et que les conclusions de fait ne sont pas entachées d'une erreur manifeste et déterminante, la cour d'appel doit faire preuve d'une grande retenue envers l'appréciation des dommages-intérêts par un juge de première instance : voir, par exemple, *Nance c. British Columbia Electric Railway Co.*, [1951] A.C. 601 (C.P.). Il convient de faire preuve de la même retenue envers le jugement motivé et minutieux du juge de première instance quant à l'indemnité pécuniaire appropriée pour corriger un enrichissement injustifié. Il me faut aborder deux derniers points précis.

[159] Monsieur Seguin prétend, très brièvement, qu'une application juste de la méthode fondée sur la « valeur accumulée » commanderait que l'on fasse une analyse attentive afin de déterminer la valeur des contributions des tiers à la croissance de Fastlane pendant la période où il avait réduit ses propres contributions, à la suite de ce que l'avocat appelle les « exigences » de M^me^ Vanasse, qui voulait qu'il diminue ses heures de travail et qu'ils retournent à Ottawa. Cet argument postule qu'il n'avait pas à partager l'argent provenant de la vente avec M^me^ Vanasse. Je ne peux pas accepter ce postulat. La raison pour laquelle il a reçu plus que sa part à la vente de l'entreprise ou pour laquelle, ayant reçu plus qu'il ne le devait, M^me^ Vanasse n'a toujours pas droit à une part équitable de ce qu'il a reçu, demeure inexpliquée.

[160] Aussi, il y a la conclusion de la Cour d'appel selon laquelle la juge de première instance n'a pas pris en considération la preuve des nombreuses et importantes contributions non financières de M. Seguin au bien-être de la famille. Avec égards, je ne peux pas souscrire à cette conclusion. La juge de première instance a expressément mentionné ces

unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. *Disposition*

[161] I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The *Kerr* Appeal

A. *Introduction*

[162] When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr $315,000, holding that she was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr $1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

contributions dans ses motifs. En outre, en limitant la période d'enrichissement injustifié à une période de trois ans et demi, la juge de première instance a tenu compte des périodes pendant lesquelles les contributions de M^me^ Vanasse n'étaient pas disproportionnées par rapport à celles de M. Seguin. À mon avis, la juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de M. Seguin.

D. *Dispositif*

[161] Je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de la Cour d'appel et de rétablir l'ordonnance de la juge de première instance. L'appelante a droit à ses dépens dans toutes les cours.

V. Le pourvoi *Kerr*

A. *Introduction*

[162] Quand leur union de fait a pris fin après plus de 25 ans, M^me^ Kerr a intenté une action contre son ancien conjoint, M. Baranow, concluant à l'enrichissement injustifié, à l'imposition d'une fiducie résultoire et à l'octroi d'une pension alimentaire. Par une demande reconventionnelle, M. Baranow a cherché à faire reconnaître que M^me^ Kerr s'était injustement enrichie grâce aux services d'entretien ménager qu'il lui avait rendus entre 1991 et 2006, grâce aussi à la retraite anticipée prise pour lui apporter une aide personnelle. Le juge de première instance a accordé 315 000 $ à M^me^ Kerr, estimant qu'elle avait droit à ce montant par application de la fiducie résultoire (pour refléter sa contribution à l'acquisition de biens) et par application de la fiducie constructoire de nature réparatoire (comme réparation pour enrichissement injustifié). Il a également accordé à M^me^ Kerr une pension alimentaire mensuelle de 1 739 $, rétroactive à la date d'introduction de l'instance. Bien que le juge de première instance ait rejeté l'affirmation de M. Baranow selon laquelle M^me^ Kerr s'était injustement enrichie à ses dépens, les motifs du jugement et l'ordonnance rendue n'abordent pas par ailleurs la question de la demande reconventionnelle de M. Baranow.

[163] Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

[164] Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

(1) a resulting trust arose in her favour;

(2) she had unjustly enriched Mr. Baranow; and

(3) spousal support should begin as of the date she instituted proceedings.

[165] In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

B. *Overview of the Facts*

[166] The trial judge's disposition of both the resulting trust and unjust enrichment claims

[163] Monsieur Baranow a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que les demandes de M^me^ Kerr relatives à une fiducie résultoire et un enrichissement injustifié devaient être rejetées, que la demande de M. Baranow fondée sur l'enrichissement injustifié devait être renvoyée au juge de première instance pour qu'il tranche à nouveau la question et que l'ordonnance de pension alimentaire devait rétroagir à la date du premier jour du procès, et non à la date d'introduction de l'instance.

[164] Madame Kerr fait appel de cette décision et plaide que la Cour d'appel a commis une erreur en écartant les conclusions du juge de première instance selon lesquelles :

(1) une fiducie résultoire a été créée en sa faveur;

(2) M. Baranow s'est injustement enrichi grâce à elle;

(3) la pension alimentaire devait être versée à compter de la date d'introduction de l'action.

[165] À mon avis, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concerne la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de M. Baranow à la Cour suprême de la Colombie-Britannique. Cependant, j'estime qu'au lieu de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié, la cour d'appel aurait dû ordonner la tenue d'un nouveau procès. Les erreurs du juge de première instance n'étaient certes pas inoffensives, mais il est impossible de dire au vu du dossier, qui comprend des conclusions de fait clairement erronées, que la demande fondée sur l'enrichissement injustifié était vouée à l'échec si elle avait été analysée à l'aide du cadre juridique précisé ci-dessus. En ce qui concerne la date d'exécution de l'ordonnance alimentaire, je suis d'avis d'annuler l'ordonnance de la Cour d'appel et de rétablir l'ordonnance de première instance.

B. *Aperçu des faits*

[166] La conclusion du juge de première instance en ce qui concerne les allégations de fiducie

turned on his conclusion that Ms. Kerr had provided $60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this $60,000 of equity and assets consisted of three elements: her $37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

[167] The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

[168] The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However,

résultoire et d'enrichissement injustifié reposait sur le fait que M^me^ Kerr avait fourni des capitaux et des actifs d'une valeur de 60 000 $ au début de la relation. Ce fait, selon le juge de première instance, justifiait de lui accorder un tiers de la valeur de la maison qu'elle partageait avec M. Baranow au moment de la séparation. Selon le juge de première instance, ces capitaux et actifs de 60 000 $ englobaient trois éléments : 37 000 $ en valeur nette de la maison de la rue Coleman qu'elle a partagée avec son ex-époux; la valeur d'une automobile; et la valeur des meubles qu'elle possédait avant de rencontrer M. Baranow. Le juge de première instance n'a tiré aucune conclusion de fait précise à propos de la valeur des contributions non financières de M^me^ Kerr ou de M. Baranow. Comme je l'ai déjà dit, bien que le juge ait rejeté en une seule phrase la prétention de M. Baranow voulant que M^me^ Kerr se soit injustement enrichie à ses dépens, il n'a pas expliqué le fondement de cette conclusion. La demande reconventionnelle de M. Baranow n'a pas été considérée.

[167] Les conclusions de fait du juge de première instance doivent évidemment être acceptées à moins qu'elles ne soient entachées d'une erreur manifeste et déterminante. Cependant, en l'espèce, l'intervention de la Cour d'appel à l'égard de quelques-unes des principales conclusions du juge était justifiée parce que ces conclusions n'étaient pas étayées par le dossier. Je vais devoir étudier les faits, plus qu'il ne serait habituellement nécessaire, pour expliquer ma conclusion.

[168] Les parties ont commencé à habiter ensemble dans la maison de M. Baranow sur la rue Wall, à Vancouver, en mai 1981. Peu de temps après, ils ont déménagé dans l'ancien domicile conjugal de M^me^ Kerr sur la rue Coleman. Ils s'étaient rencontrés au port de Vancouver, leur lieu de travail, où elle occupait un poste de secrétaire et lui, un poste de débardeur. Madame Kerr était en instance de divorce. Aux termes de l'accord de séparation, elle a reçu l'intérêt de son mari dans leur ancienne résidence familiale de la rue Coleman, à North Vancouver, tous les meubles et une Cadillac

Ms. Kerr's ex-husband owed more than $400,000 and Ms. Kerr was guarantor of some of that debt.

[169] In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had two teenage children, was earning under $30,000 a year, and had no money to save the house.

[170] Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid $33,000 in cash to secure the property against outstanding debts, and guaranteed a $100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

[171] The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

[172] While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the $450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a $32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

[173] The Coleman Street property was sold in August 1985 for $138,000. This sale was at a considerable loss, taking into account the real estate

Eldorado 1979. Cependant, son ex-époux devait plus de 400 000 $ et M^me^ Kerr était garante d'une partie de cette dette.

[169] À l'été 1981, la maison de la rue Coleman faisait l'objet de procédures de forclusion et, selon la preuve, elle était sur le point d'être saisie le 29 juillet 1981. Madame Kerr a déclaré au procès que, à ce moment-là, elle avait deux adolescents, elle gagnait moins de 30 000 $ par année et elle n'avait pas d'argent pour conserver la maison.

[170] Madame Kerr a demandé à son avocat de céder la maison et la voiture à M. Baranow, lequel a payé 33 000 $ en argent pour protéger la maison contre les dettes impayées et a garanti un prêt hypothécaire de 100 000 $ à un taux de 22 pour cent. Il a ensuite commencé à faire les paiements hypothécaires, plus tard, il a refinancé l'hypothèque avec celle de sa maison de la rue Wall, et il a assumé lui-même cette nouvelle hypothèque.

[171] Le couple a vécu ensemble pendant les 25 années qui ont suivi, d'abord dans la maison de la rue Wall, puis dans celle de la rue Coleman, ensuite dans un appartement temporaire et enfin dans leur « maison de rêve » qu'ils ont fait construire sur le terrain de la rue Wall appartenant à M. Baranow.

[172] Quand les parties habitaient la maison de la rue Coleman (de septembre 1981 à décembre 1985), M. Baranow conservait le revenu de 450 $ par mois que lui procurait la location de sa maison de la rue Wall. Le juge de première instance a conclu que, bien que les parties aient toujours géré leurs finances personnelles séparément, il y avait une entente aux termes de laquelle M. Baranow payait les taxes foncières et les hypothèques des deux résidences, celle de la rue Coleman et celle de la rue Wall. Les hypothèques ont été entièrement remboursées avant juillet 1985. Cependant, M. Baranow a contracté un prêt hypothécaire de 32 000 $ pour la maison de la rue Wall en juillet 1985, qui a été remboursé avant août 1988.

[173] La maison de la rue Coleman a été vendue en août 1985 pour un montant de 138 000 $. Cette vente représentait une perte importante, compte

commission, the $33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

[174] The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between $97,000 and $105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid $350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house . . . even after the $32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was $942,500, compared with $205,000 in October of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

[175] In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an

tenu de la commission de l'agent immobilier, du montant de 33 000 $ payé par M. Baranow au moment du transfert, et des paiements hypothécaires qu'il a faits entre le transfert à l'été 1981 et la vente à l'été 1985.

[174] Les parties ont emménagé dans un appartement (d'août 1985 à octobre 1986) pendant la construction de leur « maison de rêve » sur la rue Wall. L'habitation existante a été démolie et remplacée. Monsieur Baranow a dépensé entre 97 000 $ et 105 000 $ pour la construction, plus les matériaux, la main-d'œuvre et les permis. Selon le juge de première instance, M^me^ Kerr s'occupait de la planification, de la décoration intérieure et du nettoyage. Elle a aussi semé du gazon, entretenu le jardin de fleurs et payé du lambris pour la chambre du sous-sol. De plus, elle a contribué à l'achat des meubles, des électroménagers et d'autres effets pour la maison de la rue Wall. Son fils payait un loyer mensuel de 350 $, montant que M. Baranow conservait. Dans un passage de ses motifs, le juge de première instance a affirmé que M^me^ Kerr payait [TRADUCTION] « toutes les dépenses du ménage et les assurances de la nouvelle maison [. . .] même après que [M. Baranow] eût remboursé l'hypothèque de 32 000 $ en août 1988 » (par. 24). Toutefois, ailleurs dans ses motifs, il a souligné que M^me^ Kerr payait les services publics et l'assurance et elle faisait « parfois le marché » (par. 36). Selon lui, M. Baranow payait les dépenses liées à la propriété, soit les taxes foncières (moins la prestation d'invalidité de M^me^ Kerr) et les frais d'entretien (qui étaient minimes dans la nouvelle maison). Le juge de première instance a conclu que la maison de la rue Wall valait 942 500 $, comparativement à 205 000 $ en octobre 1986. Il a ensuite conclu que, comme il n'y avait plus de paiements hypothécaires à faire après 1988, la part des dépenses de M^me^ Kerr [TRADUCTION] « a été probablement plus élevée » que celle de M. Baranow pendant environ 18 ans, jusqu'à ce qu'ils n'habitent plus ensemble.

[175] En 1991, M^me^ Kerr a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque, qui l'ont laissée paralysée du côté gauche et l'ont rendue inapte au travail. Sa santé s'est progressivement détériorée et la relation du couple est devenue

early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. *Analysis*

(1) The Resulting Trust Issue

[176] The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.

(a) *Gratuitous Transfer*

[177] The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly $133,000 was required to save the property (it was subject to a first mortgage of just under $80,000, a second mortgage of just under $35,000, a judgment in favour of the Bank of Montreal of just under $12,000, and other miscellaneous debts and charges, adding up to roughly $133,000). There was also a $26,500 judgment in favour of CIBC, which was of concern

de plus en plus tendue. Monsieur Baranow a pris une retraite anticipée en 2002. Le juge de première instance a reconnu que M. Baranow avait dit avoir pris sa retraite pour prendre soin de M^me^ Kerr, mais il a fait remarquer que cette retraite favorisait aussi M. Baranow. Selon le juge de première instance, M. Baranow a commencé à ressentir une certaine fatigue liée à son rôle d'aidant naturel et à chercher dès juin 2005 des solutions pour qu'elle reçoive des soins en établissement. L'été suivant, en août 2006, M^me^ Kerr a dû subir une chirurgie du genou. Après la chirurgie, M. Baranow a clairement indiqué au personnel hospitalier qu'il n'était pas prêt à la ramener à la maison. Madame Kerr a été transférée dans un établissement de soins prolongés où elle demeurait au moment du procès. Le juge de première instance a conclu que, dans les 18 derniers mois où M^me^ Kerr habitait la maison de la rue Wall, M. Baranow s'occupait de la majeure partie des tâches ménagères et lui prodiguait des soins personnels.

C. *Analyse*

(1) La question de la fiducie résultoire

[176] S'appuyant sur trois motifs, le juge de première instance est arrivé à la conclusion que M. Baranow détenait un tiers de la valeur de la maison de la rue Wall au titre d'une fiducie résultoire pour M^me^ Kerr. La Cour d'appel a conclu que chacun de ces motifs était erroné. Avec égards, je suis aussi de cet avis.

a) *Transfert à titre gratuit*

[177] Le juge de première instance a conclu que le transfert du titre de la maison de la rue Coleman à M. Baranow a été fait à titre gratuit, créant ainsi la présomption de fiducie résultoire en faveur de M^me^ Kerr. Au moment du transfert, il fallait environ 133 000 $ pour conserver la propriété (elle était grevée d'une première hypothèque d'un peu moins de 80 000 $ et d'une deuxième hypothèque d'un peu moins de 35 000 $, d'un jugement en faveur de la Banque de Montréal d'un peu moins de 12 000 $ et d'autres dettes et charges diverses, pour une dette totale d'environ 133 000 $). Il y avait aussi

to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to $15,000 of debt for which she had co-signed with her former husband.

[178] The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

[179] On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly $33,000 in cash, and guaranteed a $100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion that there was "no evidence" that Mr. Baranow's payment of $33,000 in cash and his guarantee of the $100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow

un jugement de 26 500 $ en faveur de la CIBC, qui préoccupait M^me^ Kerr, bien qu'il ne figure pas dans la liste des paiements à faire pour conclure le transfert. Nous savons que M^me^ Kerr était garante d'une partie des dettes de son ex-époux et qu'elle a fait faillite en 1983 relativement à une dette de 15 000 $ dont elle était cosignataire avec son ex-époux.

[178] La Cour d'appel a infirmé la décision du juge de première instance à propos de la fiducie résultoire, concluant que le transfert n'a pas été fait à titre gratuit. Elle a signalé les contributions et les responsabilités assumées par M. Baranow pour rendre le transfert possible, et a statué que la conclusion du juge de première instance à cet égard constituait une erreur manifeste et dominante.

[179] À cet égard, je partage l'opinion de la Cour d'appel. Nul ne conteste que M. Baranow a investi environ 33 000 $ en argent et a garanti un prêt hypothécaire de 100 000 $ pour éviter la saisie de la propriété par la banque. Cela constituait une contrepartie, et le transfert ne peut donc pas être raisonnablement considéré comme étant à titre gratuit. Selon l'intimé, il faudrait conclure le contraire en se fondant sur des arguments techniques à propos de l'absence de coïncidence précise entre le moment du transfert et des paiements et le fait que ceux-ci n'ont pas été faits directement à M^me^ Kerr, M. Baranow les ayant versés à ses créanciers. Ces arguments sont dénués de fondement. Un élément important de la conclusion du juge de première instance en ce qui a trait à l'existence d'une fiducie résultoire était le fait qu'il n'existait [TRADUCTION] « aucune preuve » selon laquelle le paiement en argent de 33 000 $ effectué par M. Baranow et sa garantie de l'hypothèque de 100 000 $ « étaient liés au transfert ou faisaient partie d'une entente entre les parties de sorte qu'ils constituaient une contrepartie au transfert » (par. 76). Si l'on fait abstraction pour le moment de la question de savoir si cette conclusion reflète bien la notion de transfert à titre gratuit, cette affirmation du juge est clairement erronée; il existait en effet de nombreux éléments de preuve en ce sens. Monsieur Baranow a affirmé que M^me^ Kerr lui avait [TRADUCTION] « demandé

"faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of $26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so." Thus, contrary to the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

[180] The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) *Ms. Kerr's Contributions*

[181] The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the

en pleurant » de l'aider à protéger la propriété des créanciers. L'avocat de M^me^ Kerr a noté dans sa lettre-rapport qu'elle avait l'impression de n'avoir d'autre choix que de céder la maison à M. Baranow [TRADUCTION] « compte tenu des lourdes dettes de [son] mari qui inclu[aient] un jugement en faveur de la CIBC pour une dette de 26 500 $ ». Au procès, on a demandé à M^me^ Kerr si elle avait demandé à M. Baranow de sauver la maison et elle a répondu : [TRADUCTION] « Je suppose. » Ainsi, contrairement à la conclusion du juge, de nombreux éléments de preuve indiquaient que M. Baranow avait remboursé les dettes et garanti l'hypothèque parce que la maison lui avait été transférée. La preuve montre qu'il a accepté le transfert et assumé les obligations financières à la demande de M^me^ Kerr, et aussi dans le but d'éviter que les créanciers saisissent la propriété.

[180] La Cour d'appel a eu raison d'intervenir sur ce point et de conclure que le transfert n'avait pas été fait à titre gratuit. L'imposition, par le juge de première instance, d'une fiducie résultoire sur le tiers de la valeur de la maison de la rue Wall pour cette raison ne peut donc être maintenue.

b) *Les contributions de M^me^ Kerr*

[181] Le juge de première instance a aussi fondé sa conclusion relative à l'existence d'une fiducie résultoire sur les contributions financières et non financières de M^me^ Kerr à l'acquisition de la nouvelle maison sur la rue Wall. Selon lui, M^me^ Kerr avait versé un total de 60 000 $: 37 000 $ en valeur nette provenant du transfert de la résidence de la rue Coleman à M. Baranow; une Cadillac d'une valeur de 20 000 $ aussi transférée à M. Baranow; et des meubles de la maison de la rue Coleman d'une valeur de 3 000 $. De plus, le juge de première instance a fait remarquer que, en obtenant le titre légal de la maison de la rue Coleman, M. Baranow était en mesure de [TRADUCTION] « réhypothéquer les deux propriétés pour une valeur de 116 000 $ et d'utiliser 16 000 $ pour acquérir la maison de la rue Wall » (par. 82). En outre, M. Baranow n'aurait pas pu rembourser les prêts hypothécaires aussi diligemment sans les contributions de M^me^ Kerr

extent of the resulting trust which he imposed on the Wall Street property.

[182] The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have $37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

[183] I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for $138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) *Common Intention Resulting Trust*

[184] The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

aux dépenses du ménage. Cependant, le juge de première instance n'a attribué aucune valeur à ces deux derniers points dans sa décision quant à la portée de la fiducie résultoire qu'il a imposée relativement à la maison de la rue Wall.

[182] La Cour d'appel a écarté cette conclusion au motif qu'elle n'était pas étayée par le dossier. Elle a fait remarquer que M^me^ Kerr ne détenait pas 37 000 $ en valeur nette de la maison de la rue Coleman au moment où M. Baranow en a acquis le titre, que M. Baranow n'a reçu aucun intérêt bénéficiaire dans le véhicule et qu'il n'y avait aucune preuve de la valeur des meubles.

[183] Je souscris à la façon dont la Cour d'appel a tranché ce point. Comme elle l'a souligné, la preuve démontrait que, outre le fait que M. Baranow a payé en argent et garanti une hypothèque, il a versé les paiements hypothécaires mensuels, a payé les taxes et les frais d'entretien de la maison de la rue Coleman jusqu'à ce qu'elle soit vendue en 1985 pour un montant de 138 000 $ (moins la commission de l'agent immobilier). Monsieur Baranow n'a reçu aucun intérêt bénéficiaire dans le véhicule et le juge ne s'est pas prononcé sur la valeur des meubles. En réalité, M^me^ Kerr n'a retiré de la maison de la rue Coleman aucune valeur nette lui permettant de contribuer à l'acquisition ou à l'amélioration de la maison de la rue Wall. Je suis d'avis de confirmer la conclusion de la Cour d'appel sur ce point.

c) *Fiducie résultoire fondée sur l'intention commune*

[184] Le juge de première instance semble aussi avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de M^me^ Kerr et de M. Baranow, de partager la propriété de la rue Wall. Pour les motifs que j'ai déjà exposés, la fiducie résultoire fondée sur « l'intention commune » n'a plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. J'estime qu'une fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété de la rue Wall sur la base de l'intention commune des parties.

(d) *Conclusion With Respect to Resulting Trust*

[185] In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

[186] The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of $315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

a. $37,000 equity in the Coleman Street property;

b. the automobile;

c. the furnishings;

d. $16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property;

e. $22,000 gained on the resale of the Coleman Street property;

f. household expenses and insurance paid on both properties;

g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue;

h. assistance with planning and decoration of the Wall Street house;

i. financial contributions towards the purchase of chattels for the new home;

j. a disability tax exemption;

d) *Conclusion relative à la fiducie résultoire*

[185] À mon avis, la Cour d'appel a eu raison d'écarter les conclusions du juge de première instance à l'égard des questions relatives à la fiducie résultoire.

(2) Enrichissement injustifié

[186] Le juge de première instance a aussi conclu que M. Baranow s'était injustement enrichi de 315 000 $ grâce à M^me^ Kerr, soit un tiers de la valeur de la maison de la rue Wall déterminée dans le cadre de l'analyse concernant la fiducie résultoire. Il était d'avis que M^me^ Kerr avait apporté les avantages suivants à M. Baranow :

a. une valeur nette de 37 000 $ dans la maison de la rue Coleman;

b. l'automobile;

c. les meubles;

d. 16 000 $ au titre du refinancement provenant du transfert de la maison de la rue Coleman et utilisés pour l'acquisition de la maison de la rue Wall;

e. 22 000 $ tirés de la revente de la maison de la rue Coleman;

f. les dépenses ménagères et les assurances liées aux deux résidences;

g. des services tels que les tâches ménagères, accueillir des invités et préparer les repas jusqu'à ce que l'invalidité de M^me^ Kerr l'empêche de continuer;

h. l'aide à la planification et à la décoration de la maison de la rue Wall;

i. les contributions financières à l'achat de biens pour la nouvelle maison;

j. une exemption d'impôt pour personnes handicapées;

k. approximately five years' worth of rental income from Ms. Kerr's son.

[187] Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

[188] The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no $60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses

k. l'équivalent du revenu de location du fils de M^me^ Kerr durant environ cinq ans.

[187] En ce qui concerne l'appauvrissement correspondant, le juge de première instance a souligné qu'il était [TRADUCTION] « peu probable » que M^me^ Kerr ait renoncé à une carrière ou à des possibilités de s'instruire pendant sa relation. De plus, son revenu est resté inchangé, même après son accident vasculaire cérébral, parce qu'elle touchait des prestations d'invalidité et d'autres avantages. Selon le juge, elle n'a pas eu à payer de loyer pendant toute la durée de la relation. Il est toutefois arrivé à la conclusion qu'elle avait subi un appauvrissement parce que, si elle n'avait pas investi la valeur nette de la maison de la rue Coleman, il était [TRADUCTION] « raisonnable d'inférer qu'elle l'aurait utilisée pour acheter un bien à son propre nom, investir pour elle-même, nourrir un intérêt personnel, ou autrement profiter d'une belle occasion d'affaires » : par. 92. Il a aussi conclu, sans plus d'explications, que les avantages qu'elle a tirés de la relation n'ont pas dépassé ses contributions.

[188] La Cour d'appel a écarté la conclusion du juge de première instance en ce qui concerne l'enrichissement injustifié. Elle a conclu que les contributions directes et indirectes de M. Baranow, grâce auxquelles M^me^ Kerr s'est enrichie et pour lesquelles il n'a pas été compensé, constituaient un motif juridique justifiant l'enrichissement, le cas échéant, de M. Baranow au détriment de M^me^ Kerr. Selon la Cour d'appel, pour les motifs exposés ci-dessus, M^me^ Kerr n'a pas versé une contribution de 60 000 $ et, par conséquent, sa demande reposait sur ses contributions indirectes. Toujours selon la Cour d'appel, le juge de première instance n'a pas évalué l'étendue des contributions directes et indirectes versées par M. Baranow à M^me^ Kerr, y compris : les frais d'hébergement qu'il a payés pendant toute la durée de la relation; sa contribution à l'acquisition de la fourgonnette que M^me^ Kerr possède toujours; le fait qu'elle a bénéficié de près de la moitié de son régime viager d'assurance-maladie des employés, pour payer ses soins de santé; le fait qu'il ait pris une retraite anticipée avec une prestation mensuelle réduite pour prendre soin de M^me^ Kerr; et le fait qu'il ait fourni d'importants services de soins personnels

permitted her to save about $272,000 over the course of the relationship.

[189] The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's $60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

[190] More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

[191] I will deal with these submissions in turn.

(a) *Findings of Fact Regarding the $60,000 Contribution*

[192] As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the

et des services domestiques sans compensation. De plus, la Cour d'appel est d'avis que le juge de première instance n'a pas pris en considération que le fait que M. Baranow a payé les frais de subsistance de M^me^ Kerr a permis à cette dernière d'économiser environ 272 000 $ au cours de la relation.

[189] L'appelante conteste la décision de la Cour d'appel pour deux raisons. Premièrement, elle soutient que la Cour d'appel a eu tort de modifier la conclusion de fait du juge de première instance relativement à sa contribution de 60 000 $. Deuxièmement, elle prétend que la Cour d'appel a eu tort d'examiner la question des avantages réciproques en fonction du motif juridique, et qu'elle n'a donc pas cherché à savoir globalement qui s'est enrichi et qui s'est appauvri. Sur ce dernier point selon M^me^ Kerr, il faudrait procéder à l'examen des avantages réciproques aux deux premières étapes de l'analyse de la question de l'enrichissement injustifié : l'enrichissement et l'appauvrissement correspondant. Une fois cette preuve faite, elle prétend que les attentes légitimes des parties peuvent être prises en considération dans le cadre de l'analyse de la question de savoir s'il y avait un motif juridique de l'enrichissement. L'essentiel, selon l'argument de l'appelante, est que le juge de première instance pouvait donc conclure que les parties s'attendaient légitimement à accumuler une richesse proportionnelle à leur revenu respectif; sans une part de la valeur de l'immeuble acquis pendant la relation, cette attente raisonnable ne peut se réaliser.

[190] Plus fondamentalement, l'appelante exhorte la Cour à adopter ce qu'elle appelle la « méthode fondée sur l'avoir familial » en matière d'enrichissement injustifié. Essentiellement, elle prétend que ses contributions lui permettaient de s'attendre raisonnablement à recevoir une part équitable des biens acquis pendant la relation.

[191] Je vais examiner chacune de ces prétentions.

a) *Conclusions de fait quant à la contribution de 60 000 $*

[192] Comme je l'ai déjà mentionné, la Cour d'appel avait raison d'écarter la conclusion du

appellant had contributed $60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) *Analysis of Offsetting Enrichments*

[193] On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) *The "Family Property Approach"*

[194] I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship.

juge de première instance selon laquelle l'appelante avait contribué à l'actif du couple pour une valeur de 60 000 $. De façon réaliste, il n'y avait aucune « valeur nette » provenant de la maison de la rue Coleman qui pouvait servir à l'acquisition de la nouvelle « maison de rêve » de la rue Wall. De plus, l'appelante a conservé l'usage bénéficiaire du véhicule et il n'y avait aucune preuve valable de la valeur des meubles. Les conclusions du juge sur ce point résultaient d'une erreur claire et déterminante.

b) *Analyse des enrichissements compensatoires*

[193] Sur ce point, je ne peux pas accepter les conclusions du juge de première instance ni celles de la Cour d'appel. Je le répète, dans sa décision au sujet de l'enrichissement injustifié de M^me^ Kerr, le juge de première instance n'a guère tenu compte des contributions de M. Baranow. Cependant, pour les raisons exposées précédemment, la Cour d'appel a commis une erreur en évaluant les contributions de M. Baranow dans le cadre de l'analyse du motif juridique; cette analyse a prématurément tronqué la preuve *prima facie* d'enrichissement injustifié de M^me^ Kerr. J'ai énoncé précédemment dans mes motifs la façon dont il convient d'aborder cette question. Comme j'estime qu'un nouveau procès doit être tenu relativement à l'allégation d'enrichissement injustifié de M^me^ Kerr et à la demande reconventionnelle de M. Baranow, il n'est pas nécessaire d'en dire plus. Les principes énoncés ci-dessus doivent donc s'appliquer lors du nouveau procès sur cette question.

c) *La « méthode fondée sur l'avoir familial »*

[194] J'aborde enfin l'argument de nature plus générale de M^me^ Kerr selon lequel il faudrait évaluer sa demande suivant une « méthode fondée sur l'avoir familial ». Comme je l'ai déjà dit, pour démontrer qu'elle a droit à une part proportionnelle de la richesse accumulée pendant la relation, M^me^ Kerr doit établir que M. Baranow s'est injustement enrichi à ses dépens, que leur relation constituait une coentreprise familiale et que ses contributions sont liées à l'accumulation de la richesse pendant

She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) *Disposition of the Unjust Enrichment Appeal*

[195] I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

[196] The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separately from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

[197] More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr

la relation. Elle devrait ensuite démontrer quelle proportion de la richesse accumulée conjointement correspond à ses contributions. Bien sûr, le juge de première instance et la Cour d'appel n'avaient pas accès à ce modèle clarifié. Cependant, ces exigences sont bien différentes de celles avancées par l'appelante, de sorte que sa « méthode fondée sur l'avoir familial » doit être rejetée.

d) *Décision sur la question de l'enrichissement injustifié*

[195] Je conclus que les conclusions du juge de première instance en matière d'enrichissement injustifié ne peuvent être maintenues. La question suivante est de savoir si, comme l'a jugé la Cour d'appel, il convient de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié ou de la renvoyer pour qu'elle fasse l'objet d'un nouveau procès. Bien qu'à contrecœur, j'estime que la dernière option est la plus équitable dans les circonstances.

[196] La première considération à l'appui d'un nouveau procès est que la Cour d'appel a ordonné l'audition de la demande reconventionnelle de M. Baranow. Comme le juge de première instance n'a malheureusement pas examiné cette demande de manière significative, l'ordonnance de la Cour d'appel sur ce point est inattaquable. Certains éléments de preuve indiquaient que M. Baranow a contribué de façon importante au bien-être de M^me^ Kerr de sorte que sa demande reconventionnelle ne peut simplement pas être rejetée. Comme je l'ai déjà dit, le juge de première instance a aussi mentionné diverses autres contributions financières et non financières apportées par M^me^ Kerr au bien-être et au confort du couple, mais il ne les a pas évaluées et les a encore moins comparées à celles de M. Baranow. Dans ces circonstances, il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle de M. Baranow séparément de celle de M^me^ Kerr.

[197] Fondamentalement, la demande de M^me^ Kerr n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale que

made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed Mr. Baranow to pay off the $116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at $942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

[198] In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

j'ai exposée. Même si l'on suppose que M^me^ Kerr a établi le bien-fondé de sa demande relative à l'enrichissement injustifié, il est impossible en l'espèce d'appliquer équitablement cette méthode d'analyse sur la base du dossier soumis à notre Cour. Peu de conclusions de fait sont pertinentes en ce qui concerne la question clé de savoir si la relation des parties constituait une coentreprise familiale. De plus, même si l'on était convaincu que la preuve permettrait de trancher la question de la coentreprise familiale, le dossier ne permet pas de décider si les contributions de M^me^ Kerr à une coentreprise familiale étaient liées à l'accumulation de la richesse et, le cas échéant, dans quelle proportion. Le juge de première instance a estimé que le fait qu'elle ait payé les dépenses du ménage et les assurances, en plus du « produit » tiré de la maison de la rue Coleman, ont permis à M. Baranow de rembourser le prêt hypothécaire de 116 000 $ sur les deux maisons avant juillet 1985. On peut donc dire que ses contributions étaient liées à l'accumulation de la richesse étant donné que la maison de la rue Wall était évaluée à 942 500 $ au moment du procès. Cependant, comme les conclusions du juge relatives à la valeur nette que possédait M^me^ Kerr dans la maison de la rue Coleman ne peuvent être maintenues, cette conclusion est considérablement minée. Pour à peu près les mêmes raisons, il est impossible au vu du dossier d'évaluer les contributions proportionnelles apportées à la coentreprise familiale. Bref, tenter de trancher sur le fond la demande de M^me^ Kerr fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présente trop d'aléas et des risques d'injustice.

[198] À cet égard, le pourvoi *Kerr* diffère nettement du pourvoi *Vanasse*. Dans *Vanasse*, un enrichissement injustifié a été admis et les conclusions de fait de la juge de première instance correspondent étroitement à la méthode d'analyse que j'ai proposée. Dans *Kerr*, bien que les conclusions ne semblent pas établir l'existence d'une coentreprise familiale ou un lien concomitant avec la richesse accumulée, il serait injuste d'arriver à cette conclusion sans donner aux parties la possibilité de présenter leur preuve et leurs arguments selon la méthode énoncée dans les présents motifs.

[199] Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

[199] Ainsi, bien qu'à regret, je suis d'avis d'ordonner la tenue d'un nouveau procès relativement à la demande de M^me^ Kerr fondée sur l'enrichissement injustifié et de confirmer l'ordonnance de la Cour d'appel prescrivant une audition de la demande reconventionnelle de M. Baranow.

(3) Effective Date of Spousal Support

(3) Date de prise d'effet de l'ordonnance alimentaire pour époux

[200] The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

[200] La dernière question est celle de savoir, comme l'a conclu la Cour d'appel, si le juge de première instance a commis une erreur en rendant en faveur de M^me^ Kerr une ordonnance alimentaire rétroactive à la date d'introduction de l'action plutôt qu'à la date du début du procès. À mon humble avis, la Cour d'appel a commis une erreur dans l'application des facteurs pertinents et n'aurait pas dû annuler l'ordonnance du juge de première instance.

[201] The trial judge found that the appellant's income in 2006 was $28,787 and the respondent's income was $70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of $1,304 to $1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

[201] Le juge de première instance a conclu qu'en 2006, le revenu de l'appelante était de 28 787 $ et que celui de l'intimé s'élevait à 70 520 $, sur le fondement de leur déclaration de revenus respective. Il a ensuite appliqué les Lignes directrices facultatives en matière de pensions alimentaires pour époux (« Lignes directrices ») pour arriver à une fourchette de 1 304 $ à 1 739 $ par mois. Il a accordé un montant se situant dans la partie supérieure de la fourchette pour que M^me^ Kerr soit en mesure de payer une chambre privée en attendant un lit subventionné dans un établissement approprié plus près de sa famille.

[202] The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective

[202] La Cour d'appel était d'accord avec le juge de première instance pour dire que M^me^ Kerr avait droit à une pension alimentaire compte tenu de la durée de la relation des parties, de son âge, de son revenu fixe et limité et de l'importance de son invalidité, qu'elle avait droit à une pension alimentaire qui lui permettrait d'avoir un mode de vie se rapprochant davantage de celui qu'avaient les parties quand elles vivaient ensemble. La Cour d'appel était aussi d'avis que le juge avait bien déterminé le montant de la pension alimentaire.

the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently making the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

Elle a toutefois conclu que le juge de première instance avait commis une erreur en ordonnant que la pension alimentaire soit rétroactive à la date à laquelle M[me] Kerr avait intenté les procédures. Elle a adressé au juge de première instance les reproches suivants : il a rendu l'ordonnance de façon automatique plutôt qu'en appliquant les principes juridiques pertinents; il n'a pas pris en compte le fait que, pendant la période transitoire, M[me] Kerr n'avait aucun besoin financier au-delà de ses moyens car elle résidait dans un établissement de soins de santé subventionné par le gouvernement et elle n'avait pas eu à puiser dans son capital; il n'a pas pris en compte le fait qu'elle n'avait pas demandé à M. Baranow de lui verser une pension alimentaire provisoire et qu'elle n'avait pas expliqué pourquoi elle n'avait pas demandé une telle pension; il a ordonné la rétroactivité de la pension alors que, vu l'absence d'une demande provisoire, on n'avait rien à reprocher à M. Baranow.

[203] The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

[203] L'appelante soutient que la décision d'établir un parallèle entre les principes se rapportant à la pension alimentaire pour le conjoint avec effet rétroactif et ceux se rapportant à la pension alimentaire pour enfants avec effet rétroactif a été prise sans aucun examen ou analyse juridique. Elle soutient également que le raisonnement de la Cour d'appel impose un fardeau trop lourd et inapproprié aux demandeurs, les obligeant essentiellement à présenter une demande de pension alimentaire pour conjoint provisoire, sous peine de perdre leur droit aux aliments. Enfin, elle affirme que dans le cas de la pension alimentaire rétroactive, il faut en droit faire une distinction selon que la pension est rétroactive à une date antérieure ou postérieure au dépôt de la demande, et que dans ce dernier cas, il est moins nécessaire que le juge fasse preuve de retenue. Je suis d'accord avec l'appelante quant aux deuxième et troisième prétentions.

[204] There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family*

[204] Il ne fait aucun doute que le juge de première instance pouvait accorder une pension alimentaire devant prendre effet à la date d'institution des procédures. Cela ressort clairement de

Relations Act, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

93 . . .

(5) An order under this section may also provide for one or more of the following:

. . .

(d) payment of support in respect of any period before the order is made;

[205] The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: definition of "spouse", s. 1(1)(b) of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

[206] I will not venture into the semantics of the word "retroactive": see *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *D.B.S.* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

[207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor,

l'al. 93(5)d) de la *Family Relations Act*, R.S.B.C. 1996, ch. 128, de la Colombie-Britannique (« *FRA* ») :

[TRADUCTION]

93 . . .

(5) Une ordonnance rendue aux termes du présent article peut aussi prévoir au moins un des éléments suivants :

. . .

d) le paiement d'une pension alimentaire pour toute période antérieure à l'ordonnance;

[205] L'appelante a demandé une pension alimentaire à compter de la date à laquelle son bref d'assignation et sa déclaration ont été délivrés et signifiés. Elle n'a pas demandé, et ne demande toujours pas, de pension alimentaire pour la période antérieure au début des procédures, ou pour une période pendant laquelle une autre ordonnance alimentaire était en vigueur. Je remarque qu'elle était légalement tenue de présenter une demande de pension alimentaire dans l'année suivant la fin de la cohabitation : définition d'[TRADUCTION] « époux », al. 1(1)b) de la *FRA*. Madame Kerr a présenté sa demande à peine plus d'un mois après la fin de la cohabitation des parties.

[206] Je ne me risquerai pas dans les débats sémantiques sur la définition du mot « rétroacti[f] » : voir *D.B.S. c. S.R.G.*, 2006 CSC 37, [2006] 2 R.C.S. 231, par. 2, 69-70; *S. (L.) c. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (C.A.), par. 55-57. Je préfère plutôt suivre l'exemple du juge Bastarache dans *D.B.S.* et examiner les facteurs pertinents qui entrent en jeu lorsqu'une demande de pension alimentaire est présentée relativement à une période antérieure à l'ordonnance.

[207] Bien que l'arrêt *D.B.S.* porte sur la pension alimentaire pour enfants plutôt que pour le conjoint, je souscris à l'opinion de la Cour d'appel selon laquelle des considérations semblables à celles exposées dans le contexte de la pension alimentaire pour enfants sont également pertinentes pour décider de l'opportunité d'une pension

the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era"

alimentaire « rétroactive ». Plus précisément, ces facteurs incluent les besoins du bénéficiaire, le comportement du débiteur, la raison du retard dans la présentation de la demande de pension alimentaire et tout préjudice que peut causer une pension rétroactive au conjoint débiteur. Cependant, dans les cas de pension alimentaire pour conjoint, ces facteurs doivent être examinés et soupesés à la lumière de principes et objectifs juridiques qui diffèrent de ceux de la pension pour enfants. J'aborde brièvement certaines de ces différences, mais sans les approfondir.

[208] La pension alimentaire pour le conjoint n'a pas le même fondement juridique que la pension pour enfants. La relation parent-enfant est une relation fiduciale de dépendance présumée et l'obligation du père et de la mère de subvenir aux besoins de leur enfant s'applique dès la naissance. En ce sens, l'enfant acquiert le droit aux aliments « automatiquement » et le père et la mère doivent privilégier les intérêts de leur enfant plutôt que les leurs au moment de négocier la pension et de la débattre en justice. Le droit aux aliments appartient à l'enfant, et non au parent qui demande la pension au nom de l'enfant, et le montant de base de la pension pour enfants en vertu de la *Loi sur le divorce*, L.R.C. 1985, ch. 3 (2^{e} suppl.), (ainsi que plusieurs lois provinciales en matière de pension alimentaire pour enfants) dépend maintenant du revenu du débiteur, et non d'une pondération hautement discrétionnaire des ressources et des besoins. Ces aspects de la pension alimentaire pour enfants apaisent quelque peu les préoccupations relatives à l'absence d'avis et au manque de diligence dans les demandes de pension alimentaire pour enfants. En ce qui concerne l'avis, le parent débiteur sait, ou devrait savoir, qu'il est tenu de payer des aliments proportionnellement à son revenu. En ce qui concerne le retard à agir, le droit aux aliments appartient à l'enfant et, par conséquent, c'est l'enfant, et non l'autre parent, qui subit un préjudice en raison du manque de diligence du parent demandant la pension : voir *D.B.S.*, par. 36-39, 47-48, 59, 80, 100-104. Par contre, le conjoint n'a aucun droit présomptif à la pension et, contrairement à la pension pour enfants, le conjoint n'est généralement pas tenu de protéger les intérêts

(2004-2005), 23 *C.F.L.Q.* 243, at pp. 281 and 291-92.

[209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).

[210] Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

[211] In *D.B.S.*, Bastarache J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175, at para. 24. While in my view, the decision

juridiques du conjoint séparé. Par conséquent, les préoccupations au sujet de l'avis, du retard et de la conduite répréhensible ont généralement plus de poids en ce qui concerne les demandes d'aliments pour conjoint : voir, par exemple, M. L. Gordon, « Blame Over : Retroactive Child and Spousal Support in the Post-Guideline Era » (2004-2005), 23 *C.F.L.Q.* 243, p. 281 et 291-292.

[209] Lorsque, comme en l'espèce, le débiteur se plaint de ce que la pension aurait pu être demandée plus tôt, mais ne l'a pas été, deux intérêts sous-jacents entrent en jeu. Le premier concerne la certitude des obligations juridiques du débiteur; la possibilité qu'une ordonnance s'applique rétroactivement complique la planification des finances personnelles et une forte ordonnance alimentaire « rétroactive » non prévue par le débiteur peut lui causer des difficultés financières. Le deuxième vise à inciter le demandeur à présenter sa demande promptement (voir *D.B.S.*, par. 100-103).

[210] Ni l'une ni l'autre de ces préoccupations n'a beaucoup d'importance en l'espèce. L'ordonnance était rétroactive à la date où les procédures visant à obtenir un redressement ont été intentées, et il n'y a eu aucune ordonnance provisoire pour un montant différent. L'introduction des procédures a clairement avisé le débiteur qu'une pension alimentaire était demandée et lui a permis de se préparer à l'éventualité qu'elle soit ordonnée. Il n'y a donc pas vraiment lieu de s'interroger sur la certitude des obligations du débiteur. Madame Kerr a poursuivi l'affaire avec diligence et, cela étant, il n'est pas vraiment nécessaire de mettre en place d'autres mesures propres à l'inciter, elle ou d'autres personnes dans sa situation, à procéder de façon plus diligente.

[211] Dans l'arrêt *D.B.S.*, le juge Bastarache a dit que la date de l'information réelle du parent débiteur devrait « généralement être retenue » comme étant, « de prime abord », la date d'application de l'ordonnance (par. 118, 121; voir également le par. 125). La Cour d'appel de l'Ontario a retenu la date de l'introduction de la demande de pension alimentaire pour conjoint comme étant la [TRADUCTION] « date de prise d'effet habituelle », en l'absence de toute raison de ne pas faire entrer l'ordonnance en

to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *D.B.S.*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

[212] Other relevant considerations noted in *D.B.S.* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example, concealing assets or failing to make appropriate disclosure: *D.B.S.*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *D.B.S.* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *D.B.S.* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

vigueur à cette date : *MacKinnon c. MacKinnon* (2005), 75 O.R. (3d) 175, par. 24. Bien que, à mon avis, la décision de faire rétroagir le versement des aliments doive résulter du pouvoir discrétionnaire exercé à la lumière des circonstances particulières, le fait que l'ordonnance soit demandée à compter de l'introduction de la demande sera souvent un facteur important à considérer pour savoir quelle importance accorder aux considérations pertinentes. Il importe de souligner que, dans *D.B.S.*, les quatre parties demandaient que les paiements de pension alimentaire pour enfants remontent à une période antérieure au dépôt de leurs demandes respectives; ce n'est pas le cas en l'espèce.

[212] Parmi les autres facteurs pertinents signalés dans *D.B.S.*, mentionnons le comportement du débiteur, la situation de l'enfant (ou, dans le cas d'une pension alimentaire pour conjoint, la situation du conjoint qui réclame une pension), et toute difficulté occasionnée par l'ordonnance. Le comportement en question doit avoir un lien quelconque avec l'obligation alimentaire, par exemple, dissimuler certains biens ou ne pas communiquer l'information de manière appropriée : *D.B.S.*, par. 106. L'examen de la situation du conjoint qui demande la pension, par analogie avec l'analyse exposée dans *D.B.S.*, se rattachera aux besoins du conjoint au moment où la pension aurait dû être versée et au moment présent. Les commentaires formulés par le juge Bastarache au par. 113 de *D.B.S.* s'adaptent facilement à la situation du conjoint qui demande une pension alimentaire : « [le conjoint] qui a connu des difficultés dans le passé peut obtenir réparation grâce à une ordonnance rétroactive. Par contre, une telle ordonnance est plus difficile à justifier dans le cas où [le conjoint] a bénéficié de tous les avantages qu'il aurait obtenus [de cette pension] ». En ce qui concerne les difficultés, il y a le risque qu'une ordonnance rétroactive ne tienne pas compte de ce que le débiteur peut se permettre et que cela nuise à la capacité du débiteur de gérer ses finances. Cependant, il est aussi essentiel de souligner que, dans *D.B.S.*, notre Cour a mis l'accent sur le besoin de souplesse et a considéré l'affaire dans sa globalité en fonction des faits de l'espèce; la même souplesse est appropriée dans le cas des pensions alimentaires pour conjoint « rétroactives ».

[213] In light of these principles, my view is that the Court of Appeal made two main errors.

[214] First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

[213] À la lumière de ces principes, j'estime que la Cour d'appel a commis deux erreurs principales.

[214] Premièrement, elle a commis une erreur en concluant que la situation de l'appelante était telle qu'elle n'avait pas besoin de soutien avant le procès. Le juge de première instance a conclu, et la Cour d'appel n'a pas contesté cette conclusion, que l'appelante avait droit à une pension alimentaire non compensatoire pour conjoint, dans la partie supérieure de la fourchette proposée dans les Lignes directrices, pour une période indéfinie. Le droit à la pension, le montant de celle-ci et la période indéfinie de l'ordonnance ne font pas l'objet du présent pourvoi. Il est clair que M^me^ Kerr avait besoin que l'intimé lui verse une pension alimentaire à la date où elle a introduit les procédures et qu'elle en avait toujours besoin lors du procès. La Cour d'appel a signalé à juste titre les facteurs pertinents, tels que son âge, son invalidité et son revenu fixe. Cependant, la Cour d'appel n'a pas expliqué de quelle façon la situation de M^me^ Kerr avait changé entre le début de l'instance et la date du procès et le changement ne ressort pas non plus clairement des conclusions de fait du juge de première instance. Si je comprends bien le dossier, un des objectifs de l'ordonnance alimentaire était de permettre à M^me^ Kerr d'avoir accès à une chambre privée pendant qu'elle attendait un lit subventionné dans un établissement convenable près de chez son fils. À compter de la date d'introduction des procédures jusqu'à la date du procès, elle habitait dans le pavillon Brock Fahrni qui se trouve dans un établissement de soins prolongés subventionné par le gouvernement et elle occupait une chambre avec trois autres personnes. À mon humble avis, elle avait besoin de soutien pendant toute cette période. Si, selon le raisonnement de la Cour d'appel, le besoin de M^me^ Kerr ne se ferait sentir qu'une fois qu'elle aurait sa chambre privée, sa décision de faire rétroagir l'ordonnance au premier jour du procès semble incompatible avec ce point de vue. La Cour d'appel n'a pas laissé entendre qu'il y avait une différence sur le plan des besoins qu'elle avait cette journée-là et ceux qu'elle avait au moment où elle a introduit les procédures. Elle n'a pas non plus indiqué que l'ordonnance alimentaire du juge de première instance causerait des difficultés financières à M. Baranow.

[215] Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

[216] Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

[215] Avec égards, la Cour d'appel a commis une erreur de principe en annulant l'ordonnance du juge qui prenait effet à la date d'introduction de la demande au motif que M^me^ Kerr n'avait aucun besoin pendant cette période, tout en confirmant les conclusions du juge se rapportant aux besoins de M^me^ Kerr dans une situation identique à celle qui existait au moment où la demande a été introduite.

[216] Deuxièmement, à mon avis, la Cour d'appel a eu tort de reprocher à M^me^ Kerr de ne pas avoir présenté une demande provisoire, lui attribuant de ce fait un retard déraisonnable dans le dépôt de la demande de pension alimentaire pour la période en question. Madame Kerr a introduit sa demande peu de temps après la séparation et, compte tenu du fait que le procès n'a débuté que treize mois plus tard, elle semble avoir poursuivi les procédures avec diligence. Monsieur Baranow avait donc reçu un avis clair de la pension alimentaire demandée et il aurait facilement pu demander conseil concernant l'étendue possible de sa responsabilité. Compte tenu des coûts financiers, matériels et affectifs élevés des requêtes interlocutoires, surtout pour une personne dont les moyens sont limités et qui souffre d'une invalidité importante comme M^me^ Kerr, j'estime qu'il était déraisonnable pour la Cour d'appel d'attacher des conséquences aussi graves au fait qu'une demande provisoire n'ait pas été présentée. À mon avis, la position adoptée par la Cour d'appel n'incite pas les parties à rechercher la communication de renseignements financiers, à poursuivre leurs réclamations avec diligence raisonnable et à restreindre au minimum les procédures interlocutoires. Le fait d'exiger des demandes provisoires risque de prolonger les procédures au lieu de les accélérer. L'argument de l'intimé fondé sur le fait qu'un critère juridique différent se serait appliqué à l'étape de la pension alimentaire provisoire est peu convaincant. Après un procès complet sur le fond, le juge de première instance est arrivé à des conclusions claires et maintenant incontestées quant au besoin de soutien en se fondant sur des circonstances qui n'avaient pas changé entre l'introduction de la demande et le procès.

[217] In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

[218] While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

[219] In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

D. *Disposition*

[220] I would allow the appeal in part. Specifically, I would:

a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;

b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;

c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a

[217] En résumé, M^me^ Kerr n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début du procès. Madame Kerr avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec l'intimé. Monsieur Baranow avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge mettait M. Baranow dans une situation financière difficile, de sorte que l'ordonnance était inappropriée.

[218] Bien qu'il soit regrettable que le juge n'ait pas expliqué pourquoi il faisait rétroagir l'ordonnance à la date d'introduction des procédures, les principes juridiques pertinents qui ont été appliqués aux faits qu'il avait constatés appuient le prononcé de cette ordonnance et la Cour d'appel a commis une erreur en décidant autrement.

[219] En somme, je conclus que la Cour d'appel a commis une erreur en annulant la partie de l'ordonnance alimentaire du juge qui couvrait la période écoulée entre l'introduction des procédures et le début du procès. Je suis d'avis de rétablir l'ordonnance du juge de première instance en donnant effet à la pension alimentaire pour conjoint au 14 septembre 2006.

D. *Dispositif*

[220] Je suis d'avis d'accueillir le pourvoi en partie. Plus précisément, je suis d'avis :

a. d'accueillir le pourvoi sur la question de la pension alimentaire et de rétablir l'ordonnance alimentaire du juge de première instance;

b. d'accueillir le pourvoi en ce qui concerne la décision de la Cour d'appel de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié et d'ordonner une nouvelle audition de cette demande;

c. de rejeter le pourvoi en ce qui concerne la demande de M^me^ Kerr relative à la fiducie

new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

[221] As Ms. Kerr has been substantially successful, I would award her costs throughout.

Appeal 33157 allowed in part with costs.

Appeal 33358 allowed with costs.

Solicitors for the appellant Margaret Kerr: Hawthorne, Piggott & Company, Burnaby.

Solicitor for the respondent Nelson Baranow: Susan G. Label, Vancouver.

Solicitors for the appellant Michele Vanasse: Nelligan O'Brien Payne, Ottawa.

Solicitors for the respondent David Seguin: MacKinnon & Phillips, Ottawa.

résultoire et l'ordonnance de nouvelle audition de la demande reconventionnelle de M. Baranow et de confirmer l'ordonnance de la Cour d'appel quant à ces questions.

[221] Comme M^{me} Kerr a eu gain de cause en bonne partie, je suis d'avis de lui accorder les dépens dans toutes les cours.

Pourvoi 33157 accueilli en partie avec dépens.

Pourvoi 33358 accueilli avec dépens.

Procureurs de l'appelante Margaret Kerr : Hawthorne, Piggott & Company, Burnaby.

Procureur de l'intimé Nelson Baranow : Susan G. Label, Vancouver.

Procureurs de l'appelante Michele Vanasse : Nelligan O'Brien Payne, Ottawa.

Procureurs de l'intimé David Seguin : MacKinnon & Phillips, Ottawa.

Tab 19

Kerry (Canada) Inc. v. DCA Employees Pension Committee

CITATION: Kerry (Canada) Inc. v. DCA Employees Pension Committee, 2007 ONCA 605
DATE: 20070907
DOCKET: C45720

COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and ROULEAU JJ.A.

BETWEEN:

KERRY (CANADA) INC.

Respondent (Appellant/
Respondent by way of cross-appeal)

and

ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R. FULLER, PAUL CARTER, R. A. VARNEY and BILL FITZ, being members of the DCA EMPLOYEES PENSION COMMITTEE representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.

Appellants (Respondents/
Appellants by way of cross-appeal)

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent (Respondent/
Respondent by way of cross-appeal)

Ronald J. Walker and Christine P. Tabbert for the appellant/respondent by way of cross-appeal.

Ari N. Kaplan and Clio M. Godkewitsch for the respondents/appellants by way of

cross-appeal.

Deborah McPhail and Mark Bailey for the respondent/respondent by way of cross-appeal.

Heard: January 10 and 11, 2007

On appeal from the judgment of the Divisional Court (Justice John G.J. O'Driscoll, Justice Peter G. Jarvis and Justice Anne M. Molloy) dated March 15, 2006, with reasons reported at (2006), 209 O.A.C. 21, and order dated May 31, 2006, with reasons reported at (2006), 213 O.A.C. 271.

COSTS JUDGMENT

GILLESE J.A:

[1] On June 5, 2007, this court released its reasons for decision in this matter in which it allowed the appeal and dismissed the cross-appeal. As explained in those reasons, this court held that neither Kerry nor the Committee was entitled to costs of the initial proceedings before the Tribunal. However, the parties were invited to make written submissions on what party or parties were entitled to costs of the appeals to the Divisional Court and to this court, from what source or sources, and on what scale. After considering those submissions, I would make the following orders in respect of costs.

Kerry (Canada) Inc.

[2] The Divisional Court ordered Kerry to pay costs to the Committee, on a partial indemnity basis, of $90,000 plus disbursements and GST, for the two appeals that it heard and decided. Given Kerry's success on the appeal and cross-appeal to this court, I would set aside the Divisional Court's costs order and award Kerry costs of the Divisional Court appeals on a partial indemnity basis. The fact that a number of the issues were novel and important and that their resolution benefitted the broader pension community augurs in favour of a modest award. Accordingly, I would fix those costs at $45,000, inclusive of disbursements and GST. As I explain below, in my view, those costs are properly payable by the Committee, rather than from the pension fund (the "Fund").

[3] Similarly, in light of Kerry's success, it is entitled to its costs of this appeal and cross-appeal on a partial indemnity basis. I see nothing in the appeal or cross-appeal that warrants costs being awarded on a substantial indemnity basis. Thus, I would further order that the Committee pay Kerry's costs of the appeal and cross-appeal. For the reasons given below, I would fix those costs at $40,000, inclusive of disbursements and GST.

The Committee

[4] The Committee submits that this court should order that its costs of the appeals to the Divisional Court and to this court be paid from the Fund, on a substantial indemnity basis.[1] It argues that the courts have "repeatedly" awarded costs from pension funds in situations similar to the present case, regardless of the degree of success of the parties.

[5] I accept that, pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43,[2] this court has the power to order costs from the Fund. However, when determining whether to exercise that power, I begin from the proposition that there is no special rule or presumption applicable to pension cases that entitles plan members to have pension litigation financed by the pension fund. This view is informed by the fact that there is a regulatory system in place that provides pension plan members with the opportunity to have concerns investigated with little risk that costs will be ordered against them. As I understand it, a request that the Superintendent examine a matter attracts no risk of a costs sanction. And, costs at the Tribunal level are not generally imposed absent "clearly unreasonable, frivolous or vexatious" behaviour by a party (see *Financial Services Tribunal Practice Direction on Costs Awards* (August 1, 2004)). In the present case, both the Superintendent of Financial Services and the Financial Services Tribunal scrutinized Kerry's impugned actions with no costs awards being made against any party.

[6] In determining whether to order the Committee's costs from the Fund, guidance can be taken from the approach followed in trusts litigation. That approach was well-summarised by Cullity J. in *Sutherland v. Hudson's Bay Co. Ltd.*, [2006] O. J. No. 2009 (S.C.J.) at para. 11:

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the

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[1] It was the Committee's position that Kerry should be awarded costs on the same basis.

[2] Section 131(1) reads as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

> rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settler who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund.

[7] In determining whether to award costs from a pension fund, courts in other jurisdictions[3] have relied on the following passage from *Re Buckton*, [1907] 2 Ch. 406 at 414 - 415:

> In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. …
>
> There is a second class of cases differing in form, but not in substance from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the

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[3] See, for example, *Canadian Assn. of Smelterand Allied Workers, Local 1 v. Garvin* (2001), 89 B.C.L.R. (3d) 29 (C.A.); *Patrick v. Telus Communications Inc.* (2005), 49 B.C.L.R. (4th) 74 (C.A.); and *White v. Halifax (Regional Municipality) Pension Committee* (2007), 252 N.S.R. (2d) 39 (C.A.).

> administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
>
> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation and order the unsuccessful party to pay the costs.

[8] For a number of reasons, I favour the approach articulated by Cullity J. (which I will refer to as the "pension trust approach"). I do not find the categories set out in *Buckton* to be particularly helpful in the pension trust context. There is significant overlap in the first two categories in *Buckton*. Both categories are based on the same public policy consideration, namely, that it is desirable that parties have access to the courts to ensure that trusts are properly administered. The only difference between the first two *Buckton* categories is in who brings the matter to court. In category one, the proceedings are brought by the trustee whereas in category two, they are brought by the beneficiaries.

[9] Furthermore, the third category in *Buckton* is problematic when dealing with pension trusts. To determine whether a matter falls within the third *Buckton* category, the court must decide whether the claims that have been advanced are adverse to other beneficiaries. While that determination is usefully made when considering traditional trusts, it is often irrelevant in pension trusts where there are numerous categories of beneficiaries, many with conflicting interests. For example, in a merged plan, one group of beneficiaries may claim full surplus entitlement based on historical plan language. Their claim is adverse to those of other classes of beneficiaries, such as those made by new employees or by employees who have been "imported" from the merging plan. But, if an issue arises as to the proper distribution of surplus, costs are properly payable from the trust fund as public policy dictates that the issue of entitlement be resolved before the

trust fund is distributed. The fact that the interests of one group of beneficiaries is adverse to those of other groups is irrelevant.

[10] By contrast, the two categories set out in the pension trust approach reflect different public policy reasons for granting costs from the trust fund. The first category reflects the public interest in ensuring that all trust funds, including those in which pension monies are held, are properly administered. If there is ambiguity about the rights of beneficiaries, those administering the pension fund are to be encouraged to bring the matter to the courts for direction so that when they perform, they do so in accordance with the law. By awarding costs from the pension trust fund, there is no penalty or disincentive to seeking such direction.

[11] That same public policy interest exists when direction is sought by the beneficiaries in pursuance of their right to compel due administration of the trust. To be meaningful, beneficiaries must be able to exercise that right without risk of costs consequences, so long as they act reasonably.

[12] The second category of court proceedings referred to in the pension trust approach are those proceedings taken for the benefit of all of the beneficiaries. As all beneficiaries stand to reap the benefits of such a proceeding, an award of costs from the trust fund is fair as all beneficiaries bear the cost of the proceedings.

[13] Under the pension trust approach, unless a court proceeding fits within one of those two categories, the usual civil litigation costs rules ought to apply.

[14] Using that approach, I now consider the Committee's claims.

[15] It will be recalled that the first category in the pension trust approach is litigation that is necessary to ensure that a trust is properly administered. Typically, the litigation is required to determine the rights of beneficiaries and arises as a result of ambiguity in the trust documents.

[16] At a general level, the present case could be said to be aimed at ensuring that the Fund was properly administered. And, clearly, interpretation of the pension and trust documents was essential to resolving this case. However, this litigation was not directed at having the courts determine the rights of beneficiaries. Compare it to the surplus cases – a classic example of pension litigation. Unlike the surplus cases, in which the courts' interpretation of plan documents is necessary to determine the rights of beneficiaries, this litigation arose because of the Committee's claim that Kerry was improperly administering the Fund by paying Plan expenses from it and taking contribution holidays in respect of the Part 2 members. This litigation was not about beneficiaries' rights; it was about the propriety of actions taken by those responsible for the administration of the Fund and its aim was to force the employer to make payments into the Fund to the benefit

of a limited group. In my view, the claims advanced were adversarial in nature; they were not directed at the interpretation of documents to ascertain beneficiaries' rights.

[17] In so concluding, I note that certain members of the Committee made the very decisions that were attacked in these proceedings. The record shows that those members had been senior members of the management team which had overall responsibility for administering the Plan. When the management team made the decisions to take contribution holidays and pay plan expenses from the Fund, it did so with the benefit of appropriate legal and actuarial advice and with the belief that the decisions were properly made. It was open to management to have applied to the court for advice and directions at the time such actions were being contemplated, had there been serious concern about the legality of such actions.

[18] These comments are not intended to suggest that costs ought never to be awarded from a trust fund in "after-the-fact" proceedings. Nor are they intended as a criticism of any members of the Committee. I make these observations to assist in explaining why I see the proceedings as adversarial rather than as being directed at the due administration of the Fund.

[19] Whether litigation is adversarial or directed at the due administration of a trust is critical in deciding whether to order costs from the trust fund because, where the matters in issue are truly administrative, there is no unfairness in ordering costs from the pension fund. Costs in those circumstances are a legitimate expense of ensuring that the fund is properly administered.

[20] Where the litigation is adversarial, however, there is an inherent unfairness in ordering costs from the Fund because it results in less money being in the Fund and, therefore, available for the benefit of all plan members. That unfairness is compounded in the present case because the pension plan is ongoing. As the employer and plan sponsor, Kerry is responsible for the Fund's solvency. If costs are paid from the Fund, Kerry may be required to contribute more in future than it might otherwise have been required to pay. If that occurred, Kerry, the successful litigant, would be paying the costs of the unsuccessful litigants. That does not accord with our basic notions of fairness in the adversarial litigation process.

[21] The second category of cases in which costs are awarded from a trust fund is where the claims can reasonably be considered to have been advanced for the benefit of those beneficially interested in the trust. In my view, the Committee's claims do not fall within this category either.

[22] Two considerations lead me to this conclusion. First, the Committee did not bring the proceedings on behalf of all of the Fund beneficiaries. Indeed, as discussed in the reasons for decision, there is no evidence of the level of support that the Committee had

from the Plan membership. Further, the central thrust of the Committee's position throughout the litigation was that a second pension plan and fund had been established. Had the Committee been successful, Kerry would have been required to pay money into the original fund which, on the Committee's view, was to be held for the benefit of a particular class of plan beneficiaries, namely, the Part 1 members. Thus, contrary to the Committee's contention, its claims were not brought for the benefit of all those beneficially interested in the Fund.

[23] As the Committee's claims do not fall within either category, I would apply the usual costs rules in respect of civil litigation and order the Committee to pay Kerry its costs on a partial indemnity basis. In determining the quantum, I again note that a number of the issues were novel and important and that resolution benefitted the broader pension community. A competing consideration, however, is that the proceedings were protracted by virtue of the position the Committee took on the cross-appeal. The law governing the contribution holiday issue raised on the cross-appeal was well-known. Its application was straightforward and acknowledged as such by the Tribunal and the Divisional Court. While the Committee was entitled to pursue that issue, the reasonableness of its position on all issues is a factor that must be taken into consideration.

[24] After balancing all of the relevant considerations, in my view, awarding costs Kerry of the appeal and cross-appeal, fixed at $40,000, all inclusive, is fair and reasonable.

The Superintendent

[25] As the Superintendent made no claim for costs and no claim was advanced against him, I would make no order as to costs in respect of the Superintendent.

DISPOSITION

[26] Accordingly, I would order costs to Kerry payable by the Committee fixed at $45,000, all inclusive, in respect of the Divisional Court appeals and $40,000, all inclusive, in respect of the appeal and cross-appeal to the court.

RELEASED: September 7, 2007 ("JL")

"E. E. Gillese J.A."
"I agree John Laskin J.A."
"I agree Paul Rouleau J.A."

Tab 20

Lima v. Kwinter
[2019]

Lima v. Kwinter

Ontario Judgments

Ontario Superior Court of Justice

C. Petersen J.

Heard: January 28, 29, 31 and February 1, 2019.

Judgment: July 3, 2019.

Court File No.: 678/16

[2019] O.J. No. 3683 | 2019 ONSC 4064 | 96 C.C.L.I. (5th) 273 | 2019 CarswellOnt 11338

Between David Lima, Client/Applicant, and Alfred M. Kwinter, Alfred Kwinter Professional Corporation and 1736314 Ontario Inc., carrying on business as Singer Kwinter, Solicitors/Respondents

(204 paras.)

Case Summary

Legal profession — Barristers and solicitors — Compensation — Measure of compensation — Quantum meruit — Application by the clients for assessment of a solicitor's account — Clients retained the respondent law firm to represent them in an action against their insurance company and broker after a fire loss — Action was settled prior to trial — Respondents billed a total of $349,460 in fees — Contingency fee agreement was found to be unlawful — Solicitors were entitled to bill fees of $328,546, equivalent to 25 per cent of the claims paid by the defendants.

Professional responsibility — Self-governing professions — Professions — Legal — Barristers and solicitors — Application by the clients for assessment of a solicitor's account — Clients retained the respondent law firm to represent them in an action against their insurance company and broker after a fire loss — Action was settled prior to trial — Respondents billed a total of $349,460 in fees — Contingency fee agreement was found to be unlawful — Solicitors were entitled to bill fees of $328,546, equivalent to 25 per cent of the claims paid by the defendants.

Application by the clients for assessment of a solicitor's account. The clients retained the respondent law firm to represent them in an action against their insurance company and broker relating to losses arising from a fire that destroyed their home in 2011. Amounts in excess of $4,000,000 were involved in the litigation. The parties entered into a contingency fee agreement which was unenforceable and invalid. The clients' action was settled prior to trial. The respondents billed a total of $349,460 in fees. The clients sought a substantial reduction in fees.

HELD: Application allowed.

The solicitors were entitled to bill fees of $328,546, equivalent to 25 per cent of the claims paid by the defendants. This percentage took into consideration the significant monetary value of the matters in issue and their importance to the client, the very substantial amount of time reasonably expended by the solicitors on the file, the high degree of skill and competence demonstrated by the solicitors, the risk of non-payment assumed by the solicitors, the excellent results achieved by the solicitors, the client's ability to pay and the amount that the client could reasonably have expected to pay in the circumstances. It also took into consideration the fact that the claims were settled prior to trial and prior to completing full trial preparation. The steps taken to advance the litigation were appropriate and reasonable. The court rejected the client's allegation that the solicitors failed to follow client instructions or that the solicitors' account should be reduced due to lack of skill or competence. Given the substantial risk assumed by the

solicitors, it would be inequitable to compensate the solicitors in this case on an hourly basis for the services they provided on a percentage contingency fee basis.

Statutes, Regulations and Rules Cited:

Solicitors Act *R.S.O. 1990, c.S.15, s. 28.1*(8), s. 28.1(9)

Counsel

Grace Maitland-Carter, for the Client/Applicant.

Alfred Kwinter, for the Solicitors/Respondents.

REASONS FOR JUDGMENT

C. PETERSEN J.

INTRODUCTION

1 This Application is for an assessment of a solicitors' account.

2 In July 2011, the Applicant, David Lima and his then common law spouse, Martha Hildebrandt ("the clients") retained the Respondent law firm, Singer Kwinter to represent them in connection with an action against their insurance company and their insurance broker. Their claims related to losses arising from a fire that destroyed their home in February 2011.

3 The parties entered into a contingency fee agreement. The agreement provided that the solicitors' fees would include partial indemnity costs obtained from the defendants, in addition to a percentage of all damages recovered from the defendants. Subsection 28.1(8) of the *Solicitors Act*, *R.S.O. 1990, c.S.15* stipulates that "a contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising from an award of costs or costs obtained as part of a settlement", unless prior judicial approval of the costs portion of the agreement is obtained. The parties did not seek judicial approval of the costs portion of their agreement.

4 The clients were not aware of the restrictions imposed by the *Solicitors Act* when they entered into the contingency fee agreement. Singer Kwinter was aware of the statutory requirements, but it regularly entered into such agreements with its clients without complying with s.28.1(8) of the Act. The evidence adduced during the assessment hearing suggests that this was a common practice among plaintiff-side personal injury law firms across the province up until the Divisional Court ruled in December 2015 that a class action could be certified against a law firm that had acted for numerous clients under contingency fee agreements that did not comply with the provisions of s.28.1(8) of the *Solicitor's Act*: *Hodge v. Neinstein*, *2015 ONSC 7345* (Div.Ct.), upheld *2017 ONCA 494* (Ont.C.A.).

5 The clients' action was settled prior to trial. The claim against the broker was resolved in May of 2015 and the claim against the insurer was resolved in June of 2015. Singer Kwinter billed the two claims separately, for a total of $349,460.57 in fees, plus HST, plus disbursements. The fees were calculated pursuant to the unlawful contingency fee agreement and were paid, as were disbursements, directly from the settlement funds.

6 Mr. Lima served Singer Kwinter with a Notice of Assessment almost one year after the accounts were paid. He sought reimbursement of the fees charged by Singer Kwinter on the basis that the contingency fee agreement was unlawful and unenforceable. Alternatively, he sought return of the costs portion of the fees charged.

7 The matter came before an assessment officer but was transferred to the Superior Court of Justice because of the legal issues pertaining to the validity of the contingency fee agreement.

8 Mr. Lima's Superior Court Application was initially scheduled for a two day hearing commencing on November 15, 2018. The parties appeared before Justice Lemon on that date. Singer Kwinter conceded that the contingency fee agreement was unenforceable pursuant to s.28.1(9) of the *Solicitor's Act*, but took the position that it was nevertheless entitled to retain all of the fees billed on a *quantum meruit* basis.

9 In the *Neinstein* case, the Divisional Court held (at para.81) that a law firm is not necessarily disentitled from recovering any fees for services rendered to a client simply because the firm's contingency fee agreement is found to be unenforceable. The solicitors may be able to establish another basis for compensation. An assessment can therefore be directed.

10 The Divisional Court in *Neinstein* held that a law firm may be entitled to bill fees on a *quantum meruit* basis or may be entitled to retain the portion of fees based on the percentage of damages, excluding any portion of the fees attributable to costs. The Court remarked, however, that the latter option may not constitute fair compensation for solicitors in cases where the percentage fee taken was low in relation to the amount of costs. On appeal, the Court of Appeal did not interfere with these findings: *Neinstein*, ONCA, at paras.126-128.

11 In this case, Justice Lemon directed an assessment of Singer Kwinter's account. In his Endorsement dated November 15, 2018, he identified the issue to be adjudicated as "a determination of the *quantum meruit* value of the Singer Kwinter retainer". He noted that there is no issue regarding Singer Kwinter's entitlement to the disbursements listed in its account. He adjourned the hearing to the next court sittings in January 2019 because he anticipated that the assessment would require more than two days.

12 The *quantum meruit* assessment hearing was conducted by me on four days in late January and early February 2019.

PARTIES' POSITIONS

13 Mr. Lima seeks a substantial reduction in Singer Kwinter's fees. He argues that the entire costs portion of the fees (at least $150,000 from the Halwell settlement) should be reimbursed to him and that the remaining fees should be reduced by more than $60,000 because of unnecessary duplication of time, double billing and other factors discussed below. He requests an order for the excess fees to be paid to him.

14 Singer Kwinter takes the position that the total of its fees is fair and reasonable. It argues that no monies should be returned to Mr. Lima. In the alternative, Singer Kwinter argues that if the court reduces its fees, only 2/3 of the reduction should be paid to Mr. Lima because Ms. Hildebrandt was responsible for 1/3 of the fees. Ms. Hildebrandt did not complain about the amount of fees and did not participate in the assessment hearing.

ANALYTICAL FRAMEWORK

15 Singer Kwinter bears the onus of demonstrating the value of the legal services rendered. In *Cohen v. Kealey & Blaney*, *[1985] O.J. No.160*, at para.11, the Ontario Court of Appeal set out the following factors for consideration when assessing a solicitor's account on a *quantum meruit* basis:

(a) the monetary value of the matters in issue;

(b) the importance of the matter to the client;

(c) the time expended by the solicitor;

(d) the legal complexity of the matters to be dealt with;

(e) the degree of skill and competence demonstrated by the solicitor;

(f) the degree of responsibility assumed by the solicitor;

(g) the results achieved;

(h) the ability of the client to pay; and

(i) the client's expectation as to the amount of the fee.

16 In order to provide context for consideration of these factors, I will first summarize the facts that gave rise to the litigation for which Singer Kwinter rendered the disputed accounts, the steps in the litigation, the terms of settlement, and the manner in which the solicitors' accounts were billed and paid.

FACTS

Background Facts

17 Mr. Lima owned a large tract of land in Arthur, Ontario. The land was divided into three parcels. The first parcel was rented to a farmer. That property was mortgaged, but generated a modest annual income. The second parcel contained a two-story dwelling occupied by tenants. It was also mortgaged, but the rental income covered the mortgage payments.

18 Mr. Lima had constructed a luxury home on the third parcel, where he resided with Ms. Hildebrant. The house had multiple bedrooms, several bathrooms and an indoor swimming pool. The home was furnished with the belongings of both Mr. Lima and Ms. Hildebrandt. There was also a hanger on the property, where Mr. Lima stored boats, ATVs, airplanes and vintage cars that he bought and sold over the internet. Revenues from these sales constituted his primary source of income.

19 Mr. Lima and Ms. Hildebrandt had two mortgage loans registered against title to the third parcel of land. The first mortgage was held by the Toronto Dominion Bank and the second was held by Ellas Holdings Inc.

20 In late February 2011, a fire occurred on the third parcel of land. Independent investigations by the Fire Marshall's office and by a forensic engineering firm retained by Mr. Lima both concluded that there were two points of origin to the fire and that it was incendiary in nature. The fire was not accidental; it was the result of an intentional act of arson. No suspect was ever arrested.

21 The fire destroyed the buildings on the property and all of their contents. The clients were insured by Halwell Mutual Insurance Company under a policy obtained by Mr. Lima. The policy had been brokered by Ostic Insurance Brokers Ltd.

22 The Halwell insurance policy covered a maximum of $2,546,800 for the dwelling, $127,340 for debris and demolition, $254,680 for private structures, $1,1782,760 for personal property and $509,360 for additional living expenses. These policy limits were insufficient to indemnify the full extent of the fire losses that Mr. Lima and Ms. Hildebrandt claimed to have sustained. The limits were for less than the replacement value of the home and contents. Some of their belongings were specialty items not insured under the policy. Mr. Lima blamed Ostic for these deficiencies in the insurance coverage.

23 After the fire was reported by Mr. Lima, Halwell provided him with an interim payment of $10,000, but it subsequently refused to make any further payments on account of the fire loss because it suspected that Mr. Lima had deliberately set the fire.

24 Mr. Lima and Ms. Hildebrandt submitted sworn Proof of Loss claims to Halwell, requesting payment for the loss of the dwelling, private structure and contents and also for additional living expenses. All of their claims were denied by Halwell on the basis of alleged arson and on the basis that the claims were exaggerated.

25 Mr. Lima retained David Leblanc from National Fire Adjustment ("NFA") to complete a valuation of the property.

26 The Halwell insurance policy contained a standard mortgage clause protecting the mortgagees in the event of property loss (i.e., a clause obligating Halwell to pay mortgagees the principal balance of any mortgages charged against titled at the time of property loss, even in circumstances where the insured has breached the policy). At the time of the fire, approximately $1,170,000 was outstanding on the TD mortgage and $500,000 was outstanding on the Ellas mortgage. Mr. Lima took steps to have Halwell pay the balance of these mortgage loans, but Halwell initially refused to do so.

27 All of Mr. Lima's mortgages were in good standing at the time of the fire, but he stopped making payments on all of them after he was advised of Halwell's denial of his claim. Interest, late payment charges and penalty fees accumulated on the loans.

28 Halwell eventually paid Ellas the sum of $500,000 in or about February 2012, approximately one year after the fire. An amount in excess of $90,000 remained outstanding on the Ellas mortgage loan because Halwell was only obligated to pay the balance owing as of the date of the fire loss.

29 In December 2012, almost two years after the fire, Halwell paid $1,176,850.99 to TD. An amount of $55,000 remained outstanding on the TD mortgage loan after the insurance proceeds were paid. Halwell's delay in paying the balance of the mortgage combined with Mr. Lima's default on the mortgage payments had resulted in the accumulation of $55,000 in interest charges and fees.

30 When Mr. Lima defaulted on the mortgages on his other two properties, the mortgagees foreclosed on the mortgages and both properties were sold under power of sale.

Retainer Agreement

31 Mr. Lima and Ms. Hildebrant met with lawyers Jason Singer and Alfred Kwinter for the first time in July 2011. At that time, Mr. Lima retained Singer Kwinter to make claims on his behalf against both Halwell and Ostic. He paid an initial retainer in the amount of $5,000, to be used in preparation for an examination under oath requested by Halwell. The examination never took place and those retainer funds were held in trust by the law firm.

32 During their first meeting, Mr. Lima entered into a verbal contingency fee agreement according to which Singer Kwinter's fee would amount to 1/3 of all sums payable to him by the defendants with respect to the claims, including prejudgement interest, special damages, costs and HST, in addition to all disbursements incurred. Singer Kwinter agreed to consider reducing its fee if the matter was resolved quickly or if Mr. Lima's recovery was in excess of $1-2 million.

33 Mr. Lima subsequently corresponded with Mr. Singer, the lawyer who had primary carriage of the file, and expressed a concern that the terms of the retainer agreement were unfair and unduly favourable to the firm. Mr. Singer, on behalf of the firm, agreed to revise the terms of the retainer.

34 Mr. Lima and Ms. Hildebrand both signed a revised retainer agreement on September 13, 2011. They entered into a contingency fee agreement with Singer Kwinter, whereby the solicitors' fee would be calculated as follows: 20% of all claims paid to them by the defendants up to the sum of $500,000, 10% of all claims paid to them by the defendants in excess of $500,000, plus partial indemnity costs paid by the defendants and any disbursements incurred.

35 As discussed earlier in these reasons, the revised contingency fee agreement does not comply with s.28.1(8) of the *Solicitor's Act* and is therefore unenforceable. It is, however, the agreement under which the litigation proceeded, pursuant to which the law firm assumed substantial risk and according to which Mr. Lima's expectations were established.

Litigation

36 Singer Kwinter issued a Statement of Claim on behalf of the clients on October 26, 2011. The claims against Halwell included damages in the amount of $5,220,664 for breach of contract and punitive and aggravated damages in the amount of $250,000 for mental distress and breach of the insurer's duty of good faith. The clients' claim against Ostic was for damages in the amount of $2,000,000 for negligence and/or breach of contract.

37 Ostic filed a Statement of Defence on January 16, 2012.

38 Halwell filed a Statement of Defence and Counterclaim on January 26, 2012. It pleaded that the clients had either deliberately set the fire or had caused the fire to be set, either individually or jointly. It also pleaded that the clients had exaggerated the value of their claim and had therefore forfeited their right to claim under the insurance policy. Halwell counter-claimed for damages in the amount of $1,700,000 on the basis that it was contractually obligated to pay all amounts owing as of the date of loss on the mortgages held by TD and Ellas.

39 Singer Kwinter, on behalf of the clients, filed a Statement of Defence to Halwell's counter-claim on February 8, 2012.

40 An appraisal process was undertaken because Halwell disputed the amounts claimed by the clients in their Proofs of Loss. With respect to the contents claim, the clients estimated that the replacement cost of their personal property was $3,149,520. They estimated the actual cash value to be $2,677,092. They therefore made a claim under the policy for the maximum amount of $1,782,760. The insurer took the position that these estimates were inflated. In May 2013, the Appraisal Tribunal Umpire awarded an actual cash value of only $827,499 and replacement cost of $1,376,001, inclusive of taxes.

41 With respect to their dwelling, the Appraisal Tribunal Umpire awarded an actual cash value of $3,201,000 and replacement cost of $3,300,000. These amounts were roughly the same as the clients had claimed.

42 Ellas issued a Statement of Claim against Mr. Lima and Ms. Hildebrandt on February 27, 2012. It claimed $91,395.48, plus pre-judgement interest at the rate of 12%, for late payments, interest and charges resulting from their default on the second mortgage (the balance of the principal having been paid by Halwell).

43 On March 8, 2012, Singer Kwinter filed, on behalf of the clients, a Statement of Defence to Ellas's claim and a Third Party Claim against Halwell in the Ellas action.

44 MCF Investments Inc. held the mortgage on Mr. Lima's farm land. There was a shortfall after MCF sold that property by power of sale. MCF served Halwell with a notice of garnishment, seeking payment of approximately $110,000.

45 TD Bank held the mortgage on Mr. Lima's other parcel of land where the tenants resided. On July 31, 2012, TD issued a Statement of Claim against Mr. Lima and Ms. Hildebrandt, claiming $398,240.67 in connection with a default on the payments owed toward that mortgage loan. The clients did not defend that action.

46 Mr. Lima and Ms. Hildebrand were also sued by an acquaintance named Stirling Fisher, who commenced an action against them on August 8, 2013 for $62,528.09. Mr. Fisher had loaned the clients $45,000 for a one year term in May 2010, at an interest rate of 53% annually. The loan was secured against a 2006 Ford Mustang and a

Richard Schaller Searey Aircraft owned by Mr. Lima. The Ford Mustang was destroyed in the fire and the auto insurance proceeds were given to Mr. Stirling, but a substantial amount of money was still outstanding on the loan.

47 On August 30, 2013, Singer Kwinter filed on behalf of the clients a Statement of Defence to Mr. Fisher's claim. The clients pleaded that $12,000 from auto insurance proceeds for the Ford Mustang had been provided to Mr. Fisher in partial satisfaction of the loan and that Mr. Fisher had agreed to await re-payment of the balance of the loan, without charging interest, until their dispute with Halwell was resolved.

48 Singer Kwinter did not enter into any additional retainer agreements with Mr. Lima or Ms. Hildebrandt in connection with the Ellas, Fisher, TD or MCF matters.

Settlements and Solicitors' Accounts

49 The clients' negligence action against the broker Ostic settled in early May 2015. Ostic agreed to pay Mr. Lima and Ms. Hildebrand $150,000 all inclusive, which they accepted in full and final resolution of their claim.

50 Singer Kwinter calculated its fee for the Ostic settlement at $50,000, plus HST of $6,500, exclusive of disbursements. In a reporting letter to the clients dated June 17, 2015, Mr. Singer stated that this fee represented "20% plus partial indemnity fees (sic) paid by the defendant", per the revised contingency fee agreement. He did not specify the portion of the fee allocated to partial indemnity costs. The clients did not request further clarification of the manner in which the $50,000 fee was calculated. No objection was made by Mr. Lima to the fee, even though it amounted to 1/3 of the Ostic settlement payment, with HST and disbursements charged on top - precisely the terms of the original contingency fee agreement to which he had objected.

51 At the client's request, Singer Kwinter agreed to bill them only a portion of the Ostic account at that time. The firm issued an interim account, billing only $30,000 in fees, plus HST of $3,900. The firm had incurred $29,399.50 in disbursements up to that date, but agreed to bill only approximately half of the disbursements at that time. Mr. Singer testified that the firm did this in order to provide the clients with additional funds because they were in difficult financial circumstances and needed to satisfy a judgement that Mr. Fisher had obtained against them. Mr. Lima and Ms. Hildebrandt owed Mr. Fisher approximately $34,000. Mr. Fisher agreed to accept partial payment of $10,000 at that time, with a final payment of $23,000 to be made by March 30, 2016.

52 In the June 17, 2015 reporting letter, Singer Kwinter agreed that the clients would receive $100,000 from the Ostic settlement funds, less the $10,000 to be paid to Mr. Fisher. The record establishes that the law firm was paid a total of $50,000 from the Ostic settlement funds: $33,900 for fees (inclusive of HST) and $16,100 for disbursements. It was understood and agreed that the balance of the solicitors' fees and the remaining disbursements (totalling $35,899.50, inclusive of HST) would be billed upon resolution of the Halwell claims. Jason Singer testified that the firm was aware that it may never recover those funds.

53 The Halwell action settled on June 26, 2015. All claims, counter-claims and cross-claims, including the clients' Third Party Claim against Halwell in the Ellas action were resolved with a payment of $1,250,000 by Halwell. The Minutes of Settlement stipulated that the clients would provide Halwell with a direction to make funds available to MCF Investments Inc. in order to satisfy MCF's notice of garnishment. MCF subsequently agreed to accept $97,000 in satisfaction of the mortgage debt, which was paid directly by Halwell. Halwell then paid the balance of the settlement funds -- an amount of $1,153,000 -- to Singer Kwinter in trust.

54 The Halwell settlement was all inclusive. Jason Singer testified that the firm "backed out the costs component and disbursements", resulting in the following breakdown: $994,605.66 payable by Halwell for all claims, plus partial indemnity costs in the amount of $150,000, plus HST in the amount of $19,500, plus disbursements. The disbursements included a payment of $53,190.32 to National Fire Adjustment to satisfy the clients' outstanding account for adjustment of the building portion of their insurance claim. Further disbursements in the amount of $32,704.02, inclusive of HST, were billed by Singer Kwinter in its final account dated September 18, 2015.

55 Mr. Singer testified that the firm used 15% (on the claim amount of $994,605.66) to calculate partial indemnity costs of $150,000. He stated that 15% was typical for a claim resolved at that stage of litigation. He said it was Singer Kwinter's common practice to apply 15% to calculate partial indemnity costs in such circumstances. To his knowledge, based on his experience as a litigator and as a former director of the Ontario Trial Lawyers Association, he testified that 15% was a competitive rate consistent with what other personal injury firms typically charged in similar cases. His evidence on this point was neither challenged during his cross-examination nor contradicted by any other evidence during the hearing.

56 A portion of the Halwell settlement funds was used to pay Stirling Fisher. Mr. Fisher accepted $20,000 as a final payment, in exchange for which he released Mr. Lima and Ms. Hildebrandt from their outstanding debt to him arising from the $45,000 loan. The clients instructed Singer Kwinter to make that payment to Mr. Fisher from the Halwell settlement funds.

57 According to the law firm's trust ledger statement and final reporting letter dated September 18, 2015, Singer Kwinter disbursed the $1,153,000 settlement funds from Halwell as follows: $53,190.32 to NFA, $20,000 to Stirling Fisher, $708,715.22 held in trust for the clients, and $371,094.46 paid to the firm in satisfaction of its final account ($32,704.02 for disbursements and $338,390.04 for fees, inclusive of HST). The law firm's fees were calculated by applying 20% to the first $500,000 of the claims portion of the Halwell settlement ($994,605.66) and 10% to the balance, plus $150,000 for partial indemnity costs, plus HST.

58 The September 18, 2015 reporting letter states that Singer Kwinter agrees to waive all amounts owing on the interim account rendered in connection with the Ostic settlement. Mr. Singer testified that the firm never demanded payment of the $35,899.50 outstanding on the Ostic account. This is disputed by Mr. Lima, who alleges that Singer Kwinter took the balance owing on the Ostic account from the Halwell settlement funds. He argues that the firm's fees should therefore be reduced by at least $35,899.50.

59 The evidence does not support Mr. Lima's claim that the law firm billed him and Ms. Hildebrandt for the outstanding amount owing on the Ostic account, notwithstanding its representation that it had waived that amount. However, the firm billed $32,704.02 for disbursements in the Halwell final account, which included $29,399.50 in disbursements previously noted in the firm's Ostic interim account. No credit was given for the $16,100 portion of those disbursements already paid from the Ostic settlement funds. The firm therefore (inadvertently) double billed the clients $16,100 in disbursements.

60 Although the total amount of the disbursements is not disputed in this assessment proceeding, the firm's double billing of a portion of the disbursements is at issue. I will return to this issue later in my reasons.

61 I note that Singer Kwinter treated the Ostic and Halwell claims separately in its billing, despite the fact that the revised contingency fee agreement stipulated that the law firm's fee would be comprised of partial indemnity costs, plus 20% of all claims paid by the defendants (in the plural) to the clients up to $500,000 and 10% of all claims paid by the defendants in excess of $500,000. The 20% applied to the $150,000 Ostic settlement funds ought therefore to have been taken into consideration when the Halwell settlement was billed. By treating the accounts separately, the law firm applied a 20% fee to more than the first $500,000 of the combined total paid by the defendants. The precise amount of the overbilling cannot be calculated because the costs portion of the Ostic fee is not known.

62 In any event, my task is not to determine what the firm was entitled to bill pursuant to the revised contingency fee agreement. As noted above, the revised retainer agreement was unlawful and is unenforceable. My task is to assess the value of the legal services provided by Singer Kwinter on a *quantum meruit* basis. However, correct billing pursuant to the terms of the revised contingency fee agreement is relevant to a determination of Mr. Lima's reasonable expectation as to the amount of the fees, which is one of the factors for consideration in a *quantum meruit* assessment.

63 No additional fees were charged by Singer Kwinter in connection with the Ellas and Fisher actions. The Ellas

action was dormant for a long time and was eventually administratively dismissed for delay. The Fisher action was resolved as outlined above.

Disbursement of Settlement Funds to Clients

64 Mr. Lima and Ms. Hildebrant separated after commencing the action against Halwell and Ostic. They became embroiled in civil litigation and family litigation against each other. When settlement funds were obtained, initially from Ostic and later from Halwell, Singer Kwinter deducted its fees, HST and disbursements and made payments to third parties, as directed by the clients, then it held the net remaining funds in trust until instructions were received from the clients regarding the manner in which the funds should be disbursed.

65 Of the $90,000 disbursed to the clients from the Ostic settlement funds (after Singer Kwinter collected a portion of its fees and disbursements, and Mr. Fisher was paid $10,000), the record shows that Ms. Hildebrandt received $6,000 and Mr. Lima received $84,000.

66 Mr. Singer testified that, after the Halwell settlement, Singer Kwinter placed the net settlement funds of $708,715.22 in a Guaranteed Investment Certificate so that the money would gain interest for the client's benefit, until instructions were provided with respect to the disbursement of the funds. The clients eventually executed Minutes of Settlement on May 20, 2016, resolving their civil and family litigation. Pursuant to the terms of their settlement, they directed Singer Kwinter to release a total of $261,500 of the funds to Ms. Hildebrandt. Mr. Lima received the remaining amount of $451,739.35, plus a refund of his original $5,000 retainer.

ANALYSIS

67 I will now review each of the factors relevant to the *quantum meruit* analysis.

(a) Monetary Value of the Matters in Issue

68 The clients' claims against Halwell included $5,220,064 in specific damages and $250,000 in aggravated and punitive damages (in the main action), plus $91,395.48 in damages (in the Ellas action). The clients' claim against Ostik was for $2,000,000.

69 The amounts of damages pleaded in the clients' Statement of Claim and Third Party Claim exceeded the amounts that they could have obtained at trial because of the Umpire's binding appraisal of the value of their property. The pleadings are therefore not an accurate measure of the monetary value of the matters in issue. Nevertheless, substantial sums of money (in excess of $4,000,000) were involved in the litigation.

(b) Importance of the Matter to the Client

70 The matter was of extreme importance to Mr. Lima because he lost everything as a result of the fire. He lost his home, his primary source of income and all of his personal belongings, including items of sentimental value.

71 The ripple effect of these financial losses and of Halwell's denial of his claim resulted in the loss of two other parcels of land.

72 Mr. Lima's reputation was also at stake in the litigation because of Halwell's allegations that he committed both arson and insurance fraud.

(c) Time Expended by the Solicitors

73 This factor involves not only a determination of the actual hours expended by the solicitors on the file, but also a determination of the reasonableness of those hours: *Burgess v. Dauncy*, *[2005] O.J. No. 810* (Ont.C.A.), at para.4.

A solicitor who overworks a file and devotes an unreasonable amount of time to it should not benefit from credit given for unnecessary and excessive hours of work.

74 In this case, the record establishes that Jason Singer had primary carriage of the file and Alfred Kwinter was senior co-counsel. Mr. Kwinter attended some of the client meetings with Mr. Singer, as well as a mediation session and three pre-trial conferences. Mr. Singer otherwise handled the file largely on his own, with some limited assistance from junior lawyers and clerks in the firm.

75 Mr. Singer testified that he liaised with the clients, drafted all the pleadings, met with the clients to prepare them for discoveries, attended multiple days of examinations for discovery of both Mr. Lima and Ms. Hildebrandt, reviewed voluminous amounts of documents (including an Ontario Provincial Police file obtained by Halwell), retained an expert witness to provide an opinion in connection with the negligence claim against Ostic, retained Price Waterhouse Coopers to provide an expert report regarding Mr. Lima's financial worth, liaised with National Fire Adjustment and negotiated a reduction in NFA's fee, spoke to the forensic engineer retained by Mr. Lima to investigate the fire, personally met with the Fire Chief in Mapleton to discuss the Fire Department's investigation of the fire, prepared for and attended a mediation session and three pre-trial conferences, and regularly communicated with both Halwell's counsel and Ostic's counsel. Other lawyers in the Singer Kwinter office interviewed potential witnesses, including firefighters who attended the scene, people who were involved in the construction of the home, and friends and family of the clients.

76 Mr. Singer testified that there was a "staggering" amount of documentation involved in the file. He stated that he "did not remember ever spending more time on a case that didn't go to trial." However, he acknowledged that full trial preparation was not completed, even though the action settled close to trial.

77 None of the above evidence was contradicted at the hearing and I accept it as credible.

78 The amount of time devoted to the defence to Halwell's counter-claim was disputed. During Mr. Singer's cross-examination, Ms. Maitland Carter suggested that little time was expended in connection with the counter-claim because Singer Kwinter was aware that it would "fall away" as soon as the clients' claims against Halwell were resolved. Mr. Singer disagreed.

79 On this issue, I find that the record supports Mr. Lima's position. While the evidence demonstrates that Mr. Singer worked diligently to advance the clients' claims and to gather evidence to rebut the defences raised, there is no evidence that any additional work was undertaken to defend against Halwell's counterclaim, other than drafting and filing a perfunctory three paragraph statement of defence.

80 The other disputed area of evidence relates to the amount of time that Mr. Singer spent trying to persuade Halwell to pay the balance of the Ellas and TD mortgages. Mr. Lima testified that he did most of that work himself, or with the assistance of TD's counsel, with minimal input from Mr. Singer. Mr. Singer disagreed that his input was minimal. He testified that he was instrumental in persuading the insurer to pay the mortgagees, but he acknowledged that Mr. Lima was also involved. Notably, he did not claim that his own involvement was particularly time-consuming.

81 The documentary record shows that Mr. Singer took some steps early on to try to persuade Halwell to pay the mortgagees but that others (including Mr. Lima and TD's counsel) took charge of this matter as time passed. Based on all of the evidence, I find that only minimal time was spent by Singer Kwinter on this particular issue.

82 It is, however, clear from the record that a significant amount of time was devoted by Singer Kwinter to the overall file. Unfortunately, the precise number of hours expended by the solicitors is not known. Mr. Singer and the other lawyers at the firm did not docket their time because the legal services were being provided pursuant to a contingency fee agreement on a percentage basis.

83 After Mr. Lima served his Notice of Assessment, his counsel asked Mr. Singer to disclose dockets for the work

performed on the file. Mr. Singer reviewed the file, estimated the amount of time that each task would have taken and produced reconstructed dockets. Those reconstructed dockets estimate that Mr. Kwinter spent 30.8 hours, Mr. Singer spent 209.3 hours, and five other lawyers and clerks spent a combined total of 69.8 hours on the file, for a total of 309.9 hours.

84 Mr. Singer testified that he estimated the time expended on each task as fairly and conservatively as he could. Upon review of the reconstructed dockets and the other documents in the record, I find that the time estimates are reasonable for the nature of the services provided.

85 In my view, the steps taken to advance the litigation were appropriate and reasonable. While it may seem redundant to conduct three pre-trial settlement conferences, in addition to a private mediation meeting, in the specific circumstances of this case -- with several claims against two defendants, as well as ancillary mortgage issues - the multiple conferences were warranted. Each of the conferences was productive in advancing the claims toward their ultimate resolution.

86 Mr. Singer said the reconstructed dockets did not capture all of the solicitors' time spent on the file. For example, he stated that some discussions (internally between co-counsel, with the clients, with witnesses and with opposing counsel) did not generate a memo to file, so time spent on that work was lost. I accept this evidence as both credible and probable. It is likely that more than the 310 estimated hours were actually expended by the solicitors. It is reasonable to assume that at least an additional 20 hours were likely expended over the four year period that Singer Kwinter had carriage of the file. I therefore conclude that lawyers at the firm probably spent a total of approximately 330 hours on the file.

87 Mr. Singer was challenged by Ms. Maitland Carter regarding duplication of effort during client meetings, the mediation session and three pre-trial conferences that both he and Mr. Kwinter attended. He testified that Mr. Lima had specifically requested Mr. Kwinter's attendance because of Mr. Kwinter's prominent reputation as a very experienced litigator with notable success in civil arson jury cases. He stated that he also attended because he had primary carriage of the file and was intimately familiar with all aspects of the proceeding. He explained that the presence of two senior counsel did not increase the firm's actual fees because the clients' contingency fee agreement was not based on hourly rates.

88 If the legal services had been billed on an hourly basis, I would deem it unreasonable to charge for two senior counsel's attendance at client meetings, mediation and conferences. Discounting that unnecessary duplication of approximately 30 hours, I conclude that it would have been reasonable for the firm to expend roughly 300 billable hours on the file.

89 Mr. Singer performed some additional services for the clients, including negotiating a reduction of the amount garnished by MCF, defending the Ellas and Singer actions, and negotiating a reduction of the monies owed to Mr. Singer. The amount of time expended by him on these ancillary matters is contested by Mr. Lima.

90 It is unnecessary for me to determine the amount of time devoted to the MCF, Ellas and Singer matters, because Mr. Singer testified that the firm provided those services *gratis*. Having agreed to perform that additional work without charging the clients, Singer Kwinter cannot now ask the Court to consider the time expended on that work in the overall valuation of the legal services provided under the retainer.

91 My task is to assess the value of the legal services that were provided pursuant to the unlawful and unenforceable revised retainer agreement, which pertains only to the clients' actions against Halwell and Ostic. I will consider the Third Party Claim against Halwell (in the Ellas action) as part of the retainer, because it forms part of the overall claims against Halwell that were settled in June 2015, but legal services provided in connection with all other ancillary matters are not properly part of this assessment.

(d) Legal Complexity of the Matters Dealt With

92 There were two different defendants named in the clients' action. Although the claims against the defendants related to the same fire loss, they were distinct.

93 The claims against Halwell included breach of contract, as well as allegations of bad faith with remedial requests for punitive and exemplary damages. The bad faith allegation related primarily to Halwell's delay in complying with its obligations to pay TD and Ellas under the standard mortgage clause in the policy.

94 The arson defence raised by Halwell complicated the file. Although the origins and incendiary nature of the fire were not contested, it was still necessary to gather expert evidence regarding the cause of the fire in order to support Mr. Lima's assertion that he was not sufficiently knowledgeable about electrical matters to have been able to set the fire. Furthermore, the arson defence meant that issues of motive and opportunity to start the fire needed to be addressed. The solicitors were therefore required to gather evidence of the clients' financial circumstances and movements on the day of the fire. Expert evidence needed to be marshalled to establish Mr. Lima's financial situation because of his self-employment, multiple sources of income, and failure to disclose the majority of his income to Revenue Canada.

95 Halwell's defence also alleged that the clients made exaggerated and false claims. The solicitors were therefore required to gather evidence to prove that the claims were honest and reasonable. This was not a straightforward task because Mr. Lima completed many transactions using cash, so he did not have receipts as proof of purchase for his belongings.

96 As noted above, Halwell counterclaimed against the clients for $1.7 million. That counter-claim was premised on the insurer paying out the Ellas and TD mortgages and seeking to recover it back from the clients. This aspect of the case was not particularly complicated, but it added another dimension to the issues in dispute.

97 The negligence claim against Ostic required the lawyers to obtain expert evidence regarding the applicable standard of care for brokers. Ostic defended the claim by asserting that Mr. Lima had advised them that he had another broker looking after specialty items such as his aircraft. This assertion was disputed by Mr. Lima. Ostic also pleaded that, as builder of his own house, Mr. Lima knew how much it would cost to rebuild and should have taken steps to ensure that it was insured to that replacement value. The solicitors were required to gather evidence to rebut these defences.

98 Even if the negligence claim against Ostic succeeded, in order for the clients to recover any damages from the broker, they would be required to prove that insurance coverage would have been available for some of the uninsured specialty items, such as $230,000 worth of airplane parts. This further complicated the legal and evidentiary issues in the file.

99 Mr. Singer testified that the complexity of the file was heightened by the fact that the clients were facing multiple law suits and had judgments against them pertaining to other properties and debts (i.e., Ellas, TD, Fisher and MCF). For the reasons already set out above, apart from the Third Party Claim against Halwell in the Ellas action, I am not prepared to take these ancillary matters into consideration in assessing the complexity of the file as they were not part of the retainer.

100 Based on all of the above, I find that the legal complexity of the file was significant. The action was not a simple and straightforward breach of contract claim against an insurer. There were multiple claims, two defendants, and multifaceted evidentiary, legal and remedial issues that needed to be tackled.

(e) Degree of Skill and Competence Demonstrated by the Solicitors

101 As noted earlier, Mr. Singer had primary carriage of the file and performed most of the legal services himself. He did not delegate tasks to junior counsel with less experience. He personally attended discoveries and personally

interviewed the Fire Chief. Two senior counsel (Mr. Singer and Mr. Kwinter) attended client meetings, pre-trial conferences and a mediation session.

102 The record shows that Mr. Singer and Mr. Kwinter handled the litigation with demonstrable expertise and competence. Moreover, Singer Kwinter's prior successes with property damage claims, particularly its notable success in obtaining high punitive damage awards from juries in arson cases, was possibly a factor in the ultimate settlement that was reached. The solicitors had a reputation for going to trial. That fact could not be ignored by the defendants.

103 Had the clients agreed to pay Singer Kwinter by the hour, the skill, experience and expertise of the counsel would have justified high hourly rates. In the reconstructed dockets, Mr. Singer listed his hourly rate at $600 and Mr. Kwinter's hourly rate at $800. The other lawyers' and clerks' time were billed at either $300/hour or $150/hour. During his cross-examination, Mr. Singer explained that hourly rates were never discussed with the clients because the parties had entered into a contingency fee agreement for a percentage of the damages paid by the defendants.

104 Based on the hourly rates listed in the reconstructed dockets and the time estimated by Mr. Singer (309.9 hours), the total time spent on the file amounted to $162,205 in fees, exclusive of HST. Ms. Maitland Carter cross-examined Mr. Singer about the hourly rates. She drew his attention to a 2016 reported decision in another case in which Mr. Kwinter's hourly rate was listed as $750. In light of that decision, she questioned how Mr. Kwinter's rate could have been $800/hour in 2011, when the firm was retained by the clients in this case. Mr. Singer responded that different clients are billed at different rates, depending on a variety of factors. While I accept that answer as credible, the disparity in Mr. Kwinter's two rates, given the applicable time periods, seems peculiar. Even allowing for different rates for different clients, it is unlikely that Mr. Kwinter would have been billing in 2011 at an hourly rate that was $50 higher than a rate he billed another client five years later. Moreover, had the fees on the file been billed by the hour, I would have expected both Mr. Singer's and Mr. Kwinter's rates to increase incrementally over time. Lawyers' hourly rates do not typically remain static over four years.

105 I conclude that the $800/hour rate listed for Mr. Kwinter would be reasonable for work performed on the file in 2015, given his decades of experience and the known 2016 comparator of $750/hour on another file, but his hourly rate ought to have been lower at the outset of the retainer in 2011-2013.

106 Mr. Singer testified that he was called to the bar in 2003. He had eight years of personal injury litigation experience, with some property loss experience (including civil arson case experience), when he assumed carriage of the clients' file in the summer of 2011. As a lawyer with less than ten years of experience, notwithstanding his skill, I find that $600 would have been an excessive hourly rate for his services in the early years of the retainer in 2011-2013.

107 I have not lost sight of the fact that the file was not billed at hourly rates. This discussion about hourly rates is, therefore, somewhat academic. However, a fee calculation based on reasonable time expended and reasonable hourly rates is a relevant factor in the overall valuation of the services provided.

108 I conclude that the $162,205 fee estimated in Mr. Singer's reconstructed dockets is excessive. Had the file been billed at hourly rates, it would have been appropriate to delegate certain tasks to junior counsel or clerks who billed at lower hourly rates, and it would not have been appropriate to bill for two senior counsel's attendance at client meetings, mediation and pre-trial conferences: *Best v. Kingsland Estates Ltd.*, [2014] S.C.C.A. No. 180 (S.C.C.), at para.8 and *Re Solicitors*, [1978] O.J. No. 2324 (O.S.C.) at para.2. Furthermore, as noted above, the hourly rates used in the reconstructed dockets would have been unreasonably high in the early years of the retainer.

[8] Taking all of these factors into consideration, I conclude that a reasonable fee, calculated on an hourly basis, would be approximately $135,000, plus HST. This is, however, only one factor for consideration in conducting a *quantum meruit* assessment. A valuation based solely on hourly fees would not be appropriate because of the risk

assumed by the law firm under the percentage based contingency fee agreement. Indeed, Mr. Singer testified that Singer Kwinter would *not* have agreed to a contingency fee based on hourly rates.

109 Mr. Lima does not impugn the skill or competence with which the solicitors pursued the claims against Halwell and Ostic. He does, however, criticize Mr. Singer for allegedly failing to follow client instructions with respect to Ms. Hildebrandt's removal as a plaintiff from the action, or alternatively for allegedly failing to notify him that she was not removed from the action. He seeks to have Singer Kwinter's fees discounted to compensate him for financial losses that he claims to have suffered as a result of Mr. Singer's alleged incompetence.

110 Mr. Singer and Mr. Lima gave contradictory evidence about this issue, but some of the relevant facts are undisputed. It is agreed that, in or about March 2012, Mr. Lima notified Mr. Singer that he and Ms. Hildebrandt had separated and that she wanted to withdraw from the litigation and move on with her life. Mr. Singer told Mr. Lima that he would need to receive instructions from Ms. Hildebrandt directly.

111 Ms. Hildebrandt then contacted Mr. Singer by telephone. She left him a voicemail message on April 4, 2002, indicating that she wished to withdraw from the litigation against Halwell and Ostic. She also signed a written direction to that effect, which Mr. Lima emailed to Mr. Singer that same day. In his email message, Mr. Lima asked Mr. Singer to confirm that Ms. Hildebrandt "will never have to come in and sign anything ever again at your office or that she will never have to do any examination of discoveries". Mr. Singer responded by email, advising Mr. Lima that Ms. Hildebrandt would need to sign a release prepared by the defendants, but that she would not need to attend at Singer Kwinter's office to do that. Mr. Singer also said he doubted that the defendants would force Ms. Hildebrandt to attend discoveries because she was abandoning her claims.

112 Mr. Singer testified that he then contacted the defendant's counsel and advised that he had instructions to discontinue Ms. Hildebrandt's claims. He said the insurer would not consent to a dismissal of her claims without costs. Moreover, Halwell's lawyer wanted to examine her for discoveries. Mr. Lima testified that he does not believe Mr. Singer's account of his communications with opposing counsel, but there is no evidence to contradict it and I have no basis to doubt its accuracy.

113 Mr. Singer testified that he then contacted Ms. Hildebrandt and explained to her that a contested motion would need to be brought in order to attempt to remove her as a plaintiff in the action. He explained to her that there might be cost consequences to her. He said some time passed before she communicated with him again. For a short period of time, he was unable to locate her. Then she resurfaced and contacted him in June 2012. At that point, she told him that she wanted to continue with the case. Mr. Lima did not contest these facts, but he claimed not to have been aware of them at the time.

114 Mr. Lima testified that Mr. Singer never notified him that Ms. Hildebrandt had not been removed from the action. He claimed that Mr. Singer's failure to inform him of her continued involvement in the litigation resulted in great financial loss to him. He said he agreed to give Ms. Hildebrandt his new truck, new furniture and appliances, a new television, and also agreed to release her from their joint debts to MCF and Stirling Fisher, in exchange for her withdrawal from the action against Halwell and Ostic. (I note that the debts to MCF and Stirling Fisher were paid from the settlement proceeds, so Mr. Lima did not, in fact, release Ms. Hildebrandt from joint liability for those debts.) Mr. Lima testified that he never would have entered into the settlement with Halwell had he known that Ms. Hildebrandt would be receiving 1/3 of the net settlement funds.

115 According to Mr. Lima, when he attended an examination for discovery on April 17, 2012, he was under the impression that Ms. Hildebrandt was no longer a plaintiff in the action. He recalled that, during a break in the examination, Mr. Singer assured him that Ms. Hildebrandt would not receive any damages paid by the defendants. He stated that Mr. Singer told him, "Don't worry, Mr. Lima, you will be the one leaving with the cheque". He said he therefore understood that Ms. Hildebrandt had been removed as a plaintiff. He claimed to be under that impression throughout the remainder of the proceeding, right up until the action against Halwell settled in June 2015. He blames Mr. Singer for not disabusing him of this misunderstanding. To corroborate his testimony, he relies on an

email dated October 7, 2013, in which he wrote to Mr. Singer that Ms. Hildebrandt had "removed herself from the claim".

116 Mr. Singer could not recall whether he ever responded in writing to that October 7, 2013 email message. However, he denied having made the statement attributed to him on the occasion of Mr. Lima's examination in April 2012. He disputed the suggestion that Mr. Lima was unaware of Ms. Hildebrandt's continued involvement in the case, right up until the Halwell claim was settled in June 2015.

117 The totality of the evidence does not support Mr. Lima's contention that he believed Ms. Hildebrandt had discontinued her claims. I make this finding for the following reasons. First, Mr. Lima was aware that Ms. Hildebrandt participated in an examination for discovery in September 2012. Second, Ms. Hildebrandt continued to attend client meetings with Mr. Singer throughout the litigation. Third, she participated in all three pre-trial conferences and in the mediation session. Fourth, she received $6,000 from the Ostic settlement funds in May 2015, pursuant to her and Mr. Lima's joint instructions to Mr. Singer. Fifth, Singer Kwinter's reporting letters were addressed to both clients. Sixth and finally, Ms. Hildebrandt was present when the Halwell claim settled on June 26, 2015. She signed both Minutes of Settlement and Directions to Counsel on that day. The Minutes include her name in the Style of Cause and refer to the "plaintiffs" (in the plural) throughout. The Directions to Counsel similarly refer to settlement of "our claims" and use the pronoun "we" to refer to both Mr. Lima and Ms. Hildebrandt as the clients.

118 Mr. Lima gave two different explanations for why he thought that Ms. Hildebrandt was still attending meetings, pre-trial conferences and the mediation sessions if she was no longer a plaintiff in the action. First, he said that she was attending simply because they were friendly with each other and she was being supportive of him. This explanation is not credible, given the breakdown of their spousal relationship and the animosity between, as documented in Mr. Lima's email to Mr. Singer dated October 7, 2013.

119 At another point during his cross-examination, Mr. Lima stated that Ms. Hildebrandt's continued presence at meetings and pre-trial conferences was recommended by Mr. Singer who told him, "She's a pretty face, she will help our claim". I find that evidence to be preposterous.

120 Mr. Lima was not only unable to provide a believable explanation for why Ms. Hildebrandt continued to attend meetings and pre-trial conferences had she withdrawn from the litigation, he was also unable to provide a coherent explanation for why she signed the Minutes of Settlement and Directions to Counsel on June 25, 2016. When asked about this, he stated that he assumed that Ms. Hildebrandt was "doing her own thing with Jason [Mr. Singer] but needed to be there with me".

121 Based on the totality of the evidence, I reject Mr. Lima's allegation that Mr. Singer failed to follow client instructions to remove Ms. Hildebrandt from the claims. I accept Mr. Singer's testimony that Ms. Hildebrandt's instructions changed and that he followed her instructions.

122 I reject Mr. Lima's allegation that he was misled by Mr. Singer's representations or by Mr. Singer's failure to advise him of Ms. Hildebrandt's continued participation in the action. Although there is no evidence of a formal written notice to Mr. Lima of Ms. Hildebrandt's decision to remain involved in the litigation, Ms. Hildebrandt's continued participation was obvious and must have been known to him.

123 Even if I accepted Mr. Lima's contention that he agreed to terms of settlement with Halwell without knowledge that Ms. Hildebrandt still had a claim to a portion of the settlement funds, I would not reduce Singer Kwinter's account on that basis. Mr. Lima has not commenced an action against Singer Kwinter. He is effectively seeking to use the assessment process to obtain compensation for alleged professional negligence without having to establish the elements of negligence on a balance of probabilities. To permit him to do so would constitute an abuse of the assessment process and would be unjust.

124 For all of the above reasons, I reject Mr. Lima's argument that the solicitors' account should be reduced due to lack of skill or competence. On the contrary, I find that the high degree of skill and competence demonstrated by the

solicitors favours a generous assessment of their fees.

(f) Degree of Responsibility Assumed by the Solicitors

125 The financial risk assumed by Singer Kwinter is a critical factor pertaining to the degree of responsibility assumed by the solicitors in this case. Singer Kwinter agreed to proceed with the action on a contingency fee basis. They pursued the matter diligently for over four years and incurred significant disbursement costs, knowing that they might never be compensated for their services or expenses.

126 The degree of financial risk assumed by the solicitors can be measured by evaluating both the likelihood of success at trial and the prospect of settlement before trial.

127 The record establishes that the parties attended three pre-trial conferences with three different judges. At the first conference in July 2013, the presiding judge identified Mr. Lima's credibility as a pivotal issue in the case and expressed a negative view of the clients' claims. Mr. Lima did not personally attend the first conference, but Mr. Singer reported to him what had transpired. At the end of the first conference, the defendants offered to settle for $325,000, all inclusive (i.e., $300,000 from Halwell and $25,000 from Ostic). Mr. Lima rejected this offer out of hand. Mr. Singer recommended making a counter-offer for $838,000, plus disbursements and costs, but Mr. Lima was not interested and the clients did not do so.

128 At the mediation meeting in May 2014, the defendants offered $500,000 to settle all claims. At that time, Mr. Lima was unwilling to consider settling for anything less than $2,000,000.

129 The second pre-trial conference was held on November 13, 2014. Once again, the presiding judge (a different judge) expressed an unfavourable view of the merits of the clients' case. She identified concerns about Mr. Lima's credibility, shared her view that aspects of his contents claim appeared inflated, and questioned whether more insurance coverage would have been available for his speciality items even if Ostic had asked for it.

130 Mr. Singer testified that, although some offers to settle were made by the defendants, he did not expect the action to settle because Mr. Lima was being "bullish in his view of the case". He said he anticipated that the action would proceed to trial. Although he believed that there was evidence to support the clients' claims, there was also considerable evidence to support the defendant's pleadings. He thought there was a genuine risk that a jury might not award the clients any damages. Given the unpredictability of jury verdicts, it was not unreasonable for him to hold that view.

131 Mr. Singer testified that he expected the jury trial would last five to six weeks, unless the parties could resolve some of the evidentiary issues. He intended to contest the admissibility of evidence relating to Mr. Lima's prior insurance claims, as well as evidence pertaining to a police investigation of Mr. Lima's suspected fraudulent activities. If the defendants insisted on introducing that contested evidence at trial, pre-trial motions would have been required to obtain admissibility rulings. If the contested evidence were admitted, it would significantly lengthen the trial (and the increase the degree of financial risk to the law firm).

132 In contrast, Mr. Lima testified that, to his knowledge, the trial was only ever expected to last seventeen days. While that may have been an early estimate of the length of the trial, give the multiplicity of issues and defendants, I find that Mr. Singer's estimate of five weeks is more realistic, subject to the parties resolving the evidentiary issues in the clients' favour.

133 Mr. Singer testified that a conservative estimate of the projected cost of the trial would be at least $500,000 in fees for his firm, if fees were calculated on an hourly basis. As of April 2015, the firm had already invested over $30,000 in disbursements in the case. The expert witnesses were not working for a contingency fee and had to be paid regardless of the outcome at trial. If the jury did not find in the clients' favour, the firm would be required to absorb all of those expenses.

134 As discussed in more detail below, Mr. Singer testified that the merits of Halwell's arson and fraud defences became stronger as the case progressed. If the jury accepted either of those defences, the claim against Ostic would also be defeated. Mr. Singer therefore viewed the case as increasingly risky, yet the firm did not at any time consider withdrawing from the retainer and did not approach the clients to negotiate a different retainer agreement in order to mitigate the risk.

135 Mr. Singer testified that the Ostic settlement in May 2015 reduced the anticipated length of the trial by about ten days, but he still anticipated a jury trial of at least three weeks' duration.

136 Mr. Lima argued that Singer Kwinter assumed minimal financial risk. He stated that Mr. Singer told him not to worry about the negative views of the pre-trial conference judges because "judges tell both sides that they don't have a good case in order to encourage settlement". Mr. Lima felt confident that the action would settle before trial because the insurer and broker kept making offers to settle and the amounts of the offers were increasing. He said Mr. Singer told him that insurance companies "play games", that they always "low-ball" their first offer and rarely make a "decent offer" before a trial date has been fixed. Mr. Singer did not recall making those statements, but he did not deny that he may have conveyed words to that effect to Mr. Lima.

137 Notwithstanding the incremental progress achieved in the settlement discussions over time, it was not obvious that the parties would compromise sufficiently for a settlement to be reached. The solicitors therefore assumed substantial financial risk in this case. The risk increased as the firm's investment in the case grew and weaknesses in the merits of the clients' claims surfaced. Mr. Singer's September 2013 recommendation that the clients offer to settle for $838,000, plus disbursements and costs, is a good indicator of the solicitors' cautionary view of the case at that point in time. The fact that Mr. Lima would not even consider settling for less than $2,000,000 as late as May 2014 supports Mr. Singer's testimony that he was being bullish in his view of the claims.

138 Mr. Lima testified that he had the impression that Singer Kwinter never intended to go to trial. He points to the fact that full trial preparation was not completed and to the fact that Halwell came to the last pre-trial conference with a pre-typed release for him to sign. He argues that this is proof that a settlement was inevitable.

139 I am not prepared to draw that inference. It is not uncommon for experienced lawyers to complete preparation on the eve of a trial (or even during a trial). For example, litigators often meet with and prepare witnesses in close proximity to the date when they will be called to testify in order to refresh their memories. It makes no practical sense to incur expert fees associated with trial preparation until all efforts to resolve the dispute have been exhausted. Otherwise, the preparation might need to be repeated at a later date and the expert fees could increase exponentially.

140 Moreover, it is not uncommon for defendants to arrive at a pre-trial conference with a standard Release for the plaintiff to sign in the event that a settlement can be reached. This is not an indicator that a settlement has already been reached (between counsel) or that one will necessarily be achieved.

141 The evidence in this case demonstrates that Mr. Singer was actively gathering evidence, reviewing the defendant's disclosure, and taking steps to schedule the matter for trial, while simultaneously refraining from completing full trial preparation in the hope of resolving the action prior to trial. The record supports Mr. Singer's testimony that the firm was prepared to take the case to trial and was assuming the risk that it might never be compensated for its efforts if the jury found in the defendants' favour.

142 When the Ostic claim settled in May 2015, the financial risk assumed by the law firm decreased, but only marginally. The anticipated length (and cost) of the trial was reduced, but the resources already invested in the case were not diminished and the risk of non-recovery from Halwell remained. Moreover, as explained above, Singer Kwinter agreed to bill only a portion of the Ostic fees and disbursements at that time, knowing that it might never recover the balance if the clients did not obtain damages from Halwell.

143 Given the substantial risk assumed by Singer Kwinter, it would be inequitable to compensate the solicitors in this case on an hourly basis for the services they provided on a percentage contingency fee basis. The clients assumed no financial responsibility. Mr. Lima paid an initial retainer of only $5,000 but that amount was ultimately refunded to him. The clients benefitted from skilled legal representation at no cost to them, with all of the financial risk assumed by their solicitors.

[16] The risk associated with contingency fee agreements is why such retainers are typically negotiated with fees calculated on a percentage basis, rather than using hourly rates. Mr. Singer testified that, based on his experience, the industry practice in Ontario is for personal injury law firms to calculate contingency fees as one third (33%) of any recovery obtained. Mr. Leblanc from NFA, who was called as a witness by Mr. Lima at the assessment hearing, testified that he has been doing fire loss appraisals for law firms for over sixteen years. Based on his experience, he stated that most plaintiff-side law firms charge between 25% and 35% of the recovery on a contingency fee basis. This evidence was neither challenged on cross-examination nor contradicted by any other witness at trial.

(g) Results Achieved

144 Mr. Singer testified that Singer Kwinter achieved "outstanding" results for the clients. Mr. Lima, in contrast, testified that only "average" results were achieved.

145 To highlight the mediocre outcome, Mr. Lima stated that he was not compensated for $30,000 in clean-up costs that he incurred and $48,000 in temporary living expenses after the fire. However, these heads of damages are part of the all-inclusive settlement with Halwell in the amount of $1,250,000.

146 Mr. Lima testified that he was disappointed because Singer Kwinter "promised" he would get a punitive damages award, as well as money from Ostic for underinsuring him. Mr. Singer denied that any such promises were made. Given the uncertainty of litigation, the unpredictability of jury awards, and the solicitors' experience, I find it implausible that either Mr. Kwinter or Mr. Singer would have *promised* to deliver a favourable outcome to the clients. They likely touted their firm's past successes in similar cases, but that does not amount to a "promise" to obtain a particular jury award.

147 In any event, the quality of the results achieved should be assessed, not relative to the clients' hopes or expectations (which may be unreasonable), but rather relative to the actual strengths and weaknesses of the claims.

148 Mr. Lima testified that Mr. Singer reassured him not to worry about the fraud and arson allegations in Halwell's Statement of Defence because they were "just common defence tactics". Mr. Singer did not recall saying that, but he testified that it was something he likely would tell a client. He explained, however, that Halwell's defences became stronger over time. According to his testimony, evidence was mounting against the clients. If either the arson or the fraud defence prevailed at trial that would have vitiated the insurance policy and defeated all of the clients' claims, including the negligence claim against Ostic.

149 During his testimony, Mr. Singer outlined numerous potential barriers to the clients' success at trial, including:

(a) NFA's appraisal attributed an actual cash value of only $827,499 to the clients' personal belongings, which was dramatically less than the $2,677,092 estimate they submitted in their Proof of Loss. Jurors might view this discrepancy as support for Halwell's allegation that the clients exaggerated (or fabricated) their claim.

(b) One of the items claimed by Mr. Lima was a slate pool table, but no slate was found in the fire wreckage. Since slate would not typically be destroyed by fire, this could support the allegation of a false claim made by Mr. Lima.

(c) The high interest rates on the Ellas mortgage (12%) and on the Stirling Fisher loan (53%) were of concern because they might be construed as evidence that the clients' financial circumstances were tenuous, which could in turn be construed as evidence of a financial motive to burn down their own house.

(d) In denying that he had a financial motive, Mr. Lima asserted that he was earning hundreds of thousands of dollars annually, but there was no documentation to support that assertion. He told Mr. Singer that he concealed most of his income from Revenue Canada. He said he declared the rental income from his farm land (about $40,000 annually) but did not disclose the bulk of his income derived from buying and selling boats, cars and aircraft. He ran a cash business, so there were no transaction records to support his claimed sales revenue. This was a concern to his solicitors for several reasons. First, it created challenges in proving that Mr. Lima was financially secure. Second, even if a jury accepted that he had substantial undeclared income, his tax evasion could negatively impact his case. Jurors might frown upon such dishonest behaviour and consequently doubt his integrity and credibility generally.

(e) At a meeting with Halwell's lawyer, at which Mr. Lima answered questions regarding his finances, he said he had a $500,000 investment at the time of the fire. Subsequent to the meeting, Mr. Lima informed Mr. Singer that he had made a mistake and that the investment was purchased after the fire. He also disclosed to Mr. Singer that he had borrowed money to obtain the investment. Mr. Singer was very concerned that Halwell could use this information to discredit Mr. Lima.

(f) The fire was incendiary in nature, but there was no suspect. The clients were unable to point to any third party suspect who might have a reason to set fire to their home. Furthermore, there was no evidence of forced entry and Mr. Lima was home when the fire started. Moreover, Mr. Lima's movements on the day of the fire were suspicious because he had driven out of his way to go home to get a pharmaceutical product that he could easily have purchased at any pharmacy over-the-counter.

(g) When Mr. Lima arrived home that day, he initially called 911 to report a break-in and ransacked house. The electrical power was out. He went to the electrical room to restore the electricity, even though the 911 dispatcher specifically told him not to. His actions ignited the fire by powering two toaster ovens that contained incendiary devices and gasoline that had been poured on the electrical box.

(h) Ms. Hildebrandt had two cats who lived with the clients. They could not be found in the fire debris. Mr. Lima located them a couple days later on another neighbouring property. He claimed that he tracked them using hunting abilities and found them across the road by a ravine. Mr. Singer thought this might seem odd to a jury. Jurors could suspect that the cats had been removed as a precaution and safely housed elsewhere by a pet owner who intended to set fire to his own house.

(i) At some point after the fire, Mr. Lima revoked his consent for the police to enter the property to continue their investigation. Mr. Singer worried that this could raise suspicion with jurors, who might infer that he had something to hide.

(j) Mr. Lima had numerous prior insurance loss claims, including two prior fire losses. One was at a hotel that he owned in April 2000 and another was in a house that he rented to tenants. The house was rebuilt after the fire at the insurer's expense. These prior fire losses might seem more than coincidental to jurors.

(k) Mr. Lima disclosed the two prior fire loss claims when he retained Singer Kwinter in July 2011, but additional prior property loss claims came to the solicitors' attention only later, when the insurer's file was produced. The file contained documentation showing approximately ten prior property loss claims, mostly relating to vintage automobiles that Mr. Lima claimed were damaged or stolen. Mr. Singer testified that this was an unusually high number of prior claims that could raise suspicion in the minds of jurors about insurance fraud.

(l) Halwell brought a Rule 30.10 motion to obtain a copy of police records relating to Mr. Lima. The records indicated that the police suspected him of arson. They also suspected him of engaging in fraudulent activity, using VIN numbers from wrecked cars in the United States to register cars that he sold in Ontario. A Crime Stopper tip received by the police in 2003 suggested that he had been changing VIN numbers on Viper vehicles. A witness interviewed in March 2011 told police that Mr. Lima had been involved in making false insurance claims. All of this information would be highly prejudicial to Mr. Lima if it were admitted as evidence at trial.

(m) The police file noted that Mr. Lima made statements to the 911 dispatcher that were inconsistent with statements he made to firefighters who attended the scene on the night of the fire.

150 According to Mr. Lima, Mr. Singer told him most of the above evidence would not be admissible at trial. I find it unlikely that Mr. Singer would have been so categorical, knowing that a trial judge would need to make that determination. I accept Mr. Singer's testimony that he intended to move for a pre-trial order excluding much of the prejudicial evidence on the basis that it constituted inadmissible bad character evidence, but he could not predict the outcome of such a motion.

151 Mr. Singer stated that, if the defendants were permitted to introduce the prejudicial evidence at trial, then the clients would need to lead good character evidence in reply. He testified that his associates, who were interviewing the clients' friends and neighbours, were having difficulty finding witnesses who could attest to the clients being upstanding community members because Mr. Lima and Ms. Hildebrandt kept to themselves and did not have many contacts in their community.

152 Mr. Lima disputed the suggestion that they had few contacts who could vouch for their good character. He noted that he coached both hockey and soccer and also paid for lower-income kids in his community to play hockey. He had explanations for and responses to much of the prejudicial evidence mentioned by Mr. Singer during his testimony. He had a photograph of the slate pool table taken inside his home. He insisted that he did not deceive Halwell's lawyer by failing to disclose that his $500,000 investment was leveraged; he explained that he did not mention it because the lawyer did not ask him directly. He testified that he received no financial gain from his prior property loss claims. He said that one of the Viper cars that was reported stolen was leased by him and the insurance proceeds went to the leasing company. Another stolen Viper was not financed, it was "100% paid for free and clear", so he could have simply sold it if he needed money. He denied inconsistency in the statements that he made to the 911 dispatcher and to the firefighters; he asserted that it was a simple misunderstanding. He testified that the high-interest loan from Mr. Fisher was not an indication of dire financial circumstances, but rather was a common business practice that he employed to share used vehicle sale profits with Mr. Fisher.

153 Mr. Singer acknowledged the existence of evidence that could be marshalled on Mr. Lima's behalf, including the fact that no criminal charges were ever laid against Mr. Lima for fraud or arson, so the police suspicions about his alleged criminal activities were merely speculative and unfounded. Furthermore, Mr. Lima's mortgages were all in good standing at the date of the fire, his bills were current, he owned assets, he had a good credit rating, and no creditors were coming after him. The defendants therefore did not have strong evidence of motive for arson. Mr. Singer testified that, due to these facts in the clients' favour, he never contemplated withdrawing from the retainer and was always prepared to take the case to trial. However, he perceived a high risk if the case went to trial.

154 Mr. Singer and Mr. Kwinter leveraged the evidence in Mr. Lima's favour to negotiate settlements with both defendants. The outcome had there been a trial is no more predictable now than it was in the summer of 2015, when the action was settled with combined payments by the defendants in the amount of $1,400,000. It is, however, clear from the totality of the evidence in the file that there were significant risks to proceeding. The certainty and closure provided by the settlements were therefore of tremendous value to the clients.

155 In evaluating the results achieved, I agree with Mr. Lima that Singer Kwinter should not be credited with the fact that Halwell paid out the Ellas and TD mortgages. First, the payments were made late, which resulted in the accumulation of tens of thousands of dollars in interest and charges that Mr. Lima ultimately had to pay--so that was

not a good outcome for the clients. Second, although Mr. Singer corresponded with Halwell's counsel about compliance with the standard mortgage clause, the record shows that Mr. Lima also communicated personally with Ellas's lawyer and with TD's in-house counsel, who were ultimately responsible for persuading Halwell to pay out the mortgages.

156 Singer Kwinter may not have been particularly instrumental in persuading Halwell to make the mortgage payments, but it must be credited for negotiating a settlement that included dismissal of Halwell's counterclaim for recovery of those mortgage payments. The dismissal of the counterclaim added independent value to the settlement, in addition to the substantial financial compensation paid by Halwell to the clients.

157 As mentioned above, the Umpire appraised the clients' dwelling at an actual cash value of $3,201,000 and replacement cost of $3,300,000. The contents were appraised at an actual cash value of $827,499 and replacement cost of $1,376,001. Had the claim against Halwell succeeded, there was policy coverage for only $2,500,000 for the dwelling. The clients would have been bound by the appraised cash value of the contents in the amount of $827,499. Consequently, their maximum potential recovery at trial from Halwell, under the policy, was $3,327,499, plus some additional amounts for demolition and living expenses. Had their negligence claim succeeded against Ostic, the maximum potential recovery from both defendants would have been a total of $4,676,001 (i.e., the replacement value of the dwelling and contents), plus demolition costs and additional living expenses.

158 Mr. Singer testified that the settlements represented almost 75% of the potential recovery at trial. I disagree. In his calculation, Mr. Singer included credit for the money paid to Ellas ($500,000) and TD ($1,176,851) because the clients "were no longer being sued for that money" by Halwell. When those mortgage amounts are added to the $1,400,000 in settlement funds, the value of the settlement equals $3,076,851, which is actually less than 66% of the potential recovery under the policy at trial (i.e., $4,676,001, plus demolition costs and additional moving expenses). Moreover, that calculation does not account for possible punitive or aggravated damages or for partial indemnity costs that might have been awarded at trial. It is therefore not, in my view, an appropriate measure of the success of the results achieved. Nor is it appropriate, in my view, to include the value of the two mortgage payments in the settlement result, unless their value is also included in the potential "best outcome" at trial.

159 In any event, I do not find it helpful to assess the quality of the results achieved by comparison with the potential "best outcome" recovery at trial, because that fails to give appropriate weight to the risks associated with a trial. As noted above, there were numerous potential barriers to success. Although the clients may have fared better than the settlement at trial, the likelihood of achieving maximum recovery was slim. Furthermore, given the prejudicial evidence that surfaced as the case evolved, there was a genuine risk that the claims against both defendants might be dismissed in their entirety at trial. Moreover, if the claims were dismissed, the clients faced the risk that Halwell's counterclaim for $1,700,000 may have succeeded. They also faced exposure to a costs award against them. This "worst case scenario" is at least as relevant as the potential "best outcome" scenario when evaluating the results achieved in the settlements.

160 Based on all of the evidence and taking into consideration the risks associated with a trial, I find that the result achieved for the clients in the Ostic settlement was very good and the result in the Halwell settlement was excellent. I do not share Mr. Singer's view that the results were outstanding, but I also reject Mr. Lima's view that the results were just average.

161 Mr. Singer also had some involvement in post-settlement negotiations that benefitted the clients. He was not solely responsible for those negotiations, but he played a part in obtaining a reduction in NFA's fee (from 7% to 5%), as well as a reduction in the amount garnished by MCF (from approximately $110,000 to $97,000). The dealings with MCF were legal services that were provided *gratis* and they are therefore not properly part of this assessment, but the negotiated reduction in NFA's fee is an aspect of the excellent result achieved by the solicitors in the Halwell action.

(h) Ability of the Client to Pay

162 In this case, the solicitors' fees have already been paid from the settlement funds. The issue is whether Mr. Lima should receive a partial refund based on a reduction of the solicitors' account.

163 Although Mr. Lima's business eventually resumed operating, he testified that he is currently suffering financial hardship, worsened by the impact of his separation from Ms. Hildebrandt. At the time of the trial, he was about to move into a friend's basement to minimize his living expenses. A reduction in the solicitors' account and reimbursement to him would provide him with some much needed financial relief.

164 I should note that, without the contingency fee arrangement, Mr. Lima would not have been able to finance the litigation. Mr. Lima's financial circumstances may have been stable at the time of the fire, but he defaulted on all of his mortgage payments soon thereafter and ran into serious financial difficulties. He no longer had a property at which he could store the boats, aircraft and other vehicles that he was buying and selling, so his business was no longer operational. He lost his primary source of income. He was being pursued by various creditors. Mr. Singer testified that, had Mr. Lima engaged Singer Kwinter on an hourly basis, he would have been required to pay at least $100,000 to get the case to trial. The evidence establishes that he could not have afforded that expense.

(i) Client's Expectation as to the Amount of the Solicitors' Fee

165 After the first meeting with his lawyers in July 2011, Mr. Lima was dissatisfied with the terms of the initial retainer agreement. It provided that Singer Kwinter would receive one third of all sums payable to him by the defendants with respect to the claims, including prejudgement interest, special damages, costs and HST, in addition to all disbursements incurred. He expressed his dissatisfaction to Mr. Singer and negotiated the revised contingency fee agreement. In these circumstances, Mr. Lima could reasonably expect to pay a fee that was markedly less than one third of the clients' total recovery from the defendants, plus disbursements.

166 Pursuant to the settlements, Ostic and Halwell paid the clients (or paid their creditors on their behalf) a total of $1,400,000. Singer Kwinter incurred disbursements totalling $32,704.02, inclusive of HST. NFA charged a contingency fee of $53,190.32, which also had to be paid as a litigation disbursement.

167 Had the clients been billed based on the terms of the initial retainer arrangement, the NFA fee and other disbursements would have been deducted from the settlement funds and a one-third percentage (33%) would have been applied to the remainder of $1,314,105.66, resulting in a fee of $438,035.22, inclusive of HST. In other words, under the terms of the initial retainer agreement -- which Mr. Lima rejected as unfair -- he would have been required to pay Singer Kwinter a total of $523,929.56 (i.e., a fee in the amount of $438,035.22, plus disbursements totaling $85,894.34, both figures inclusive of HST).

168 As set out above, the clients actually paid Singer Kwinter a total of $474,284.38 (i.e., fees of $33,900 for the Ostic settlement and fees of $338,390.04 for the Halwell settlement, plus disbursements totalling $101,994.34[1], all figures inclusive of HST). The total paid by the clients was therefore almost $50,000 less than it would have been under the terms of the initial retainer agreement.

169 Mr. Lima testified that he expected to pay significantly less than that. He said he was upset when he received Singer Kwinter's final account and saw that the solicitors' fee included $150,000 for partial indemnity costs. He claimed that Mr. Singer told him costs would only be awarded if the matter went to trial and that the costs would be offset against his legal fees and would reduce the amount that he was required to pay his lawyers.

170 Mr. Lima said he expected to pay only 20% of the first $500,000 of the combined amounts received from the two defendants ($1,400,000), plus 10% of the remainder ($900,000), pursuant to the revised retainer agreement. In other words, he expected to pay a total of $190,000 in fees to the solicitors. He said, "Somehow they added on $150,000 and called it partial indemnity costs. I have no idea where they got that number from. Mr. Singer never explained it to me. He pulled it out of a hat."

171 Mr. Singer testified that he explained the meaning of partial indemnity costs to the clients in the fall of 2011. He said he was satisfied that the clients understood the terms of the revised retainer agreement. He denied telling Mr. Lima that costs would only apply in the event of a trial. He also denied saying that any costs ordered at trial would offset the amount to be paid by the clients.

172 The documentary evidence corroborates Mr. Singer's testimony on these points. On September 8 and 9, 2011, Mr. Singer and Mr. Lima exchanged email messages dealing with the terms of the revised contingency fee agreement. Mr. Singer was clear in his proposal that partial indemnity costs would be "in addition to" the percentage amounts calculated based on the recovery from the defendants. Mr. Lima objected that the law firm would effectively be "getting paid twice" if it collected fees from him based on the percentages and also collected partial indemnity costs from the defendants. He stated, "I can live with the percentage agreement and any partial indemnity paid to me". Mr. Singer replied that if the proposed arrangement was not satisfactory to Mr. Lima, he was "free to seek other counsel".

173 The documentary evidence therefore contradicts Mr. Lima's contention that Mr. Singer said costs would be offset against the percentage fees. The retainer agreement, drafted as a letter from Mr. Singer to the clients on September 13, 2011, expressly states that, "in addition to" the sums calculated based on 20% and 10% of the claims paid by the defendants, "the balance of our fees will be paid by the defendants known as partial indemnity costs." Mr. Singer then repeated, "This amount is in addition to the amounts paid by you noted above."

174 Mr. Singer could not have been more clear that partial indemnity costs would be *added to* (not offset against) the 20% and 10% figures in order to calculate the solicitors' fee. I therefore reject Mr. Lima's contrary testimony on this point as not credible.

175 I similarly reject Mr. Lima's testimony that Mr. Singer told him partial indemnity costs would only be awarded at trial. My reasons for this are threefold. First, I have concluded that Mr. Lima's credibility is generally suspect, based on my findings above. Second, Mr. Lima wavered on cross-examination and stated that Mr. Singer simply did not talk to him about how partial indemnity costs would factor into a settlement. Third, the written correspondence between Mr. Lima and Mr. Singer, including the signed retainer letter, does not contain any suggestion that partial indemnity costs would only form part of the solicitors' fee if costs were ordered by a court after a trial.

176 I find that Mr. Lima was aware, from the time that he retained Singer Kwinter, that partial indemnity costs would be added to the solicitors' percentage fees in the event of a settlement. There is, however, no evidence that Mr. Lima knew how partial indemnity costs would be calculated. There is no evidence that Mr. Singer advised him that an industry standard of 15% would be applied.

177 I am unable to ascertain from the evidence what Mr. Lima expected the costs portion of the fee to be when he signed the retainer agreement in September 2011.

178 There is, however, evidence of his expectation regarding the total amount of the solicitors' fee on the date that he executed the Halwell Minutes of Settlement. Both he and Ms. Hildebrandt signed handwritten Directions to Counsel prepared by Mr. Singer, which stipulated the following:

> I authorize our solicitors Singer Kwinter to settle our claims with Halwell for $1,250,000 inclusive of all claims, costs and disbursemts (sic). As on estimate, after payment of all legal fees, disbursemts (sic), and assuming NFA agrees to a reduct (sic) of its fees we would be receivg (sic) about $830,000.00.
>
> We acknowlege (sic) that we further owe approximatly (sic) $71,000 to Ellas, which we will attempt to negotiate. We further acknowlegd (sic) that we owed an amount to MCF which we will attempt to negotiate a reduction in the garnishment and Fisher is also still owed $23,000.
>
> We admit acknowlge (sic) that given the risks we may have rceived (sic) more but wish to settle at this time.

179 Although the Directions to Counsel did not breakdown the amount of disbursements (including NFA's fee), partial indemnity costs and other fees payable to the solicitors, it was evident that an approximate total amount of $420,000 would be used to satisfy those expenses. Of the $1,250,000 payable by Halwell, Mr. Lima acknowledged that he and Ms. Hildebrandt would be receiving about $830,000. A difference of $420,000 was therefore obviously going to be paid to NFA and the lawyers.

180 Mr. Lima testified that it was impossible for him to know the amount of the solicitors' fee because "certain debts had to be paid off" and the amounts of the debt payments had yet to be negotiated. This is true with respect to NFA's fee, but all other debts owed to MCF, Ellas and Fisher were to be paid out of the $830,000 amount allocated to the clients; they were not to be deducted from the solicitors' fee. The amount of those debts was therefore irrelevant to the calculation of the solicitors' fee.

181 Moreover, the clients had a rough idea of what NFA would be charging. NFA had initially agreed to charge a fee equal to 7% of the clients' recovery. Seven percent (7%) of $1,400,000 equals $98,000. The Directions to counsel assume a reduction in NFA's fee. Hence Mr. Lima ought to have realized that Singer Kwinter would be paid at least $330,000 from the settlement funds after NFA's reduced fee was paid (assuming NFA's fee was reduced to at least $90,000).

182 It would have been preferable for the Directions to Counsel to specify the amount of the lawyers' fee (or an estimate of the lawyers' fee), rather than leaving it to the clients to do the mathematical calculations. However, Mr. Lima's contention that he only expected to pay $190,000 to his lawyers at the moment when he executed the Halwell settlement is simply untenable. He knew that approximately $420,000 would be used to pay NFA and Singer Kwinter.

183 Mr. Singer testified that he read the Directions to Counsel to the clients on the date of the Halwell settlement. He explained that he did so because his handwriting "is not great". He was confident that both clients knew roughly the net amount of settlement funds that would be paid to them and both were satisfied with the result.

184 Mr. Lima testified that he did not read the Directions to Counsel nor did Mr. Singer read the document to him before he signed it. I find it implausible that Mr. Singer would not have ensured that the clients read and understood the document before signing it. In any event, Mr. Lima admitted that he "looked at" it and saw the $830,000 figure. He said he thought that was the amount he would end up with. In fact, the clients did end up with almost exactly that amount. (I have already rejected Mr. Lima's testimony that he was led to believe that Ms. Hildebrandt was not entitled to any of the net settlement funds.)

185 Of the $1,250,000 paid by Halwell pursuant to the settlement, Singer Kwinter received $85,894.34 for disbursements (including $53,190.32 paid to NFA) and $338,309.04 for fees, inclusive of HST. The remainder - a total of $825,796.62 - was paid either to the clients directly or to their creditors on their behalf.

186 The amount received by the clients is commensurate with what the clients acknowledged they would be receiving when they signed the Halwell Minutes of Settlement and the Directions to Counsel. If Mr. Lima actually expected to pay less than $330,000 in fees to Signer Kwinter, then he had an unreasonable expectation based on the information available to him at the time of settlement.

187 Mr. Kwinter, on behalf of the Respondent solicitors, argues that it is "unseemly" for Mr. Lima to request a reduction in the solicitors' fee. He submits that the financial benefit of the settlements to the clients exceeded $3 million. Halwell and Ostic collectively paid $1,400,000 and Halwell released the clients from a counterclaim for $1,700,000 in damages (relating to the TD and Ellas mortgages). Using a "standard charge" of one third of recovery, Mr. Kwinter argues that it would be reasonable and commensurate with industry practice, for Singer Kwinter to bill 33% of the total financial benefit of $3,100,000. Mr. Kwinter further submits that, if disbursements are excluded, the solicitors' actual fees amount to only 11% of the total financial benefit of the settlements. If the disbursements are included, he submits that the solicitors' actual fees amount to only 13% of the total financial

benefit to the clients. Given these percentages, he argues that it is unreasonable and "unseemly" for Mr. Lima to expect a reduction in fees.

188 I do not find these submissions by Respondent's counsel to be helpful. There is no evidence that the industry standard is to bill 33% of the total financial benefit to litigants. Moreover, the clients in this case did not agree to pay the solicitors a percentage of the "total financial benefit" of any settlement. Rather, they agreed to pay 20% of the first $500,000 and 10% of the remainder of *all claims paid to them* by the defendants, plus partial indemnity costs and any disbursements incurred. Any percentage calculations must therefore be based exclusively on the claims paid to them by the defendants.

CONCLUSION

Reasonable and Fair Amount of Fees on a Quantum Meruit Basis

189 Based on an assessment of all the relevant factors, I conclude that Singer Kwinter is entitled to bill fees equivalent to 25% of the claims paid by Ostic and Halwell.

190 This percentage takes into consideration the significant monetary value of the matters in issue and their importance to Mr. Lima, the very substantial amount of time reasonably expended by the solicitors on the file, the high degree of skill and competence demonstrated by the solicitors, the risk of non-payment assumed by the solicitors, the excellent results achieved by the solicitors, Mr. Lima's ability to pay and the amount that Mr. Lima could reasonably have expected to pay in the circumstances. It also takes into consideration the fact that the claims were settled prior to trial and prior to completing full trial preparation. Had the matter gone to trial with the same result, I would have found that a higher percentage than 25% was appropriate.

191 According to Singer Kwinter's accounts, the total disbursements incurred on the file amounted to $85,894.34 (i.e., 32,704.02, inclusive of HST, plus $53,190.32 paid to NFA). These disbursement amounts are not in dispute.

192 When the disbursements ($85,894.34) are subtracted from the total payments made by Ostic and Halwell ($1,400,000), an amount of $1,314,105.66 remains. This represents the total of all claims paid by both defendants. I find that Singer Kwinter is entitled to fees equal to 25% of that total, namely $328,546.41, inclusive of HST.

193 I therefore conclude that, on a *quantum meruit* basis, Singer Kwinter was entitled to bill the clients $85,894.34 in disbursements and $328,546.41 in fees, inclusive of HST.

194 The record establishes that Singer Kwinter actually billed $101,994.34 for disbursements (inadvertently double billing an amount of $16,100), as well as $372,290.04 for fees ($33,900 for the Ostic settlement and $338,390.04 for the Halwell settlement), inclusive of HST.

195 I find that the total amounts billed by Singer Kwinter should therefore be reduced by the amount of $59,843.63.

Allocation of the Amount to be Reimbursed by the Solicitors

196 Mr. Lima asks for an order that he be reimbursed the full reduction in the solicitors' accounts. Singer Kwinter argues that Mr. Lima should receive a reimbursement of only 2/3 of the reduction because Mr. Hildebrant paid one third of the accounts.

197 I disagree for the following reasons.

198 First, the evidence does not support a finding that Ms. Hildebrandt paid one third of the solicitors' accounts. She received approximately one third of the net Halwell settlement funds, but she received much less than a third of the net Ostic settlement funds. Both settlement funds were used to pay her and Mr. Lima's joint debts with Fisher,

Ellas and MCF, as well as the disbursements in the case (including NFA's fee). I cannot determine, based on the evidence, precisely how the fees and disbursements were apportioned between them.

199 Second, the clients did not direct Singer Kwinter to release one third of the net Halwell settlement funds to Ms. Hildebrandt. The funds (in the amount of $708,715.22) were held in trust for the clients because Mr. Lima and Ms. Hildebrant were involved in both civil and family litigation against each other. The clients eventually resolved their litigation with Minutes of Settlement which stipulated that they would execute a direction to the Respondent to release the sum of $236,500 to Ms. Hildebrandt and to release the balance of the funds to Mr. Lima. That direction was signed and the funds were released in accordance with it. The direction did not state that 1/3 of the trust funds were to be released to Ms. Hildebrandt. The direction did not specify an amount to be released to Mr. Lima. There is no evidence regarding how the amount payable to Ms. Hildebrandt ($236,500) was calculated. There is no evidence upon which I could conclude that the settlement between Mr. Lima and Ms. Hildebrandt and the direction that flowed from the settlement were premised upon a one third / two thirds allocation of the solicitors' accounts.

200 Third, Ms. Hildebrant received the same reporting letters and solicitors' accounts as Mr. Lima. She did not complain about the amount of the Respondent's fees. She did not participate in this assessment proceeding. If she feels that she should be entitled to a portion of the reduction reimbursed to Mr. Lima, she may take steps to try to set aside the Minutes of Settlement regarding the allocation of the net Halwell settlement funds, or take other steps to try to obtain a portion of the refund. I have no authority to make any order in her favour because she is not a party to this assessment proceeding.

201 Finally, it would not be appropriate for me to order that one third of the reduction in the solicitors' accounts be held in trust pending potential speculative litigation that may or may not ensue between Mr. Lima and Ms. Hildebrandt.

202 I therefore decline to make the order that Singer Kwinter requests. However, in the interest of justice, I will direct Singer Kwinter to put Ms. Hildebrandt on notice that the solicitors' accounts have been reduced, pursuant to Mr. Lima's Application, with a repayment to Mr. Lima.

ORDER

203 For the reasons set out above, Singer Kwinter is ordered to pay Mr. Lima $59,843.63, plus pre-judgment interest from the date of Mr. Lima's Notice of Assessment. This amount includes $16,100 in disbursements that were inadvertently double-billed.

204 Singer Kwinter is directed to provide a copy of this Ruling to Ms. Hildebrandt at her last known address and email address.

> *NOTE: If either party believes that I have made a mathematical error in any of the calculations in this Ruling, they may bring their concern to my attention in writing within 30 days, so that the concern can be addressed and any errors can be corrected*.

C. PETERSEN J.

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1 This amount includes the inadvertent double billing of $16,100 in disbursements.

Lima v. Kwinter
[2021]

Tab 21

Lima v. Kwinter

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

D.H. Doherty, A. Hoy and M. Jamal JJ.A.

Heard: By written submissions (submitted to a panel on)

September 17, 2020.

Judgment: January 26, 2021.

Docket: C67269

[2021] O.J. No. 317 | 2021 ONCA 47

Between David Lima, Applicant (Respondent/Appellant in Cross-Appeal), and Alfred M. Kwinter, Alfred Kwinter Professional Corporation and 1736314 Ontario Inc. carrying on business as Singer Kwinter, Respondents (Appellants/Respondents in Cross-Appeal)

(91 paras.)

Case Summary

Civil litigation — Civil procedure -- costs — Offers to settle — Appeal by client from costs award on assessment allowed — Judge awarded client costs until firm's offer to settle and cost to firm thereafter — By entering into fee agreement contrary to Solicitors Act that was unenforceable and failing to inform client of these facts, firm made ultimate assessment virtually inevitable — While SK made several bona fides attempts to settle assessment, client made none and unreasonably refused firm's offer — Proper balance achieved by awarding client his costs of $20,000 up to firm's first offer and denying either party any costs thereafter.

Legal profession — Barristers and solicitors — Compensation — Contingency fee agreements — Measure of compensation — Quantum meruit — Appeal by law firm SK from assessment dismissed — Lima's cross-appeal dismissed — Lima executed contingency fee agreement — Agreement was unenforceable for failure to obtain court approval — SK billed based on Agreement — Application judge agreed with SK that fees should be assessed on quantum meruit basis and reduced fees from $372,290 to $328,546 — SK's breach of Solicitors Act did not disentitle SK to reasonable fees for services — Agreement provided valuable insight into Lima's reasonable fee expectations — Without clear and demonstrated double-counting, judge erred in requiring SK to repay $16,100 to correct double-counting of disbursements.

Professional responsibility — Self-governing professions — Professions — Legal — Barristers and solicitors — Appeal by law firm SK from assessment dismissed — Lima's cross-appeal dismissed — Lima executed contingency fee agreement — Agreement was unenforceable for failure to obtain court approval — SK billed based on Agreement — Application judge agreed with SK that fees should be assessed on quantum meruit basis and reduced fees from $372,290 to $328,546 — SK's breach of Solicitors Act did not disentitle SK to reasonable fees for services — Agreement provided valuable insight into Lima's reasonable fee expectations — Without clear and demonstrated double-counting, judge erred in requiring SK to repay $16,100 to correct double-counting of disbursements.

Appeal by the law firm SK and cross-appeal by the client, Lima, from an assessment of SK's fees. Appeal by Lima from the costs award. SK represented Lima in an action against his insurer and his insurance broker. Pursuant to a contingency fee agreement, Lima agreed to pay a fee equal to 20 percent of all claims paid by the defendants up to $500,000, and 10 percent of all claims paid in excess of $500,000. In addition to the percentage fee, the Agreement also entitled SK to costs paid by the defendants. The action proceeded through discoveries, three pre-trials, and a mediation. The broker then agreed to settle the claims against it for $150,000. The insurer settled for $1,250,000. In total, SK took fees of $372,290 and disbursements of $101,994 out of the settlement funds. The parties had agreed well before the assessment commenced that SK was entitled to the disbursements listed in its accounts and need not prove those disbursement. At the assessment, SK conceded that it the fee agreement contravened the Solicitors Act and was unenforceable due to the parties' failure to obtain judicial approval. SK argued that its fees should thud be calculated on a quantum meruit basis. The application judge agreed. On the application judge's findings, the Agreement reflected Lima's agreement as to how SK's fees would be calculated and Lima understood the Agreement included both a percentage fee component and a costs component. Ultimately, she concluded SK was entitled to fees of $328,546. Despite the parties' agreement that disbursements were not in issue, and the absence of any submissions from counsel, the application judge, based on her own review of the billing documents, concluded SK had inadvertently double-billed disbursements in the amount of $16,100. The application judge awarded Lima costs on a partial indemnity basis up to the date on which SK served Lima with an Offer to Settle for $50,000. The application judge fixed those costs at $20,000. The application judge awarded SK partial indemnity costs after that date, fixing those costs at $17,000.

HELD: Appeal allowed in part.

Cross-appeal dismissed. Appeal from costs award allowed. SK's appeal was allowed to the extent of eliminating the application judge's recalculation of the disbursements. SK's breach of the Solicitors Act did not disentitle SK to reasonable fees for services. The terms of the agreement negotiated by Lima provided valuable insight into his reasonable expectations as to the fees he would eventually have to pay. None of the arguments advanced by SK or Lima gave cause to set aside or vary the application judge's quantum meruit assessment. SK had no reason to think the amount of disbursements it claimed were challenged or that the application judge would take issue with the amount claimed for disbursements. As the parties had specifically agreed SK was entitled to the disbursements claimed and need not prove them, it was unfair to deny SK disbursements for want of proof. Absent a clear and demonstrated double-counting, the application judge erred in requiring SK to repay $16,100 to correct a double-counting of disbursements. By entering into a fee agreement it knew to be contrary to the Solicitors Act and unenforceable without prior court approval, and by failing to inform the client of these facts, SK made the ultimate assessment of its fee virtually inevitable if and when the client learned the Agreement was unenforceable. While SK made several bona fides attempts to settle the assessment, Lima made none. Lima thus bore significant responsibility for the four-day hearing that eventually ensued. A proper balance was achieved by awarding Lima his costs up to the point of SK's first offer to settlement, assessed at $20,000, and denying either party any costs after that point.

Statutes, Regulations and Rules Cited:

Solicitors Act, *R.S.O. 1990, c. S.15, s. 23*, s. 24, s. 28.1(8), s. 28.1(9)

Appeal From:

On appeal from the judgment of Justice Cynthia Petersen of the Superior Court of Justice, dated July 3, 2019 with reasons reported at *2019 ONSC 4064*.

Counsel

Abir Shamim

Chris G. Paliare and Lauren Pearce, for the appellants/respondents in cross-appeal.

Peter I. Waldmann, for the respondent/appellant in cross-appeal.

The judgment of the Court was delivered by

D.H. DOHERTY J.A.

I

1 This is an appeal brought by the law firm, Singer Kwinter ("SK"), and a cross-appeal brought by their former client, Mr. David Lima. SK represented Mr. Lima in an action brought against his insurer and his insurance broker. The appeal and cross-appeal are from an assessment of SK's fees. That assessment proceeded by way of an application before a Superior Court judge. In addition to appealing the assessment, both SK and Mr. Lima also seek leave to appeal the costs order made by the application judge.

2 I would allow SK's appeal, but only to the extent of eliminating the application judge's recalculation of the disbursements to account for what she believed to be a double-counting of certain disbursements. I would dismiss Mr. Lima's appeal from the assessment.

3 I would dismiss SK's application for leave to appeal the costs ordered on the application. I would grant Mr. Lima leave to appeal, allow the appeal and vary the costs order in his favour to $20,000.

II

BACKGROUND FACTS

4 Mr. Lima's home and other buildings on his property burned down in February 2011. Investigation revealed the fire was deliberately set. Mr. Lima's insurer suspected him.

5 In the summer of 2011, frustrated with the progress of his insurance claim, Mr. Lima decided to retain SK.[1] SK, a well-known plaintiffs' litigation firm, has enjoyed considerable success taking lawsuits to trial against insurers who have denied coverage on fire insurance policies and alleged arson.

6 Mr. Lima could not fund what was potentially long, complicated and expensive litigation on an ongoing basis. He and SK negotiated a contingency fee agreement ("CFA"). SK initially proposed a fee equal to one-third of all monies ultimately paid by any defendants. Mr. Lima verbally agreed with this proposal, but shortly afterwards, suggested to Mr. Singer the fee was too high. Mr. Singer agreed to renegotiate.

7 In September 2011, Mr. Lima signed a retainer agreement with SK. The retainer provided for payment to SK, calculated in two ways. SK was to receive a fee based on a percentage of any amount recovered. Mr. Lima agreed to pay a fee equal to 20 percent of all claims paid by the defendants up to $500,000, and 10 percent of all claims paid in excess of $500,000. In addition to the percentage fee, the CFA also entitled SK to costs paid by the defendants. The relevant provision read:

> In addition to the above-noted sums, the balance of our fees will be paid by the defendant known as partial indemnity costs. This amount is in addition to the amounts paid by you noted above.

8 In October 2011, SK commenced an action against the insurer and the insurance broker. In addition to claiming damages against the insurer of over $5 million for negligence and breach of contract, Mr. Lima sought punitive

damages based on the insurer's bad faith denial of coverage. As against the broker, Mr. Lima claimed damages of $2 million, alleging the broker failed to give him proper advice and arrange adequate or appropriate insurance coverage.

9 The insurer denied coverage in its statement of defence, alleging Mr. Lima had either started the fire or caused someone else to start the fire. The insurer and the broker both maintained the losses claimed by Mr. Lima were grossly exaggerated. The insurer also counterclaimed against Mr. Lima, seeking $1.7 million in damages for monies the insurer said it was obliged to pay to mortgagees under the terms of the policy.

10 The action proceeded through discoveries, three pre-trials, and a mediation. In May 2015, the broker agreed to settle the claims made against it with a payment to Mr. Lima of $150,000 "all in". The insurer settled about a month later in June 2015 with an "all in" payment of $1,250,000. Neither settlement attributed any part of the settlement amounts to any specific head of damages, or to costs.

11 Mr. Lima directed that certain payments be made directly to third party creditors. The remainder of the settlement funds was paid into SK's trust account. SK billed Mr. Lima $50,000 in respect of the settlement with the broker. SK unilaterally attributed $20,000 of that amount to costs. The remaining $30,000 represented SK's fees calculated in accordance with the percentages set out in the CFA. SK's bill to Mr. Lima showed $33,900 ($30,000 in fees, plus $3,900 HST) paid to SK from the settlement funds deposited into SK's trust account by the broker. Mr. Singer testified SK forgave the remaining amount owing on fees as part of its final accounting with Mr. Lima after the settlement with the insurer.

12 In respect of the funds paid by the insurer into SK's trust account, SK took fees of $338,390.04, of which it unilaterally attributed $150,000 to costs, with the remainder representing the fees owed to SK under the percentages set down in the CFA.[2]

13 In total, SK took fees of $372,290.04 ($33,900 plus $338,390.04). In addition, disbursements of $101,994.34 were paid out of the settlement funds.

III

THE APPLICATION

14 About a year after receiving SK's final account, Mr. Lima served a Notice of Assessment under the *Solicitors Act*, *R.S.O. 1990, c. S.15*. After a false start before an assessment officer, Mr. Lima commenced an application in the Superior Court in July 2017, challenging the legality of the CFA. The application was eventually heard in late January and early February 2019.

15 On the application, SK conceded that it knew when it entered into the CFA with Mr. Lima the agreement contravened s. 28.1(8) of the *Solicitors Act*, and was unenforceable by virtue of s. 28.1(9).[3] According to SK, it was commonplace in 2011 to negotiate contingency fee agreements, like the one negotiated with Mr. Lima, and to fail to apply for, or obtain, the judicial approval required under s. 28.1(8).[4]

16 SK argued, that because the CFA was unenforceable, its fees should be calculated on a *quantum meruit* basis. SK further submitted, that in performing that *quantum merit* assessment, the court must look at Mr. Lima's reasonable expectations as one of the relevant factors. SK contended Mr. Lima's reasonable expectations were reflected in the terms of the CFA he had agreed to with SK. SK contended the amount it had billed Mr. Lima pursuant to the CFA was reasonable and justifiable on a *quantum meruit* analysis.

17 On the application, Mr. Lima did not argue that SK should be required to return all of the funds it had taken as fees as a consequence of deliberately entering into an unenforceable contingency fee agreement. Instead, Mr. Lima submitted SK's bills should be reduced by subtracting the amounts SK had arbitrarily allocated to costs in the

settlement with the insurer and the broker ($170,000). Mr. Lima argued those arbitrary figures were "made up numbers" and amounted to double-counting, having regard to the fees SK had taken as a percentage of the settlement funds. Mr. Lima insisted he had never been told that SK would be entitled to costs paid by the defendant on top of the percentage fee he had agreed to pay. Finally, Mr. Lima submitted there should be other specific deductions from the fees charged to reflect duplications and excessive charges.

18 Prior to the application, counsel for Mr. Lima and SK agreed disbursements were not in issue and did not have to be proved. The application proceeded on the basis that the amount claimed for disbursements was not in issue.

19 The application judge agreed that SK's fees should be assessed on a *quantum meruit* basis. After referencing the many factors identified in *Cohen v. Kealey and Blaney*, *[1985] O.J. No. 160* (C.A.), the application judge proceeded to consider each factor at length. Ultimately, she concluded SK was entitled to fees in the amount of $328,546.41 rather than the $372,290.04 SK had claimed. The application judge ordered the difference, $43,743.63, returned to Mr. Lima.

20 Despite the parties' agreement that disbursements were not in issue, and the absence of any submissions from counsel, the application judge, based on her own review of the billing documents, concluded SK had inadvertently double-billed disbursements in the amount of $16,100. She ordered repayment of that amount by SK to Mr. Lima. In total, the application judge awarded judgment to Mr. Lima in the amount of $59,843.63, plus pre-judgment interest.

IV

THE ISSUES

21 Both parties advanced a number of grounds of appeal. Their arguments raised three questions:

* Did the application judge err in failing to eliminate or at least substantially reduce SK's fees on account of SK entering into a CFA it knew to be unenforceable under the *Solicitors Act*?

* Assuming the application judge was correct in assessing SK's fees on a *quantum meruit* basis, did she make legal errors or material factual errors in her analysis?

* Should the application judge have reviewed the amounts attributed to disbursements, given the position of the parties on the application, and if so, did she correctly hold $16,100 in disbursements had been inadvertently double counted?

A. SHOULD SK'S DELIBERATE NON-COMPLIANCE WITH THE *SOLICITORS ACT* HAVE DISENTITLED SK TO ANY FEES OR, ALTERNATIVELY RESULTED IN A SUBSTANTIAL REDUCTION IN SK'S FEES?

22 The CFA crafted by SK required Mr. Lima to pay a percentage fee based on the amount he recovered and, in addition, authorized payment of costs to SK. Sections 28.1(8) and (9) of the *Solicitors Act*, when read together, provide that a contingency fee agreement, which includes both a fee payable under the agreement and an amount "arising as a result of an award of costs or costs obtained as part of a settlement", is unenforceable unless that agreement is approved by a justice of the Superior Court. Approval is granted only if the lawyer and client make a joint application for approval of the contingency fee agreement, and satisfy the justice there are "exceptional circumstances" warranting including payment of costs to the lawyer as part of the fees owed under a contingency fee agreement. SK knew an application to the court for approval was necessary, but did not make any application. SK did not tell Mr. Lima court approval was required.[5]

23 Sections 28.1(8) and (9) are consumer protection legislation. The requirements of a joint application for approval and judicial approval predicated on exceptional circumstances protect clients from excessive fees and fees determined, according to contractual terms, lacking in transparency and predictability: *Almalki v. Canada (Attorney General)*, *2019 ONCA 26*, at paras. 47-50. The lack of transparency is apparent from a review of the CFA

entered into by SK and Mr. Lima. Under the terms of that agreement, it was left to SK to unilaterally attribute an amount from the settlement amounts to costs. Mr. Lima could not know, from the terms of the CFA, what amount from any settlement SK would attribute to costs paid by the defendant, and therefore ultimately payable to SK as part of its total fee.

24 With the CFA rendered unenforceable by the *Solicitors Act*, the question becomes how should SK's fees be assessed? Counsel for Mr. Lima on appeal submits SK's reliance on a CFA it knew to be contrary to the *Solicitors Act* and unenforceable should disentitle SK to any payment for the services it provided, or alternatively should result in a substantial reduction of any amount otherwise payable to SK for those services. Counsel argued that SK's blatant disregard of the constraints of the *Solicitors Act* resulted in a breach of its fiduciary duty to Mr. Lima and an improper removal of Mr. Lima's funds from SK's trust account. Counsel stresses SK knew all along the CFA contravened the *Solicitors Act* and could not be enforced. He submits that SK's deliberate and knowing breach of the *Solicitors Act* distinguishes this case from cases like *Tri Level Claims Consultants Ltd. v. Koliniotis* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.), at para. 40, in which this court allowed recovery of fees on a *quantum meruit* basis, after a paralegal unknowingly entered into an unenforceable contingency fee agreement.

25 I cannot accept Mr. Lima's submission for several reasons. The assessment process is intended to provide a relatively expeditious manner in which to determine a reasonable fee for legal services provided. Allegations of misconduct against a lawyer, which have no impact on the value of the legal service provided, are not properly resolved in the context of an assessment application. Mr. Lima's argument would introduce a punitive element into the assessment process. He invites the court to "punish" SK for non-compliance with the *Solicitors Act* by eliminating or reducing his fee. Punishment is not normally a goal of civil litigation. If SK should be punished, that task must be left to the state or the Law Society.

26 Mr. Lima also seeks a windfall. He would have the court make an order allowing him to avoid reasonable payment for legal services that resulted in significant financial benefit to Mr. Lima. The approach urged by Mr. Lima, which would allow him to reap the benefits of the settlements achieved by SK's efforts without paying a fair and reasonable fee, goes well beyond any legitimate consumer protection goal, and strikes me as the very definition of unjust enrichment.

27 Mr. Lima's contention that SK's breach of the *Solicitors Act* should disentitle SK to reasonable fees for services finds no support in the language of the relevant provisions in the *Solicitors Act*. Section 28.1(9) renders a contingency fee agreement that does not comply with s. 28.1(8) unenforceable. Courts have long drawn a distinction between services provided pursuant to an agreement which is illegal as offensive to fundamental public policy notions and agreements that are unenforceable. Services provided under agreements which are unenforceable but not illegal as contrary to public policy are compensable on a *quantum meruit* basis: *Tri Level Claims Consultants Ltd.*, at para. 34 (Ont. C.A.).

28 Section 28.1(9) speaks only to the enforceability of a non-compliant contingency fee agreement. SK cannot enforce the CFA. That is, SK cannot rely on the terms of that agreement to fix the value of the legal services provided to Mr. Lima. The unenforceability of the CFA does not, however, alter the reality that the services provided by SK had real value to Mr. Lima. Nor, in my view, does the unenforceability of the CFA negate SK's entitlement to reasonable compensation for the services it provided. Had the legislature intended to deny legal fees for services provided pursuant to an unenforceable CFA, or had the legislature intended that non-compliance with s. 28.1(8) should compel a deduction in fees otherwise owed, the legislature would have done much more than simply declare the contingency fee agreement unenforceable.

29 Apart from the specific language of s. 28.1(9), the common law provides no basis for depriving SK of any payment for its services by virtue of its non-compliance with s. 28.1(8). Courts will not recognize or enforce claims predicated on illegal agreements that are offensive to public policy. For example, the court process will not lend itself to recovery for services provided pursuant to an agreement to commit a tort or a crime: *Tri Level Claims Consultants Ltd.*, at para. 35.

30 The CFA entered into by SK and Mr. Lima does not contemplate the commission of a crime. Nor do the terms necessarily constitute champerty, maintenance or any other tort: see *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.), at paras. 26, 47, 70-76. The common law offers no justification for going beyond the statutory consequences described in s. 28.1(9). That section speaks only to the enforceability of the contingency fee agreement, and not to any entitlement to compensation for the value of services provided pursuant to the agreement.

31 Sections 23 and 24 of the *Solicitors Act* offer strong support for the interpretation of s. 28.1(9) that does not deny a lawyer a *quantum meruit* assessment of fees if the contingency fee agreement is rendered unenforceable by s. 28.1(9). Under s. 23, a client may challenge fees owing under any agreement, including a contingency fee agreement, on the basis the terms of the agreement are not "fair and reasonable between the parties". If the court accepts that the terms are not "fair and reasonable", s. 24 directs:

> ... the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

32 As s. 24 makes plain, a contingency fee agreement that is not fair and reasonable is "void" and "cancelled". The section, however, goes on to provide that fees are to be assessed "in the ordinary manner", that is by a determination of what is reasonable in all the circumstances: see *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (C.A.), at paras. 30-33, 49-50; *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496.

33 Although s. 28.1(9) does not specifically indicate a contingency fee agreement found unenforceable under that section should be assessed in the ordinary manner, I see no principled reason to draw a distinction between a contingency fee agreement found "unenforceable" under s. 28.1(9) and a contingency fee agreement found "void" or "cancelled" under s. 24. The same consequence should follow in respect of agreements found wanting under either s. 24 or s. 28.1(9). The lawyer can no longer rely on the terms of the contingency fee agreement as the basis for determining their fee, but is entitled to reasonable compensation reflective of the value of the legal services provided.

34 The case law, while sparse, is also against Mr. Lima's position. In *Cookish v. Paul Lee Associates Professional Corporation*, 2013 ONCA 278, the client claimed the contingency fee agreement with his lawyer was invalid for non-compliance with the *Solicitors Act*. This court framed the issue in this way, at para. 2:

> As it turns out, however, there is a dispute about the nature of the retainer agreement entered into between the parties. Is it, or is it not, a valid contingency fee agreement, as contemplated by the *Solicitors Act* [citation omitted]? If the answer is no - as Ms. Cookish contends - then the account may be assessed as to the amount on a *quantum meruit* basis. If the answer is yes - as the solicitors contend - then effect must be given to the formula set out in the agreement in determining the amount.

35 Ultimately, at para. 60, the court remitted the matter to the application judge to consider the nature, validity and effect of the agreement entered into between the client and the solicitor.

36 In *Du Vernet v. 1017682 Ontario Limited and Victor Wong*, 2009 CanLII 29191, the client sought an assessment of his lawyers' fees payable under a contingency fee agreement. The motion judge held the contingency fee agreement did not comply with the relevant regulations under the *Solicitors Act*: *Du Vernet*, at paras. 18-20. He further held the agreement was void under s. 24 of the *Solicitors Act* as unfair and unreasonable: *Du Vernet*, at para. 23. The motion judge went on, however, to determine that the lawyers were entitled to fees assessed in the ordinary manner: *Du Vernet*, at paras. 26-29.

37 In *Séguin v. Van Dyke*, 2013 ONSC 6576, the motion judge considered a contingency fee agreement that did

not comply with s. 28.1(8). He declared the agreement "void and unenforceable". The motion judge said, at para. 20:

> I grant the application and declare the contingency fee agreement void and unenforceable. The reasonableness of the fees charged by the defendant will be determined by the trial judge in the tort action, who will receive *viva voce* evidence and who will be in a better position to determine the credibility of the parties.

38 The order in *Séguin* recognizes the lawyer's entitlement to reasonable fees, despite non-compliance with s. 28.1(8) of the *Solicitors Act*, and the unenforceability of the contingency fee agreement. For reasons peculiar to that case, the motion judge directed that the assessment of the fees should be determined in the context of the pending tort action.

39 Mr. Lima relies on *Chudy v. Merchant Law Group*, *2008 BCCA 484*. In *Chudy*, the client sued his former solicitors alleging fraud, breach of trust and breach of fiduciary duty. Among other things, the client demanded the return of the funds paid pursuant to a contingency fee agreement. The client alleged the agreement was invalid for a variety of reasons, all of which involved misconduct by his former lawyers. The client maintained any fees paid were paid as a result of the lawyers' deceit and breach of their fiduciary duty.

40 The majority of the British Columbia Court of Appeal concluded the contingency fee agreements were unenforceable primarily because the solicitor who entered into the agreements was not licensed to practice law. The majority also rejected the lawyer's claim to a *quantum meruit* assessment of those fees. The court said, at para. 76:

> The appellant's arguments do not address the misconduct found by the trial judge or how that misconduct affects the *quantum meruit* claim. In this respect, the finding that the respondents would have taken the file elsewhere had they known the truth about Mr. Shaw's professional status in the winter of 2002 takes on particular significance. The application seeks to recover fees it would not have earned but for Mr. Shaw's deceit. His deceit clearly makes the *quantum meruit* claim untenable in equity.

41 I agree with the conclusion reached by the majority of the British Columbia Court of Appeal. On the findings of the trial judge, the fees paid by the client were paid directly as a consequence of the deceit perpetrated upon the clients by the lawyers. The client was entitled to recover any fees paid as damages flowing from the lawyers' fraud. A *quantum meruit* claim could not mitigate those damages.

42 There is no suggestion in this record Mr. Lima would not have agreed to the terms of the CFA if he knew the agreement contravened s. 28.1(8) of the *Solicitors Act*. Further, on the application judge's findings, Mr. Lima was not deceived or misled as to the terms of the CFA. *Chudy* does not assist Mr. Lima.

43 Both parties made some reference to *Hodge v. Neinstein*, *supra*. In that case, the Divisional Court and this court were concerned with whether s. 28.1(8) of the *Solicitors Act* could support a cause of action for the purposes of certification as a class action. Neither court opined on the consequences of non-compliance with s. 28.1(8). The Divisional Court did, however, indicate the court trying the action might order the return to the client of all funds paid under the unenforceable contingency fee agreement. The court went on to observe, if the funds were ordered returned, it would be incumbent on the lawyer to establish a valid *quantum meruit* claim for fees: *Hodge v. Neinstein*, at para. 8.

44 In summary, for the reasons set out above, the application judge correctly held the CFA was unenforceable. She properly concluded SK's fees should be assessed on a *quantum meruit* basis and correctly did not treat SK's deliberate breach of s. 28.1(8) of the *Solicitors Act* as a reason for eliminating or substantially discounting fees otherwise earned by SK.

45 On the application judge's findings, the CFA reflected Mr. Lima's agreement as to how SK's fees would be calculated. Specifically, the application judge was satisfied Mr. Lima understood the CFA included both a percentage fee component and a costs component. In coming to that conclusion, the application judge rejected Mr. Lima's evidence to the contrary, stating at, para. 176:

> I find that Mr. Lima was aware, from the time that he retained Singer Kwinter, that partial indemnity costs would be added to the solicitors' percentage fees in the event of a settlement. There is, however, no evidence that Mr. Lima knew how partial indemnity costs would be calculated.

46 By all accounts, Mr. Lima is a successful and experienced business person. He negotiated the fee agreement with SK. The terms of the agreement negotiated by Mr. Lima provided valuable insight into his reasonable expectations as to the fees he would eventually have to pay. His reasonable expectations are a significant factor in determining reasonable value for the service provided. It must, however, be stressed that the terms of the agreement go only so far in shedding light on Mr. Lima's reasonable expectations. Based on the CFA, Mr. Lima could not know how the costs component would be determined, or what the amount would be.

B. DID THE APPLICATION JUDGE MAKE ERRORS IN HER *QUANTUM MERUIT* ANALYSIS?

47 The application judge's *quantum meruit* assessment tracked the individual factors identified in the case law. She clearly understood it was not her function to value the services according to the terms of the unenforceable CFA. Instead, she had to arrive at a *quantum meruit* assessment after weighing all of the relevant factors, including Mr. Lima's reasonable expectations as to the fees he would be required to pay: *Lima v. Singer*, at para. 62.

48 In her detailed consideration of the factors relevant to a *quantum meruit* assessment, the application judge made a number of significant factual findings:

* SK took appropriate and reasonable steps to advance Mr. Lima's litigation (para. 85);

* It would have been reasonable for SK to have spent roughly 300 billable hours on the file (paras. 86-88);

* The file had significant legal complexity (para. 100);

* SK handled the litigation with demonstrable expertise and competence. They showed a high degree of skill, which "favours a generous assessment of their fees" (paras. 100, 124);

* Mr. Lima's claim that SK failed to follow his instructions on a specific matter was, like significant other parts of his evidence, false (paras. 121, 175);

* SK assumed a substantial financial risk by committing to take Mr. Lima's case all the way through trial without payment. There was a genuine risk the claim would be dismissed at trial. Had the claim failed at trial, SK would have been required to absorb losses in excess of $500,000 (paras. 133, 134, 141-43, 159);

* The results achieved by SK were "very good" and "excellent" (para. 160);

* Without SK extending the contingency fee agreement, Mr. Lima would not have been able to finance the litigation. On a normal fee-for-service basis, he would have been required to advance at least $100,000 before the case got to trial (para. 164); and

* The amounts to be paid to Mr. Lima under the terms of the settlements were commensurate with the amounts he had been told he could expect to receive under those settlements before Mr. Lima signed the Minutes of Settlement and the Directions to Counsel (para. 186);

49 It is fair to say that neither SK nor Mr. Lima are happy with the application judge's *quantum meruit* analysis. Both argue she was wrong about the level of success Mr. Lima realized through the settlements. SK argues the application judge understated the success by calculating SK's fees at the low end of the range suggested by one

witness. Mr. Lima, however, submits the application judge mischaracterized what were, in reality, average results as "very good" or "excellent".

50 I will not go through the arithmetic and other exercises performed by the parties in support of their very different interpretations of the results achieved by SK. The assessment of the level of success achieved, like other assessments (e.g. the level of risk assumed by the lawyers, the skill of the lawyers), requires a holistic assessment which places the results in the context of the entirety of the relevant circumstances. There is no doubt an element of subjectivity to some of the necessary assessments. It is sufficient, in my view, to hold that the application judge's assessments were reasonable and available to her on the record before her. I would not interfere with any of her factual findings.

51 SK and Mr. Lima allege errors in respect of the treatment of the evidence of the witness, David Leblanc. Mr. Leblanc, an appraiser who had been retained by Mr. Lima during the litigation, was called as a witness on the assessment by Mr. Lima. In cross-examination, Mr. Leblanc was asked about his experience working with law firms in cases like this one and the kinds of fees charged by those law firms. Mr. Leblanc testified to his considerable experience in cases like this one. He indicated that, as "a rough average", fees ranged from 25 to 35 percent of the recovery. Counsel for Mr. Lima objected to the answer, but the trial judge admitted it, indicating the witness was speaking only to his personal experience and not offering a broader opinion.

52 The application judge ultimately determined SK should receive a fee of 25 percent of the settlement funds, less disbursements (paras. 189-92). SK submits the 25 percent falls at the bottom of Mr. Leblanc's range and, given the findings of the application judge, the assessment should have been closer to the 35 percent, at the top of the range. Mr. Lima maintains Mr. Leblanc's evidence was inadmissible and should have been rejected outright. He claims Mr. Leblanc was not qualified to give expert evidence and the procedural requirements in respect of expert evidence were not followed.

53 The trial judge was entitled to consider Mr. Leblanc's evidence, based on his personal experience, for what it was worth. His evidence constituted some evidence of fees charged in cases that were, at least, generically similar to this one.

54 I would also reject SK's submission in respect of Mr. Leblanc's evidence. That submission proceeds on the faulty assumption that, because the application judge permitted Mr. Leblanc to testify about his personal experience, she was required to translate that evidence into a range of fees within which she must operate, for the purposes of determining SK's fees. Mr. Leblanc's evidence did not set a general range, and the application judge did not use it for that purpose. His testimony simply provided some evidence of the level of contingency fees charged in similar cases in which he had been involved.

55 The application judge made no error in her treatment of Mr. Leblanc's evidence. She did not arrive at 25 percent as an appropriate fee by relying on Mr. Leblanc's evidence. She explained how she arrived at 25 percent as an appropriate fee, at para. 190:

> This percentage takes into consideration the significant monetary value of the matters in issue and their importance to Mr. Lima, the very substantial amount of time reasonably expended by the solicitors on the file, the high degree of skill and competence demonstrated by the solicitors, the risk of non-payment assumed by the solicitors, the excellent results achieved by the solicitors, Mr. Lima's ability to pay any amount that Mr. Lima could reasonably have expected to pay in the circumstances. It also takes into consideration the fact that the claims were settled prior to trial and prior to completing full trial preparation. Had the matter gone to trial with the same result, I would have found that a higher percentage than 25 percent was appropriate.

56 SK next submits the application judge wrongly took into account Mr. Lima's ability to pay his legal fees as at the time of the assessment, some four years after the settlement. SK submits Mr. Lima's ability to pay at the time of the

retainer, or at the time of settlement, may have relevance in assessing his fees on a *quantum meruit* basis, but Mr. Lima's financial circumstances years after the settlement cannot have any relevance.

57 There is merit to SK's submission. However, although the application judge made a brief reference to Mr. Lima's difficult financial circumstances as of 2019 under the heading "Ability of the Client to Pay" (para. 163), I do not read Mr. Lima's financial difficulties as having any impact on the application judge's ultimate assessment. The application judge went no further than to indicate some reduction in SK's fees could provide financial help for Mr. Lima. The application judge did not endorse that approach or identify any reduction on account of Mr. Lima's difficult financial circumstances.

58 SK's last submission challenging the *quantum meruit* assessment by the application judge arises out of the treatment of legal services provided by SK in respect of ancillary claims made by Mr. Lima's creditors. These claims had some collateral connection to Mr. Lima's claims against the insurer and the broker. Mr. Singer testified SK undertook to help Mr. Lima on these matters without charging him anything beyond the amounts payable under the CFA.

59 SK submits that its decision not to charge for services relating to ancillary matters was predicated on the existence of the CFA. SK contends, that because the CFA was unenforceable, it is entitled to a *quantum meruit* assessment of all of the services it provided.

60 SK's submission is bold, if nothing else. In effect, SK submits that it should not be bound by its agreement not to charge for certain legal services because the CFA, which it knew all along was unenforceable, is indeed unenforceable. In any event, Mr. Lima clearly had every reason to reasonably expect he would not be required to pay for services rendered in respect of the ancillary matters.

61 Even if the service in respect of these ancillary matters should have been taken into account in the *quantum meruit* assessment, the application record indicates that minimal work was done on these ancillary files. Assuming the work should have been taken into account, I see no reason to think the minimal additional work involved would have led to any different ultimate determination as to the appropriate fee.

62 Like SK, Mr. Lima raises several alleged errors in the application judge's *quantum meruit* assessment. He argues, that without a valid contingency fee agreement, a *quantum meruit* assessment cannot be based on a percentage of the settlement amounts. He submits, if a *quantum meruit* assessment is based on the percentage of the settlement amounts, it is simply a contingency fee under another name. Contingency fees that do not comply with the *Solicitors Act* are not enforceable. Counsel contends the application judge could not avoid the prohibition against enforcing the CFA by, in effect, implementing a contingency fee agreement under the guise of a *quantum meruit* assessment.

63 The application judge did not base her *quantum meruit* assessment on a percentage of the settlement amounts. She based that assessment on her thorough review of the relevant factors and a careful blending of those factors. Her reasons clearly set out the path to her decision.

64 The application judge did ultimately determine that the assessment should be quantified as a percentage of the settlement amounts. I see no error in that mode of quantification, particularly where a significant part of the value of the legal services provided flowed from the lawyer's assumption of a very real, significant financial risk, absent which the client could not have pursued the claim. Furthermore, an assessment based on a percentage of the settlement amounts was clearly the mode of quantification contemplated by both SK and Mr. Lima.

65 Mr. Lima next argues, that even if the application judge properly determined that *quantum meruit* fees could be awarded as a percentage of the settlement amounts, the motion judge erred in failing to deduct the amounts SK had attributed to costs ($170,000) from the settlement amounts before determining the fee based on 25 percent of the settlement amounts.

66 I would reject this argument. The amount SK had attributed to costs from the settlement for the purposes of their fee calculations under the CFA had no relevance to the application judge's *quantum meruit* assessment. The application judge concluded the value of SK's legal services should be quantified as a percentage of the settlement amounts recovered for Mr. Lima. Whatever part of those amounts SK unilaterally attributed to costs, for the purposes of the CFA, had no relevance to the trial judge's assessment of SK's fees on a *quantum meruit* basis.

67 Mr. Lima further submits that time spent on the file is the "major factor" in any *quantum meruit* assessment. He contends, that while the application judge referred to the hours spent, she largely ignored them in her assessment: *Lima v. Singer Kwinter*, at paras. 73-88.

68 Time spent on the file is obviously a relevant consideration. Under traditional retainers, it will, in all likelihood, be among the most important considerations. Its significance in any given case, however, depends on the interplay of all of the relevant factors.

69 The application judge decided that the nature of the retainer and the totality of the circumstances warranted giving prominence to factors other than the time spent on the file. She said, at para. 143:

> Given the substantial risk assumed by Singer Kwinter, it would be inequitable to compensate the solicitors in this case on an hourly basis for the services they provided on a percentage contingency fee basis. The clients assume no financial hardship. Mr. Lima paid an initial retainer of only $5,000, but that amount was ultimately refunded to him. The clients benefitted from skilled legal representation at no costs to them with all the financial risk assumed by their solicitors.

70 I agree with the trial judge's observations. They explain why the hours put in on the file were not as important in arriving at a *quantum meruit* assessment in this situation, as they would be in many others.

71 None of the arguments advanced by SK or Mr. Lima give cause to set aside or vary the application judge's *quantum meruit* assessment.

C. SHOULD THE APPLICATION JUDGE HAVE REVIEWED THE DISBURSEMENTS AND, IF SO, DID SHE ERR IN FINDING AN INADVERTENT DOUBLE-COUNTING?

72 The parties had agreed well before the application commenced that SK was entitled to the disbursements listed in its accounts and need not prove those disbursements. The application proceeded on that basis. The disbursements went unchallenged and the documents relevant to the disbursements were left unexplored.

73 In her reasons, the application judge concluded SK had inadvertently included in its final bill disbursements in the amount of $16,100, that had already been claimed and paid in connection with the settlement with the broker: *Lima v. Singer Kwinter*, at paras. 57-60, 191-95. The application judge had discovered the apparent double-counting on her own review of the records during the preparation of her reasons. Neither party had any opportunity to address the issue. They first became aware that disbursements were in issue when they read the application judge's reasons.

74 The rules governing raising issues not properly pleaded are not necessarily applied as strictly in a proceeding involving an assessment of a lawyer's fees, as they would be in regular civil litigation. I think it would have been appropriate for the application judge to raise the question of the possible double-counting of disbursements, even though the parties had agreed disbursements were not in issue. The application judge erred, however, in deciding that issue without giving the parties any opportunity to address the apparent double-counting she had discovered during her review of the evidence.

75 SK had no reason to think the amount of disbursements it claimed were challenged, or that the application

judge would take issue with the amount claimed for disbursements. Fairness dictated that when the application judge had concerns about the amounts claimed for disbursements during her review of the record, she bring those concerns to the attention of the parties and give them an opportunity to call evidence and make submissions before she decided the issue.

76 The wisdom of allowing counsel an opportunity to address the issue before deciding it, is made clear on this record. The billing documents referred to by the application judge do not demonstrate any double-counting, although they do raise that distinct possibility. The submissions made in the facta filed in this court are not convincing either way. There may or may not have been an inadvertent double-counting. It may also be that the fees owing to SK as a result of the settlement with the insurance broker were understated in the same billing documents. Evidence and submissions based on that evidence would, in all likelihood, have resolved the issue one way or the other.

77 Normally, the onus would be on SK to prove the disbursements. However, when, as here, the parties had specifically agreed SK was entitled to the disbursements claimed and need not prove them, it would be unfair to deny SK disbursements for want of proof. Absent a clear and demonstrated double-counting, I would hold Mr. Lima to his agreement that SK was entitled to the disbursements claimed. The application judge erred in requiring SK to repay $16,100 to correct a double-counting of disbursements.

V

CONCLUSION ON THE APPEAL AND CROSS-APPEAL

78 I would allow SK's appeal to the extent that the judgment in favour of Mr. Lima is reduced by $16,100 from $59,843.63 to $43,743.63, plus pre-judgment interest.

79 Mr. Lima's cross-appeal is dismissed.

VI

THE COSTS APPEALS

80 The application judge awarded Mr. Lima costs on a partial indemnity basis up to November 13, 2018, the date on which SK served Mr. Lima with an Offer to Settle in the amount of $50,000. The application judge fixed those costs at $20,000.

81 The application judge treated the $50,000 offer as more favourable than the judgment obtained by Mr. Lima, as in her view the $16,100 attributable to the inadvertent double-counting of disbursements should be deducted from the judgment for the purposes of assessing costs, leaving a "net" judgment of $43,743.63. Based on this calculation, the November 13, 2018 $50,000 offer exceeded the judgment. The application judge awarded SK partial indemnity costs after November 13, 2018. She fixed those costs at $17,000.[6]

82 In the end, SK was required to pay Mr. Lima $3,000 in costs ($20,000 minus $17,000).

83 Both parties have alleged a myriad of errors by the application judge in her costs assessment. I do not propose to address each argument. Nor do I think the appropriate costs order in these circumstances should turn on the rules applicable to offers to settle. There are two fundamental facts which are largely determinative of the proper costs order on this application.

84 First, SK bears the responsibility for the need for an assessment. By entering into a fee agreement it knew to be contrary to the *Solicitors Act* and unenforceable without prior court approval, and by failing to inform the client of these facts, SK made the ultimate assessment of its fee virtually inevitable if and when the client learned the CFA

was unenforceable. Not only was the assessment made inevitable by SK's conduct, I think its very combative tone was also very much a predictable consequence of SK's troubling lack of candor with Mr. Lima. Mr. Lima had little reason to accept at face value anything SK said about their fees by the time he commenced his application.

85 SK's misconduct in respect of the CFA made the assessment of its fees virtually inevitable and goes a long way to making SK responsible for the costs of that assessment, regardless of the outcome.

86 The second important fact, however, points in the opposite direction. Beginning about two months before the application hearing, SK made several *bona fides* attempts to settle the assessment. Mr. Lima made none. His only offer to settle proposed terms more suggestive of capitulation than settlement.

87 Mr. Lima bears significant responsibility for the four-day hearing that eventually ensued. Two of the offers he rejected were better, one was much better, than the amount Mr. Lima is due under the judgment, as varied by this court. While SK's actions are largely responsible for the bringing of the assessment application, Mr. Lima's actions are primarily responsible for the four-day hearing.

88 In my view, a proper balance is achieved by awarding Mr. Lima his costs up to the point of the offer in November 2018 and denying either party any costs after that point.

89 The application judge fixed Mr. Lima's costs at $20,000 up to November 2018. This amount may be somewhat high on a partial indemnity basis. However, Mr. Lima was entitled to something more than partial indemnity costs, given SK's misconduct.

90 I would grant Mr. Lima leave to appeal costs and vary the costs to $20,000, all inclusive. I would dismiss SK's motion for leave to appeal costs.

VII

COSTS OF THE APPEAL

91 SK was successful on the main appeal to the extent of reducing the judgment by $16,100. Mr. Lima was successful on the costs appeal to the extent of increasing the costs award to him by $17,000. In light of the similar and limited success of both parties, I would make no order as to costs on the appeal.

D.H. DOHERTY J.A.
A. HOY J.A.:— I agree.
M. JAMAL J.A.:— I agree.

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1 SK was retained by Mr. Lima and his common-law wife, Ms. Martha Hildebrandt. I will refer to Mr. Lima as the client.

2 As the application judge points out, at para. 61, by treating the settlement amounts paid by the broker and insurer separately, contrary to the terms of the CFA, the total amount claimed for fees by SK exceeded the amount actually owed under the percentages set out in the CFA. The application judge did not quantify that amount, but it would appear to be about $15,000.

3 The CFA also did not comply with the applicable regulations: *O. Reg. 195/04* - Contingency Fee Agreements, ss. 2, 3.

4 The practice apparently changed after December 2015, when the Divisional Court certified a class action against a law firm. The class action raised common issues with respect to the enforceability of the contingency fee agreements and the client's entitlement to a return of any and all fees collected under contingency fee agreements that contravened the

Solicitors Act: *Hodge v. Neinstein*, *2015 ONSC 7345* (Div. Ct.), aff'd in part, *2017 ONCA 494*, leave to appeal to SCC dismissed, *[2017] S.C.C.A. No. 341*.

5 In May 2018, legislation was enacted repealing ss. 28.1(8) and (9) of the *Solicitors Act*. That amendment has not yet been proclaimed in force.

6 The application judge erred in deducting the $16,100 from the judgment, for the purposes of determining whether SK's offer exceeded the judgment. However, that error was overtaken when this court varied the judgment to $43,743.63, the amount used by the trial judge in determining whether the offers exceeded the judgment.

End of Document

Tab 22

MacDonald et al v. BMO Trust Company et al

CITATION: MacDonald et al v. BMO Trust Company et al, 2021 ONSC 3726
COURT FILE NO.: 06-CV-316213 CP
DATE: 20210617

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES RICHARD MACDONALD, LYNN D. ZOPPAS, JOHN A. ZOPPAS and MICHAEL HALASZ

Plaintiffs

- and -

BMO TRUST COMPANY, BMO NESBITT BURNS INC. and BMO INVESTORLINE INC.

Defendants

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Michael Eizenga, Odette Soriano, Linda Rothstein, Jeffrey Larry, Paul Davis and Douglas Montgomery* for the Plaintiffs

Peter Griffin and Jonathan Chen for the Defendants

HEARD: May 12, 2021 via Zoom video and subsequent written submissions

Settlement and Legal Fees Approval

[1] This class action about hidden foreign exchange fees on currency conversions in registered accounts has settled for $100 million. The plaintiffs seek judicial approval of the settlement agreement, class counsel's legal fees based on the 25 per cent contingent fee retainer and the payment of significant honoraria to the representative plaintiffs.

[2] For the reasons that follow, I approve the settlement agreement and the requested honoraria. I also approve a generous legal fees award but not on the basis of a straight-line application of a contingent fee percentage. In a large recovery or "mega" settlement such as we have here, the legal fees approved must take into account not only the risks incurred and results achieved but also the need to maintain the integrity of the legal profession.

Background

[3] The proposed class action against the BMO defendants for failing to disclose its foreign exchange mark-up in RRSP and other registered accounts was filed in 2006. The action was certified as a class proceeding seven years later in 2013.[1]

[4] The parties' motion for summary judgment on the common issues was heard and decided in 2020.[2] On the liability issues, I found that the BMO defendants were liable to the class over the 10-year class period for breach of trust, breach of fiduciary duty and breach of contract, and concluded that the appropriate remedy for the defendants' wrongdoing was an accounting and disgorgement of profits.[3]

[5] On damages, counsel agreed that the total amount of the impugned mark-up (excluding interest) was $102.9 million. Two issues had to be decided: (i) the profits realized on this amount after the deduction of 'reasonable and necessary expenses' and (ii) the appropriate "time value of money" or PJI amount.

[6] The defendants and their experts argued at the summary judgment motion that after the deduction of all reasonable and necessary expenses, the profit on the $102.9 million was about $38 million. Adding a simple PJI rate, the damages award would be about $52 million. The plaintiffs and their experts pushed for a much larger recovery based on an elevated measure of the time value of money. The class sought disgorgement of $420 million (based on the bank's internal rate of return) or $210 million (based on a typical rate of return on a balanced portfolio). If the court concluded that a simple PJI rate

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[1] *MacDonald v BMO Trust.* 2012 ONSC 759.

[2] *MacDonald et al v. BMO Trust Company et al*, 2020 ONSC 93.

[3] *Ibid.*, at paras. 102-103.

as prescribed by the *Courts of Justice Act* [4] was more appropriate, then the amount requested by class counsel was approximately $148 million.

[7] In the summary judgment decision, I directed that the 'reasonable and necessary expenses' (and hence the determination of the profits) would be decided on a reference and I concluded that the appropriate PJI rate would be the simple interest rate as set out in the legislation. I said this in my reasons for decision:

> The core finding is that the defendants' failure to disclose the amount of the markup fee charged on the foreign exchange conversions and the unauthorized self-payment are a breach of trust and fiduciary duty. The most appropriate remedy is an equitable accounting of the profits that were realized on the $102.9 million in undisclosed markup fees. There is no basis for an elevated interest award.
>
> The said profits, as well as the precise PJI amount, will be determined on the reference that will be conducted as soon as convenient. [5]

[8] Both sides filed notices of appeal. The defendants appealed primarily on the liability findings and the plaintiffs appealed on the time value of money issues and my "simple rate of interest" decision. Counsel on both sides, however, agreed to defer the appeals and first complete the reference as scheduled. Additional expert reports and factums were filed by both sides. The calculations in this additional material proceeded on the basis of my finding that a simple (and not elevated) PJI rate would be used. As class counsel explained in an affidavit filed on this motion for settlement approval:

> In terms of quantum, the defendants' position on the reference had not changed materially from summary judgment. They advanced a profit number of $37.6 million which, together with simple interest of 3.8% as per the *Courts of Justice Act*, resulted in a total of $52.4 million.
>
> The evidence of the class was that the defendants' profits were between $62 million and $97.8 million after accounting for the statute-barred amounts. Adding prejudgment interest under the *Courts of Justice Act*, the total recovery for the class would be between approximately $100 million and $145 million.

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[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[5] *MacDonald, supra*, note 2, at paras. 102-103.

[9] Just days before I was to hear the reference, counsel advised that they had reached a settlement. After 15 years of litigation (12 years if you deduct the three-year stay[6]) the parties agreed to settle this action for a non-reversionary, all-inclusive sum of $100 million.

The settlement

[10] The settlement agreement provides for a speedy, no-claim process that will distribute the funds to some 135,000 class members. An accounting firm (Deloitte) will calculate each class member's entitlement based on the foreign currency transactions in their registered accounts. The defendants will distribute the funds directly to the class members on a pro-rata basis (subject to a $25 minimum threshold) either by direct deposit if the class member still has an account with the defendants or by cheque mailed to the class member.

[11] Because the distribution costs are $12 to $23 per class member, the parties agreed that payments will be made only if they exceed a $25 threshold. The defendants estimate that this $25 minimum (as well as any cheques that are returned uncashed) will mean that approximately $380,000 will not be distributed to class members and must therefore go cy-pres. The parties have agreed that the first $250,000 in cy-pres will be paid to the Class Action Clinic at the University of Windsor and the second $250,000 to the United Way of Canada which funds financial literacy programs across the country.

[12] The settlement agreement also provides that in addition to the $100 million settlement fund, the defendants will pay the costs of notice, administration, and distribution. All class member payments paid by direct deposit (estimated to be 41 per cent of the payments) will be completed within 90 days of settlement approval and reasonable efforts will be made to ensure that payments paid by cheque will be completed within 150 days of settlement approval.

Settlement approval

[13] As I advised counsel at the hearing, this settlement is easily approved.

---

[6] The parties agreed to stay the action until another proceeding commenced by other counsel, *Skopit v. BMO Nesbitt Burns Inc.*, was decided. As it turned out, the *Skopit* action settled for a much smaller amount but the waiting time added three years to this action.

[14] The $100 million settlement amount is well within the required zone of reasonableness[7] — recall that the amount in dispute (with PJI included) ranged from a low of $52.4 million to a high of $145 million. The $100 million settlement amount is almost exactly in the middle.

[15] Add to this the fact that the action settled just a few days before the scheduled reference to determine the "profits" on the impugned $102.9 million in revenues. As the designated referee, I had already reviewed the expert reports and counsels' written submissions about 'reasonable and necessary expenses' and the appropriate 'profits' award and had a good understanding of what might be awarded. I can therefore advise the parties with a reasonable degree of confidence that the $100 million settlement amount (which arguably consists of about $64 million in principal and $36 million in simple PJI) is indeed fair and reasonable and in the best interests of the class.

[16] The settlement is approved. Kudos again to both sides for achieving a reasonable resolution to such a long and hard-fought litigation.

Legal fees approval

[17] This is the issue that consumed most of the time at the hearing and that prompted several follow-up written submissions.

[18] The retainer agreement provides that class counsel (Paliare Roland Rosenberg Rothstein LLP) will be paid a contingency fee of 25 per cent of recovery (plus disbursements and taxes) and 10 per cent of any amount in excess of $500 million. The action settled for $100 million. Class counsel docketed $5.5 million in unbilled time and ended up carrying just under $900,000 in disbursements. They ask that the court approve the agreed-to $25 million in legal fees (plus disbursements and taxes).

[19] The applicable law is not in dispute. Under ss. 32 and 33 of the *Class Proceedings Act*,[8] class counsel's fee agreement must be judicially approved. The court will approve

[7] *Dabbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).

[8] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

the fee agreement if it is "fair and reasonable."[9] If the agreement is not approved, then under s. 32(4)(a), the court may determine the appropriate amount.

[20] There is no question that class counsel have earned a premium legal fee well in excess of the $5.5 million in docketed time. This class action was truly self-made. It did not piggy-back on parallel U.S. proceedings; it did not use product recalls, corporate guilty pleas or government studies as a spring-board. Mr. MacDonald, the lead plaintiff, discovered a problem with the defendant's foreign currency conversion methods and retained class counsel. Class counsel embarked on a hard-fought 15-year litigation that involved a difficult summary judgment motion and an unexpected accounting reference and, as already noted, ended with a very fair and reasonable settlement.

[21] The issue is the determination of the appropriate legal fee. As I reminded counsel during the hearing, the straight-line application of the agreed-to contingency fee percentage — the "presumed validity" approach that I adopted in *Cannon*[10] and refined in *Brown*[11] — works well for most class action settlement amounts that average under $40 million but is not appropriate in large, "mega fund" settlements that are in the $100 million range or higher. As I noted in *Brown*:

> In *Cannon*, I embraced the percentage of the fund approach and accorded presumptive validity to the percentage that was agreed to in the contingent fee retainer agreement (up to one third) if certain conditions were satisfied … the risk incurred by class action lawyers, like personal injury lawyers, was best measured by the wins and losses in many cases over many years and not just by the specific case that was before the court. I was comfortable doing this because almost all of the settlements were under $40 million (i.e. they were not mega-fund cases) and there was rarely, if ever, any direct evidence in the record that the straight-forward application of the percentage approach resulted in legal fees that were excessive or otherwise unreasonable.[12]

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[9] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at para. 27.

[10] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[11] *Brown v. Canada (Attorney General)* 2018 ONSC 3429.

[12] *Ibid.*, at para. 46.

[22] A straight-line application of the contingency fee percentage in mega-settlements can result in undeserved windfalls and transform class action litigation into something approaching a lottery. Here is how I put it in *Brown*:

> It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well. However, it is also important that the court's approval of class counsel's legal fees not result in windfalls …
>
> Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls. Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.[13]

[23] My suggestion in *Brown* that *Cannon* should not be used where the recovery is more than $50 million was not intended as an automatic cut-off or "bright line" — indeed in *Manulife Financial*[14] I approved a 22.5 per cent contingency on a $69 million settlement. And here, as I freely admitted to class counsel during the hearing, I would have approved a 25 per cent contingency fee on say a $64 million settlement (which is arguably the core settlement amount minus PJI).

[24] Here, however, we have a $100 million settlement and a request for $25 million in legal fees.[15]

[25] The concern is the 9-digit size of the settlement and the need to ensure that the approval of legal fees in these so-called mega-settlements remains as principled as possible and not result in undeserved and unseemly windfalls. Because *Cannon* should not be used in mega-settlements, one must revert to the case-by-case approach and determine the fair and reasonable legal fee by considering the applicable law and comparable decisions.

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[13] *Brown, supra,* note 11, at paras. 50-51.

[14] *Ironworkers Ontario Pension Fund v. Manulife Financial Corp.*, 2017 ONSC 2669.

[15] At the hearing, class counsel reduced their request to $23 million and in their final written submission suggested that the approved legal fees should be "over $20 million."

[26] Although a wide range of factors may be considered,[16] the case law makes clear that the most important factors in determining whether the requested legal fee is fair and reasonable are the risks incurred and the results achieved[17] and also "whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession".[18]

[27] It is the concern about the integrity of the profession that may best explain judicial approval of premium legal fees in mega-settlements. The concern about the integrity of the profession is said to be a concern about the "decency, honour and high-mindedness of the profession, both in substance and in public perception."[19] And the approval of straight-line percentages in mega-settlements resulting in undeserved or unseemly legal fees will obviously not maintain "the integrity of the profession."[20]

[28] It is therefore not surprising that the court's primary focus in mega-settlements is the actual dollar amount of the approved legal fee, not percentages or multipliers.[21] It is one thing to approve a $8 million legal fee (say 20 per cent of a $40 million settlement). It is quite another to approve a $50 million fee (20 per cent of a $250 million settlement).[22] The former is still a large number to be sure, but easier to explain and

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[16] The list of factors that judges may consider when assessing whether the legal fees request is fair and reasonable are lengthy and include (a) the time spent and work done; (b) the factual and legal complexities; (c) the risk undertaken; (d) the degree of responsibility assumed by class counsel; (e) the monetary value of the matters in issue; (f) the importance of the matter to the class; (g) the degree of skill and competence demonstrated by class counsel; (h) the results achieved; (i) the ability of the class to pay; (j) the expectations of the class as to the amount of the fees; and (k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement. See *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[17] *Lavier, supra*, note 9, at para. 27. Also see Winkler J. in *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J) at para. 61: "Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class."

[18] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690, at para. 47 (B.C.C.A.); *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447, at para. 76.

[19] *Richardson (Guardian ad litem of) v. Low*, (1996), 23 B.C.L.R. (3d) 268 at paras. 29-30; discussed in *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 at para. 73 et seq.

[20] No judge would ever approve (and to their credit, no class counsel has ever asked for) a 25 per cent contingency fee on say a $1 billion settlement.

[21] *Richardson v. Low* (1996), 23 B.C.L.R. (3d) 268 (S.C.) at para. 35.

[22] Especially when the size of the "mega" recovery is more attributable to the happenstance of a large class size than to any corresponding assumption of risk or increase in effort on the part of class counsel.

justify in terms of risks incurred and results achieved than the latter which is more akin to a lottery win.

[29] It is evident from a survey of the mega-settlement decisions that the judge's approval of class counsel's legal fees, although certainly driven by an analysis of risks and results, is ultimately determined with an eye on the final dollar amount. The approved dollar amount is kept within appropriate bounds by using multipliers and fee/recovery ratios or percentages as cross-checks and guard-rails.

[30] This is particularly apparent in the billion-dollar settlements where legal fees ranging from $25 million to $50 million have been judicially approved. For example:

- *Endean v. Canadian Red Cross Society*[23] - $1.6 billion settlement in the Hepatitis C class action – court approved $52.5 million in legal fees – court noted involvement of multiple law firms in various provinces – and that the legal fees were 4.26 per cent of the recovery.

- *Baxter v. Canada (Attorney General)*[24] - $1.9 billion settlement in the Residential Schools class action – court approved $40 million in legal fees for the "national consortium" of class counsel and noted that the approved legal fees reflected a 2.73 multiplier (that is 2.73 times the docketed time).

- *Manuge v. Canada*[25] - $887 million settlement in the veterans' pension class action – court approved $35.5 million in legal fees and noted that the approved legal fees were 4 per cent of recovery.

- *Brown v. Canada*[26] - $800 million settlement in the "Sixties Scoop" class action – I would have awarded class counsel in the *Brown* side of the litigation (who had literally "bet the firm" and whose efforts were extraordinary in every respect) a maximum legal fee of $25 million –which amounts to about 6 per cent of the recovery.[27]

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[23] *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254.

[24] *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J).

[25] *Manuge v. Canada*, 2013 F.C. 341.

[26] *Brown*, *supra*, note 11.

[27] Assuming that one-half of the $800 million settlement can be attributed to counsel in *Brown*, the resulting fee/recovery percentage would be 25/400 or just over 6 per cent. As it turned out, the final payment to class counsel

- *Quenneville v. Volkswagen*[28] - $2.1 billion settlement in the Volkswagen "defeat device" class action - consortium of 8 law firms sought $65 million in legal fees – agreed to accept $31.2 million plus disbursements and taxes – which I approved.

- *McLean v. Canada (Attorney General)*[29] - $2 billion settlement of the Indian Day Schools class action – court approved $55 million in legal fees – noted docketed time of $10 million – and that "legal fees will be in the 3% range."[30]

[31] For settlements in the billion-dollar-plus range, Canadian courts have approved legal fee amounts of $25 million to $50 million. As here, each of these class actions were hard-fought, multi-year lawsuits that generated a significant level of docketed time and, in the end, resulted in a good settlement. In addition to assessing the risks and results, the court also considered the number of law firms involved, sometimes used a multiplier on the docketed time as a cross-check, and almost always expressed the final dollar amount in terms of a fee/recovery percentage with the objective of staying within an acceptable 4 per cent.

[32] The lesson from legal fee approvals in the billion-dollar settlements — one that also applies to this $100 million settlement — is two-fold: (i) keep an eye on the actual dollar amount; and (ii) explain and justify the approved legal fee in a principled fashion that is consistent with comparable caselaw.

[33] In the billion-dollar settlements, judges have achieved an admirable level of consistency by using the fee/recovery ratio and concluding that a 3 to 5 percentage was acceptable. I do not suggest that the legal fees herein should be limited to 4 percent of recovery or $4 million. The docketed time alone was more than $5 million. And, as already noted, I would have approved $16 million in legal fees on a $64 million recovery by extending my approach in *Cannon*. And probably even $18 million on a $72 million recovery, given the length of the litigation, the docketed time and the commendable resolution. But as the billion-dollar decisions clearly show, nine or ten-digit settlements and legal fee requests of $25 million or more take judges into a very different comfort zone.

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was higher than the suggested maximum of $25 million because of an unexpected decision from my Federal Court counterpart: see *Brown v. Canada (Attorney General)* 2018 ONSC 5456, at paras. 18-20.

[28] *Quenneville v. Volkswagen*, 2017 ONSC 3594.

[29] *McLean v Canada (Attorney General)*, 2019 FC 1077.

[30] *Ibid.*, at para. 54.

[34] What about mega-settlements in the $100 million range? These, of course, are more directly relevant. There are two comparable cases:

- *CIBC v. Deloitte & Touche*[31]– $122 million settlement of an auditor's negligence class action – the second stage of the litigation proceeded on the basis of a contingency fee agreement which provided for "two times docketed time" plus disbursements and taxes – Perell J. approved $22 million in legal fees based on the agreed 2.0 multiplier.

- *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) SNC-Lavalin Group Inc.*[32] – $110 million settlement of a securities class action – Perell J. approved $23.25 million in legal fees for Ontario class counsel, noting docketed time of $9.1 million and the corresponding 2.54 multiplier.

[35] As I read these decisions (admittedly a small sample), a $100 million settlement can result in approved legal fees of $20 million where they reflect 2 or 2½ times the docketed time.

[36] Here however, as already noted, class counsel docketed $5.5 million in time and at the end were carrying just under $900,000 in disbursements. A 2.5 multiplier would allow $13.75 million in fees. A 3.0 multiplier would allow $16.5 million in fees. The 4.0 multiplier, reserved for "the most deserving case"[33] and used by me in *Brown*, would result in $22 million in legal fees. However, this is not *Brown* where a tiny law firm risked its very survival and where I concluded that the use of the highest multiplier as a cross-check was fully justified.[34]

[37] In any event, as I have made clear in other decisions, I am not a fan of multipliers. I agree with the observation of a Federal Court colleague that in the context of mega-settlements, "the use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute

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[31] *CIBC v. Deloitte & Touche*, 2017 ONSC 5000.

[32] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*., 2018 ONSC 6447.

[33] See the Court of Appeal's direction in *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.) at 425: that if a multiplier is used, the range of the appropriate multiplier is from "slightly greater than one to three or four in the most deserving case."

[34] *Brown*, *supra*, note 10, at paras. 68-71.

entitlement."[35] In other words, their value is mainly in their use as cross-checks and guard-rails.

[38] Having examined the applicable caselaw, I come to the following conclusion: on a $100 million settlement, such as here, where the risks incurred by class counsel were real but not remarkable (more on this below), with about $5.5 million in docketed time, the upper bounds of a fair and reasonable legal fees award is at most $20 million.

[39] The question is this: given that I would have approved $16 million in legal fees on a $64 million recovery, and possibly even $18 million on a $72 million recovery, should any additional amount should be awarded to class counsel for achieving a $100 million recovery? Is there anything in the "risks incurred" or "results achieved" analysis that is particularly noteworthy and would move the legal fees needle closer to $20 million?

Risks incurred

[40] As discussed in *Brown*,[36] the primary risk incurred by class action is the risk of non-payment — that after many years of effort, several million dollars in docketed time and sizeable disbursements the action will fail, nothing will be recovered and class counsel will not be paid.[37] Most judges understand that it is the actual "impact"[38] of the non-payment that explains why the risk of non-payment is rewarded with a legal fee premium. A British Columbia judge put it best:

> It is well-recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.[39]

[41] The greater the risk of failure and non-payment – that is, the more serious the financial impact on class counsel – the larger the premium. Hence, in *Brown*, where class

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[35] *Manuge supra*, note 25, at para. 47.

[36] *Brown, supra*, note 10, at paras. 41-44.

[37] Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at 737.

[38] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) per Winkler J., at para. 29.

[39] *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69, at para. 73.

counsel had "bet the firm", I would have approved $25 million in legal fees on a $400 million recovery. I hasten to add that class action litigation should not be about betting the firm — my point is simply that if "risk incurred" is to be a meaningful analytical tool, judges must go beyond a formulaic recitation of the well-known catalogue of "risks" (such as, for example, the risk of losing the certification motion) and assess the nature and extent of the actual financial impact on the particular class counsel firm.[40]

[42] Here, however, class counsel presented no hard evidence in this regard. Or even evidence that their firm was obliged to turn away paying retainers in order to conduct this litigation. They simply repeated the familiar menu of "risks" without any demonstration of actual financial impact on them or their firm.[41]

[43] Class counsel also resisted what I thought was a self-evident observation — that third-party funding should be a relevant factor in the "risks incurred" analysis. Here, class counsel had arranged for the Class Proceedings Fund to cover the risk of adverse cost awards and agreed to the CPF's usual 10 per cent levy. Given that no class action will ever proceed without a cost indemnity for the representative plaintiff,[42] class counsel will typically assume the adverse costs risk themselves or secure third-party funding. If the latter is arranged, the levy or price charged for this particular type of 'insurance policy' is routinely paid out of the settlement funds and not out of class counsel's legal fees.[43]

[44] In my view, it is time to acknowledge that third-party funding should be considered in the "risks incurred" analysis. Indeed, the amended CPA explicitly requires

[40] It was the unworkability of the conventional approach to risk analysis in the context of "every day" settlements that compelled me to replace the "case by case" approach with the broader and more principled approach set out in *Cannon* and refined in *Brown*.

[41] Risk is best understood in terms of individualized impact. For example, an 80 per cent risk of rain (should it materialize) will have little if any impact on an indoor-wedding but enormous impact on an outdoor event. The risk that $1 million of docketed time will not be recovered will obviously have less of an impact in a large law firm than in a two-person law office.

[42] As Strathy J. noted in *Dugal v. Manulife*, 2011 ONSC 1785 at para. 28: "No rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousands of dollars."

[43] Private sector funders typically charge 7 to 8 per cent of recovery; the CPF levy is 10 per cent.

it.[44] However, I concede that it may be unfair to impose this metric retroactively on a class action that probably began under a different expectation 15 years ago.

[45] In any event, I conclude that there is nothing particularly noteworthy in the "risks incurred" by class counsel in this matter that would move the legal fee needle from the $16 or $18 million level to the $20 million level.

Results achieved

[46] Nor is there anything in the "results achieved" assessment that would do the same.

[47] I agree that class counsel achieved a good result. I also agree that even in the stratosphere of nine or ten-digit mega-settlements, large recoveries should be rewarded with appropriately commensurate legal fees.[45] Indeed, we saw this in our review of the billion-dollar settlements where fees in the range of $25 million to $50 million were judicially approved.

[48] My concern in this case is the sizeable PJI component and the extent to which this should figure in the "results achieved" analysis. It is beyond dispute that this litigation was propelled from the outset with a clear understanding that "the time value of money" would be a significant ingredient in the compensation calculation. This was evident from the statement of claim, the submissions on the summary judgment motion and the accounting reference, the terms of settlement and the settlement agreement itself.

[49] If part of the $100 million settlement includes PJI (perhaps as much as $36 million) should not the "results achieved" be adjusted to accommodate this reality? For example, if only $64 million was actually recovered by class counsel's efforts and the rest simply by the passage of time and the application of a legislatively prescribed interest rate, should this not be relevant in the determination of "fair and reasonable" legal fees?

[50] Here, it is reasonably arguable that at least $30 million of the $100 million was PJI and that the $18 million legal fee that would probably have been awarded on a $72

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[44] Section 32(2.2) of the amended CPA, S.O. 2020, c. 11, Sched. 4 (which applies to proposed class proceedings filed after October 1, 2020) provides that "the court shall consider …. (c) the existence of any funding arrangement that affected the degree of risk assumed by the solicitor in providing representation."

[45] As the B.C. court noted in *Endean, supra,* note 23, at para. 80: "A reasonable fee should bear an appropriate relationship to the amount recovered."

million settlement is already fair and reasonable and needs no further enhancement. However, it can also be noted, from a class member's perspective, that class counsel recovered almost the entirety of the $102.9 million amount in dispute, full stop.

[51] The upshot of the "risks incurred" and "results achieved" analysis is this: the most this court can justify and explain in a principled fashion consistent with comparable caselaw is a legal fees award that falls within a range of $18 million to $20 million. The right number may well be around $19 million.

[52] However, given that this was a truly self-made class action that consumed 15 years of litigation, 10,000 hours in docketed time and resulted in a genuinely commendable settlement, I am prepared to err on the side of caution and in favour of class counsel.

[53] This court approves $20 million for legal fees, plus disbursements and taxes.

Honoraria approval

[54] Class counsel asks for judicial approval of honoraria totalling $70,000 for the representative plaintiffs — $50,000 to Mr. MacDonald, $10,000 to Mr. and Mrs. Zopas together, and $10,000 to Mr. Halasz. Class counsel have filed detailed evidence describing their specific contributions.

[55] As a general rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where they can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because of their role as class representative that a significant honorarium will be justified.[46]

[56] Here, I am persuaded on the evidence that a performance honorarium at a level of $10,000 is justified for Mr. MacDonald and for Mr. and Mrs. Zopas because of their extraordinary level of dedication and commitment over a long and difficult 15-year litigation. The same can be said about Mr. Halasz although he only joined the action as a representative plaintiff in 2017. I note, however, his level of contribution and the fact that he lives in Ottawa and had to take personal time off work from his job at the National Research Council to attend in Toronto for cross-examinations and participate in a mediation. The requested honorarium is justified.

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[46] *Aps v. Flight Centre Travel Group,* 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10.

[57] Mr. MacDonald deserves more than just a performance honorarium. He is entitled to the additional $40,000 because of the financial harm he sustained as the lead plaintiff in what became a high-profile class action in the banking community. His employment as an investment advisor became strained and he had to leave the industry well before his retirement age. Comparable employment was hard to find. Mr. MacDonald eventually obtained a contract position teaching banking and finance courses at a local community college. However, his income today is much less than when he worked as an investment advisor. And, as Mr. MacDonald noted in his affidavit, the repercussions from this class action continue to be felt: "I … worry that the publicity associated with the action has and may continue to have a negative impact on my future career prospects."

[58] I therefore have no difficulty concluding that Mr. MacDonald suffered significant financial hardship in taking on the role and responsibilities of the lead representative plaintiff. The request for a $50,000 honorarium is more than justified.

[59] Each of the requested honoraria is approved.

Disposition

[60] The settlement is approved. As are class counsel's legal fees in the amount of $20 million, plus disbursements and taxes, and the requested honoraria.

[61] Orders to go accordingly.

[62] My thanks again to all counsel for their assistance. I am particularly grateful to Mr. Eizenga, who represented class counsel on the legal fees issue, for his submissions and insights.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment is effective from the date it is made and is enforceable without any need for entry and filing.

Date: June 17, 2021

Tab 23

Martin v. Barrett

2008 CarswellOnt 9521
Ontario Superior Court of Justice

Martin v. Barrett

2008 CarswellOnt 9521, [2008] O.J. No. 3813

Marsha Martin and Fern Camirand, Plaintiffs and Michael Barrett, John Rebry, Lloyd Crawford, William Demerling, Claude Gauthier, Clare Hayes, Jim Madill, Michael Stevens, Brian Ashford, John Black, John Hill, Charles Macdaid, Joseph Martin, June McFarlane, Larry Melnyk, John Stafford, as trustees of the Participating Co-operatives of Ontario Trusteed Pension Plan (FSCO Reg. No. 345736), The Canada Trust Company, CIBC Mellon Trust Company, CIBC Mellon Global Securities Services Company, Canadian Imperial Bank of Commerce, Mark Edward Whittacatt carrying on business as Whittacatt Consulting Associates, Whittacatt Holdings Ltd., Turnbull and Turnbull Ltd., the Estate of John A. Turnbull, deceased, Louis Ellement, Anthony F. Cooper and Anthony F. Cooper Actuarial Services Ltd and Torys LLP, Defendants

M. Cullity J.

Heard: April 30, 2008
Judgment: May 12, 2008
Docket: 03-CV-344195 CP

Counsel: Peter Griffin, for Moving Party, Law Foundation of Ontario
Kirk Baert, for Plaintiffs
Allan Rock, Q.C., Jay Strosberg, for Intervenors, Trustees of Charles Trust

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.vi Miscellaneous

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — General principles

In class action proceeding, terms of settlement were deemed fair and reasonable and order approving settlement was signed — Plaintiffs had received payments of $150,885.40 in respect of disbursements from Class Proceedings Fund (Fund) which was account of Law Foundation of Ontario (Foundation) — Foundation was entitled to levy of amount pursuant to s. 10(3)(a) of Class Proceedings Regulation relating to Fund levies, together with additional amount under s. 10(3)(b) — Foundation and plaintiff differed in calculation of additional amount under s. 10(3)(b) — Plaintiff's position was that Foundation was entitled to 10 per cent of net amount, and Foundation's position was that they were entitled to 10 per cent of a larger amount — Foundation brought motion seeking directions with respect to levy payable to class proceedings fund — Levy payable to Fund pursuant to Regulation was to be calculated by applying 10 per cent of net amount of any monetary award or settlement amount remaining after deduction therefrom of all sums which court directed to be paid to those other than class members — Reference in s. 10(3)(b) to entitlement of class members was indication that levy was to be calculated on amount that class members would ultimately receive — Amount to be received by Foundation for its financial assistance depended on extent of success without

regard to counsel fees or other expenditures — There was no statutory support for Foundation's case for a halfway amount between gross proceeds approach and net amount approach.

Table of Authorities

Cases considered by *M. Cullity J.*:

Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc. (2007), 2007 CarswellOnt 7042 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50

Generally — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 32 — considered

s. 32(4)(a) — considered

s. 33 — referred to

s. 33(3) — considered

s. 33(7) — considered

s. 33(7)(a) — considered

s. 33(7)(b) — considered

s. 33(7)(c) — considered

s. 33(8) — considered

Law Society Act, R.S.O. 1990, c. L.8

Generally — referred to

s. 59.1(2) [en. 1992, c. 7, s. 3] — considered

s. 59.5(1)(g) [en. 1992, c. 7, s. 3] — considered

s. 59.5(5) [en. 1992, c. 7, s. 3] — considered

Solicitors Act, R.S.O. 1990, c. S.15

s. 28.1 [en. 2002, c. 24, Sched. A, s. 4] — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 12.05 — considered

Regulations considered:

Law Society Act, R.S.O. 1990, c. L.8

Class Proceedings, O. Reg. 771/92

Generally — referred to

s. 10 — considered

s. 10(2)(b) — considered

s. 10(3)(a) — considered

s. 10(3)(b) — considered

MOTION by Law foundation of Ontario for advice and direction with respect to calculation of levy payable out of proceeds of class settlement.

***M. Cullity J.*:**

1 On April 16, 2008, a fairness hearing was conducted to determine whether a settlement of this proceeding should be approved. At the end of the hearing I indicated that I was satisfied that the terms of the settlement were fair and reasonable and in the best interests of the class and an order approving the settlement was signed. An endorsement setting out my reasons in more detail than those provided at the hearing will be released.

2 The order made on April 16 did not dispose of the question whether the fees of class counsel should be approved. Submissions on this question were made on April 17, 2008 and my decision was reserved pending the hearing of a further motion by the Law Foundation of Ontario (the "Foundation") for the advice and direction of the court with respect to the calculation of an amount it is entitled to receive out of the proceeds of the settlement. This motion was heard on April 30, 2008 with class counsel and counsel for the Foundation appearing. In addition, because of the novelty and importance of the issue for class proceedings in this jurisdiction, I had granted leave to the proposed representative plaintiffs in Paul Lawrence et al, Trustees of the *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.* [2007 CarswellOnt 7042 (Ont. S.C.J.)] (Court File No. 04 - CV - 263289 CP) to intervene. They did so and were represented by counsel at their hearing.

3 The hearing proceeded on the basis of an agreed statement of facts relating to the settlement I had approved, using, for convenience, the amounts claimed by counsel for fees and disbursements that have yet to be approved, as well as amounts actually paid by the Foundation for the plaintiffs' disbursements during the litigation.

4 The motion raises a serious issue of statutory construction and no criticism can be leveled at the Foundation for raising it.

The Issue

5 In the notice of motion, the Foundation requests an answer to the following question:

> Upon what amount is the Levy ("Levy") payable to the Class Proceedings Fund pursuant to Regulation 771/92 under the *Law Society Act*, R.S.D. 1990 Chapter L. 8 ("*Law Society Act*") to be calculated in this case?

Agreed Facts and Legislation

6 In 1990, the Attorney-General's Advisory Committee on Class Action Reform recommended that a self-funding costs assistance fund be established to assist class proceeding litigants with their disbursements. The Advisory Committee recognized that private litigants could face significant problems financing class actions, that many would not be prepared to underwrite the cost of bringing a class proceeding even if they had significant assets, and many would not be prepared to accept the cost consequences of an unsuccessful action. Accordingly, in the opinion of the Advisory Committee, the objective of increasing access to justice could be undermined without the existence of a costs assistance fund which would provide disbursements and provide an indemnification in respect of costs.

7 By amendments to the *Law Society Act* that were proclaimed on the same day as the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("CPA"), the Class Proceedings Fund (the "Fund") was established as an account of the Law Foundation. The Fund is part of the property of the Law Foundation but payments out of it are to relate to the administration or purposes of the Fund.

8 Section 59.1 (2) of the *Law Society Act* is as follows:

> (2) the Class Proceedings Fund shall be used for the following purposes:
>
> 1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding.

2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

9 As a *quid pro quo* for the financial assistance and assumption of risk by the Law Foundation, the Lieutenant Governor in Council is authorized by section 59.5(1)(g) of the Law Society Act to make Regulations -

providing for levies in favour of the Class Proceedings Fund against awards and settlement Funds in proceedings in respect of which a party receives financial support from the Class Proceedings Fund.

10 Pursuant to this authority, section 10 of Regulation 771/92 (the "Regulation") provides:

10. (1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund.

(2) a levy is payable in favour of the Fund,

(a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or

(b when the proceeding is settled and one or more persons in such a class is entitled to receive settlement Funds.

(3) the amount of the levy is the sum of,

(a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by plaintiff; and

(b) 10 per cent of the amount of the award or settlement Funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled.

11 In this case, the plaintiffs received payments from the Fund of $150,885.40 in respect of disbursements. It is not disputed that, in consequence, the Law Foundation is entitled to a levy of that amount pursuant to section 10(3)(a) together with an additional amount under section 10 (3)(b). The issue between the Law Foundation and the plaintiffs relates to the calculation of the additional amount pursuant to section 10(3)(b).

Analysis

12 Although the difference between the positions of the Foundation on the one hand, and of class counsel and the intervenors on the other, is that the former would apply the 10 per cent to a larger amount, the distinction is not between 10 per cent of the gross settlement amount and 10 per cent of the net amount that will be applied for the benefit of the class after all disbursements, administration expenses and fees of class counsel have been deducted. Whether or not a strictly grammatical interpretation of section 10(3)(b) might provide some support for the application of the percentage to the gross amount, this was not the interpretation for which Mr. Griffin contended.

13 Relying on the reference to the entitlement of the class at the end of the section, the position of class counsel, and counsel for the intervenors, was that the Foundation is entitled only to 10 per cent of the net amount. The correctness of this interpretation was disputed by Mr. Griffin, but he was not prepared to argue that the percentage is to be applied to the total amount provided by the defendants under the settlement agreement so that it would include all amounts required to cover disbursements and the fees of class counsel. He stated that it has not been the policy of the Foundation to claim the levy on interim awards of costs - an evident recognition that disbursements, other than those paid by the Foundation, and reasonable fees as between party and party, should not be included in the amount subject to the levy. It would, I believe, be quite incongruous if amounts recovered in respect of disbursements paid by the class or by class counsel, were subject to the levy and I do not see why the legal fees that are intended to provide reasonable compensation for the services of counsel should be treated differently.

14 The Foundation's position was, essentially, that - in a case like this where counsel seek a fee calculated by the application of a multiplier to a base fee pursuant to section 33 of the CPA - only the base fee determined by the court pursuant to the section, together with disbursements incurred prior to the judgment, can be deducted in determining the amount to which the 10 per cent levy is to be applied. This, submitted Mr. Griffin, would strike a reasonable balance between the gross proceeds approach and the "net of all outlays" approach advocated by class counsel, and counsel for the intervenors.

15 The difference between the competing approaches to the calculation of the levy pursuant to section 10(3)(b) of the Regulation is illustrated in the following chart provided by counsel for the intervenors:

	FOUNDATION METHOD	**INTERVENORS' METHOD**
Gross settlement Funds	$ 13,926,195.50	$ 13,926,195.50
(Disbursements paid by counsel)	(144,047.64)	(144,047.64)
(Disbursements paid by Fund)	(150,885.40)	(150,885.40)
Subtotal	13,631,262.46	13,631,262.46
(Fees)	(2,452,121.91)	4,987,500.00)
Subtotal	11,179,140.55	8,643,762.46
10% Levy	1,117,914.05	864,376.24
Difference in amount of Levy	$ 253,537.81	

16 To the extent that the intervenors' method does not make allowance for expenses of administration, I understand this to reflect the facts of this cases, In other cases, the differential between the amounts of the levy could be even greater as the plaintiffs would deduct such expenses before calculating the levy and the Foundation would not.

17 While, purely as a matter of interpretation of the words of section 10(3)(b) of the Regulation, arguments might be made in favour of the application of the percentage to the gross proceeds of the settlement - or conversely, to the net proceeds because of the reference to the entitlement of members of the class - I do not see anything explicit or implicit in the language of the section that would support the "halfway house" position advanced on behalf of the Foundation.

18 In effect, Mr. Griffin's position was that although, in his submission, the gross amount of the settlement is an amount to which the members of the class are entitled it is reasonable to make certain deductions from it but not others, when it is read in the context of the provisions and policy of the Law Society Act, the Regulation, the CPA, and the language of the settlement agreement.

19 While there are a number of interwoven strands in Mr. Griffin's arguments, the two most prominent factors on which he relied were that (a) section 10(2)(b) of the Regulation requires the amount of the levy to be determined at the time of the judgment approving a settlement; and (b) while a base fee must be determined and awarded under section 33 of the CPA, additional amounts arising from the application of a multiplier are entirely within the discretion of the court. I will comment on the significance of each of these factors in turn.

20 Section 10(2)(b) of the Regulation provides that a levy is payable in favour of the Fund "when the proceeding is settled" and one or more persons in a class that had received financial support is entitled to receive settlement Funds. In Mr. Griffin's submission the use of the word "when" indicates unequivocally that the amount of the levy is to be calculable at the time of settlement so that subsequent disbursements and administrative costs can never be taken into account as the net proceeds position of the plaintiff, and the intervenors, would require.

21 No other explanation or justification was provided for permitting the deduction of disbursements incurred prior to a settlement but not expenses incurred and paid subsequently pursuant to it and in the course of its administration. As all of these are expenditures made for the purpose of obtaining compensation, or restitution for the class, I am unable to see any principle, policy or reasonable justification for drawing a distinction in this context.

22 Although the word "when" most commonly has a temporal connotation, it can - as the shorter Oxford English Dictionary indicates - also refer to the circumstances in which something will occur. An example would be:

> Income tax is payable when a person realizes a capital gain.

23 In such a case, the tax will ordinarily not have to be paid until the following year and its amount may depend on what other income is earned subsequently in the same taxation year. Similarly, a levy can be said to be payable when a proceeding is settled without there being any implication that its precise quantum will be determinable at that time. If that were not so, the levy would presumably be payable on the maximum amount of a claims-based reversionary settlement under which the amount that the defendant would have to part with will not be determined until some subsequent time. In such cases, it is quite common - and I believe usually appropriate - to defer a decision on counsel's fees, and I see no reason why the Foundation's levy should be treated differently.

24 In this context, Mr. Griffin also relied on rule 12.05 of the Rules of Civil Procedure for the proposition that a judgment approving a settlement of a class proceeding must set out the amount of a levy. This is inaccurate as the rule provides merely that such a judgment is to "contain directions with respect to ... the payment of any levy in favour of the Fund under clause 59.5 (1) (g) of the Law Society Act".

25 It is also an exaggeration - as well as a non sequitur - to say that the "net of all outlays" approach of the plaintiffs means that "the levy can never be determined at the time of settlement approval, given that subsequent disbursements and administration costs may be incurred over months or even longer". In many, if not most, cases, these amounts, if not predetermined, will be capped on the basis of reasonable estimate in the settlement agreement before it will be approved.

26 I find the second principal strand in the Foundation's arguments to be equally unconvincing. It requires a distinction to be drawn between a base fee and the add-on obtained when the application of a multiplier is approved by the court pursuant to section 33 of the CPA.

27 Section 33 authorizes written contingency fee agreements with a representative party that permit counsel to make a motion to have their fees increased by a multiplier. Section 33 (7) provides that, on such a motion, the court

> (a) shall determine the amount of the solicitor's base fee;
>
> (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
>
> (c) shall determine the amount of disbursements to which the solicitor is entitled,
>
> . . .

28 Section 33 (3) provides that for the purposes of the section, a "base fee" means "the result of multiplying the total number of hours worked by an hourly rate".

29 In Mr. Griffin's submission, the contrast between the use of the word "shall" in section 33 (7)(a) - and, presumably, in section 33 (7)(c) - and "may" in section 33(7)(b) indicates that a base fee is an amount that the court must determine while the application of a multiplier is at the discretion of the court. Further conclusions to be drawn are set out in paragraph 50 of the Foundation's factum as follows:

> This [i.e., the contrast between the mandatory and discretionary language] recognizes that:
>
> (a) the Settlement Amount is the property of the client;

(b) the Multiplier, as approved by the court, is a transfer of a portion of the Settlement Amount to Class Counsel as a reward for the risk undertaken; and,

(c) only the base fee and disbursements "shall" be determined by this Honourable Court pursuant to section [33(7)] of the *Class Proceedings Act.*

30 I find the logic by which the conclusions are drawn, and significance is to be attributed to them, to be elusive. If the reference to the "client" was intended to refer to the representative plaintiff, the logic escapes me completely. If the "client" refers to the class - as I believe was most likely the intention, and as I will assume — the description is tendentiously inaccurate.

31 Both the base fee component of the total fee and the multiplier component will reduce the amount otherwise available for distribution and application for the direct benefit of the class. If each is to be treated as property of the class, I do not see why the discretion of the court to select an appropriate multiplier — or even the possibility that it might decide in its discretion not to apply a multiplier - should have any bearing on the issue in this motion. As the overall approach under section 33 of the CPA involves a determination of an amount that would be fair and reasonable compensation given the work performed and the risk assumed by counsel who have accepted a contingency fee retainer, I am not persuaded that it assists the Foundation to characterize the multiplier component of the fee as a "reward" that, unlike the base fee, involves a transfer of funds owned by the class.

32 Most fundamentally, an assertion that gross settlement proceeds are the property of the class ignores, and is inconsistent with, basic features of the CPA. The legislation is designed to permit representative parties to recover amounts for the benefit of persons in like situations. Although, after certification, the representative and his or her counsel have fiduciary obligations to the class, they are not agents of the class and there is no contractual relationship of solicitor and client between class counsel and the other class members. Liabilities - contingent or otherwise - incurred by the representative in respect of disbursements and the services of class counsel are not debts of class members, as such, and it would be, in my opinion, seriously wrong in principle to say that settlement amounts intended to meet, or reimburse, such liabilities are the property of class members.

33 Moreover, section 33 (8) requires that a base fee must be reasonable and this also will require an exercise of discretion. The use of the mandatory word "shall" does not exclude the possibility that, in an appropriate case, a base fee might be nil, or even, possibly, that the court might decline to approve the agreement pursuant to section 32(2).

34 I am in agreement with Mr. Rock's submission that, in attempting to find an intermediate position between the gross proceeds approach and a "net of all outlays" approach, the Foundation has constructed an artificial argument based on the words "shall" and "may" in section 33. The task of the court under that section, and under section 32, is essentially the same: it is to determine what would be a fair and reasonable fee taking into account, among other things, the work performed, the success achieved and the risks undertaken. The multiplier approach in section 33 is simply one method by which this might be done. It has no counterpart in the legislation of the other common law provinces and is now less commonly used in this jurisdiction, other than as a method of testing the reasonableness of fees to be calculated under retainer agreements as a percentage of the amount recovered for the benefit of the class.

35 Each of sections 32 and 33 applies to contingency fee agreements. Section 32 is the more general provision and is applicable, for example, where a retainer agreement provides for a contingency fee as a percentage of the amount recovered. As it has been interpreted judicially, it requires the court to determine whether the agreement should be approved as fair and reasonable in all the circumstances of the case — including a variety of factors that include both the degree of risk assumed by counsel in entering into the contingency agreement and the amount and quality of the services performed by counsel. If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32 (4)(a).

36 In *Pearson v. Boliden*, for example, under the similar provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, class counsel requested a fee of $400,000 which was less than a fee based on their recorded time and average hourly rates, but more than a 33 1/3 percentage fee provided for in the retainer agreement with their client. The court declined to approve the fee requested, or a fee based on a 33 1/3 percentage in the retainer agreement. In the exercise of its discretion, the court approved

a fee based on a percentage of 25 per cent of the amount distributable *cy pres* for the benefit of the class as an amount that was fair and reasonable in the circumstances of the case. Substantial success in the litigation had not been achieved and the court did not find it necessary to determine what would have been a reasonable fee if any risk component of the fee could be ignored. The court, in fact, expressly rejected the possible utility of a base fee/multiplier approach.

37 It follows that, in such a case, the significance that the Foundation would attribute to the distinction between discretionary and mandatory fee components for the purpose of section 33 should require the full amount of the fee to be subject to the levy. Once again, Mr. Griffin found it necessary to retreat from the logical consequences of his analysis. If the plaintiffs had received financial assistance from the Fund in a case where section 32(4)(a) applied, the court would, in his submission, be obliged to determine the part of the approved fee that would be a base fee if section 33 had been applicable. Alternatively, he suggested, it might be appropriate to treat cases involving multipliers as being in a separate category. I do not believe that either of these alternatives is satisfactory.

38 In cases under section 32(4)(a) of the CPA there is no obligation to calculate a base fee. The hours worked by class counsel and their hourly rates will invariably be considered along with the other factors relevant to a determination of what is a fair and reasonable amount - including the risks assumed by counsel in accepting a contingency fee retainer. There is, however, no statutory obligation to bifurcate the calculation, and isolate and identify the part of the fee that would be a base fee if section 33 was applicable. To require this to be done in cases where financial assistance has been provided by the Foundation would be to attribute to section 33 an importance that is not warranted either by its terms, its history or its relationship with the more general provisions of section 32.

39 Section 33 of the CPA was enacted at a time when the propriety and enforceability of agreements for fees payable only in the event of success in litigation were in this jurisdiction, uncertain. At that time, its principal importance was to remove the uncertainty as far as class proceedings were concerned. Since the enactment of section 28.1 of the *Solicitors Act*, S.O. 2002, c. 24, Schedule A, section 4, section 33 has lost its original significance and, in my opinion, it now does nothing more than provide a specific method of arriving at a fair and reasonable fee in the circumstances of a particular case. As such, I do not think the provisions of the section have any bearing on the issue to be decided on this motion.

40 I return to the interpretation of section 10 of the Regulation on which, in the ultimate analysis, the correct disposition of this motion depends

41 Under section 10(2)(b) a levy will be payable in the circumstances of this case only if a "one or more persons in the class is entitled to receive settlement proceeds". Section 10(3)(b), again, is as follows:

> The amount of the levy is the sum of,
>
> (a) ...; and
>
> (b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who receives financial support under section 59.3 of the Act is entitled.

42 A possible ambiguity in section 10(3)(b) is whether the words "to which one or more persons in a class ... is entitled" qualify the earlier reference to the "amount" or the reference to the "settlement funds". On either interpretation, the position of class counse), and counsel for the intervenors, was that the reference to the entitlement of class members is an indication that the levy is to be calculated on the amount that class members would ultimately receive. I believe this is the most reasonable interpretation. The success of a class action can be measured by the amount distributable to, or applicable for the benefit of, the class. It is, in my opinion, both reasonable and logical for the *quid pro quo* to be received by the Foundation for its financial assistance in achieving such success to depend on the extent of the success, without regard to counsel fees or other expenditures made for the same purpose.

43 The above interpretation is, in my opinion, supported also by:

(a) the Foundation's acceptance that the 10 per cent is not to be applied to the gross settlement amount, including disbursements paid by class counsel, or the class, and all legal fees;

(b) the unlikelihood that the legislature would have intended this to be done;

(c) the lack of any statutory support — and the general unpersuasiveness - of the Foundation's case for a halfway house between a gross proceeds approach and a "net of all outlays approach"; and

(d) the fact that the entitlement of class members to *receive* funds is a precondition to the right to a levy.

44 In consequence, I am satisfied that the position advanced by class counsel and counsel for the intervenors in this motion is correct.

45 For completeness, and in deference to the submissions of counsel, I will comment briefly on two additional arguments that I have not found persuasive.

46 One - advanced on behalf of the Foundation - was that significance should be attributed to the definition of the "Settlement Amount" in the settlement agreement as, in effect, the gross amount to be paid by the defendants. As the issue between the parties relates to the part of the gross proceeds that is subject to the levy, I do not think the definition materially supports the position on either side.

47 The other argument pointed to the contrast between section 32(3) of the CPA - which provides that the approved fees of class counsel are a "first charge" on any settlement funds - and section 59.5 (5) of the *Law Society Act* that states that the Foundation's levy is a "charge" on a settlement fund. Contrary to the submission of counsel for the plaintiffs, I believe that Mr. Griffin was correct in his submission that the provision that counsel fees are to have priority in payment and security over a levy owing to the Foundation does not indicate that the fees are be excluded from the amount on which the levy is to be calculated. Just as section 32 (3) would not affect the calculation of amounts owing to other creditors who might have subordinated claims arising out of the litigation, I do not believe the section tells us anything about the calculation of the amount of the Foundation's levy.

48 Counsel for the intervenors submitted that the question in the notice of motion should be answered as follows:

The levy payable to the Fund pursuant to the Regulation is to be calculated by applying 10 per cent of the net amount of any monetary award or settlement amount remaining after the deduction therefrom of all sums which the court directs to be paid to those other than class members. These deductions may include, among other items, the full amount approved by the court as fees for class counsel, amounts expended or to be expended for notice, administration, distribution, or for any other expense that the court approves as payable from a monetary award or settlement fund.

49 There will be an order accordingly.

Order accordingly.

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Tab 24

Middlemiss v. Penn West Petroleum

CITATION: Middlemiss v. Penn West Petroleum, 2016 ONSC 3537
COURT FILE NO.: CV-15-525189-CP
DATE: 20160606

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Middlemiss, Plaintiff

AND:

Penn West Petroleum Ltd., David E. Roberts, Murray R. Nunns, Todd H. Takeyasu, Frank Potter, James C. Smith, William E. Andrew and Jeffrey Curran, Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Jay Strosberg and Kirk Baert* for the Plaintiff

Scott Kugler for Defendants Penn West Petroleum, David E. Roberts and James C. Smith

Lawrence Ritchie for Defendant Murray R. Nunns and for the remaining individual defendants as agent for counsel

HEARD: May 31, 2016

Proceeding under the *Class Proceedings Act, 1992*

SETTLEMENT AND LEGAL FEES APPROVAL

[1] The approval of this proposed securities class action settlement turns on whether the settlement amount falls within a range or zone of reasonableness.[1] The other factors that are repeated in the case law[2] – such as the risks of continued litigation and the

[1] *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 12; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at para. 70 (S.C.J.). Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 305.

[2] *Dabbs*, at para. 13; *Parsons* at para. 71-72.

experience of class counsel – more often than not amount to self-serving "boiler plate" that doesn't really help the judge decide if the proposed settlement is truly in the best interests of the class (and not just in the best interests of class counsel.)[3] It is the "zone of reasonableness" analysis that, in my view, is not only the most helpful but is usually determinative.

[2] Here, as in too often the case, class counsel spent far too much time on the so-called "boiler plate" submissions and not enough time addressing and explaining the zone of reasonableness point.[4] Fortunately, class counsel agreed to file a supplementary affidavit providing more evidence about the latter and as a result, I was satisfied that the settlement was indeed within a zone of reasonableness and should be approved.[5]

Brief background

[3] The defendant Penn West Petroleum was one of Canada's largest oil and gas companies. Its shares trade on the Toronto and New York Stock Exchanges. The individual defendants are current or former officers or directors.

[4] The factual narrative in this proposed securities class action follows a well-charted course. Penn West disclosed a need to restate earlier financials. The share price dropped. Class actions materialized within days in both the U.S. and Canada alleging misrepresentation and claiming substantial damages on behalf of aggrieved shareholders. Four class actions were commenced in Canada: two in Ontario that effectively merged into one; and one in each of Quebec and Alberta.

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[3] See the discussion in *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729, at para. 12; *Leslie v. Agnico-Eagle Mines,* 2016 ONSC 532, at paras. 3-12; and *O'Brien v. Bard,* 2016 ONSC 3076, at paras.11-14.

[4] As I noted in *O'Brien v Bard,* at para. 13: "It is simply not enough for class counsel (whose interests are not aligned with those of the class) to file a factum that in essence says nothing more than '*We know what we're doing … trust us*.' It is my hope that in approving class action settlements in the future, judges will urge class counsel to skip the wind-up (i.e. all the non-specific "boiler-plate") and just throw the pitch (and explain why the settlement amount is within a zone of reasonableness.)"

[5] In every one of my most recent settlement approval motions, class counsel had to file supplementary evidence about the "zone of reasonableness" before the settlement was approved: see *Sheridan Chevrolet* at paras. 13-15; *Leslie* at paras. 13-16 and *Bard* at paras. 11-14.

[5] This familiar litigation narrative was complicated in this case by the fact that during the same time period, world oil prices were falling dramatically[6] and the defendant oil and gas producer soon found itself in a precarious financial position facing a real risk of insolvency.

[6] It was in this context that class counsel persuaded all parties, including those involved in the parallel U.S. action, to sit down with a mediator. The mediation proved to be successful and shortly thereafter the American and Canadian class actions against Penn West were settled for $53 million Canadian. Given that an almost equal amount of shares were purchased on the TSX and the NYSE, it was agreed that the settlement amount would be divided equally and the Canadian class actions would receive $26.5 million.

[7] Class counsel now moves for settlement approval. More specifically, class counsel asks that leave be granted under s. 138.8 of the *Securities Act*,[7] the action be certified for settlement purposes under s. 5(1) of the *Class Proceedings Act*,[8] and the $26.5 million settlement and class counsel's legal fees be formally approved by the court.

[8] Similar approval hearings have been scheduled in Quebec and Alberta.

The motions for leave and certification

[9] As I advised counsel at the hearing, I have no difficulty granting leave under the *Securities Act* and certifying the action for settlement purposes under the *Class Proceedings Act.* I am satisfied on the evidence before me that the action is being brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. As I noted in *Rahimi*,[9] it is hard to imagine a scenario where a

[6] On July 29, 2014, the date of the company's first disclosure about the need for a restatement, the price of West Texas Intermediate crude oil was US$104.91 a barrel. By the summer and fall of 2015, the oil price had fallen to about US$30 a barrel. The impact on the defendant company's share prices was devastating: shares tumbled from a high of around $10.00 in July, 2014 to less than dollar ($0.82) in May, 2016.

[7] *Securities Act*, R.S.O. 1990, c. S.5, as am.

[8] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[9] *Rahimi v. South Gobi Resources*, 2015 ONSC 5948.

publicly-traded company restates its financials and in doing so allegedly causes shareholder loss and leave under s. 138.8 is not granted.[10]

[10] I also find that the requirements of s. 5(1) of the CPA have been satisfied. The pleadings disclose a cause of action (namely, statutory misrepresentation); there is an identifiable class (all persons, other than residents of Quebec and Alberta, who purchased Penn West shares on the TSX during the class period); the claim raises a common issue (did any of the Penn West financials contain a misrepresentation?); there some evidence that a class action would be the preferable procedure; and there is a suitable representative plaintiff with no conflicts of interest.

[11] Leave and certification are thus granted for settlement purposes.

Settlement approval

[12] This was an early stage settlement. The proposed class action was settled within months of the action being filed and before any motions for leave or certification were brought. Early stage settlements understandably attract more judicial scrutiny than, say, settlements achieved on the eve of the common issues trial.[11]

[13] My concern here was as follows. The plaintiff used for $500 million in damages and the plaintiff's expert concluded that the actual monetary loss sustained by the Canadian class members was in the range of $186.5 million. Why did class counsel agree to settle for $26.5 million?

[14] Class counsel tried to answer this question in very broad terms: in their view, the settlement amount was fair and reasonable because the defendant's financial state was precarious and there was a real risk of insolvency; and the company's available insurance coverage was being eroded by legal defence costs. Class counsel decided that while there was still a significant amount of coverage remaining under the insurance policies, it was better to settle rather than wait until judgment or a later settlement when the insurance policies would likely be depleted.

[15] But this still did not explain why the $26.5 million settlement amount was within a range or zone of reasonableness. In other words, why $26.5 million and not, say, $126 million? I needed more information, in particular about the available insurance coverage

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[10] *Ibid.,* at para. 25.

[11] See the discussion in *Clegg v. HMQ Ontario,* 2016 ONSC 2662, at paras. 26-36.

– the applicable policy limits and how quickly these limits were being eroded by defence costs. Fortunately, class counsel agreed to provide additional information by way of a supplementary affidavit.

[16] Having reviewed this additional information, I can now set out the reasons why the settlement amount is fair and reasonable and in the best interests of the class. At the time of the mediation and shortly thereafter when the settlement was concluded, class counsel had the following information:

(i) Even if oil prices were starting to slowly recover, the defendant's share price was not following suit. In other words, the market was no longer confident about the defendant's future as an ongoing concern. The defendant was off-side its financial covenants and there was a real risk of insolvency.

(ii) The defendant would not be able to contribute financially to any class action settlement or judgment. Penn West had less than $2 million in cash on hand and was in no position to draw down on any existing credit facilities. The only realistic source of funding for class member claims was from the company's insurance coverage.

(iii) The available insurance coverage, after the payment of actual and anticipated legal defence costs in the U.S. and Canada, was in the range of C$55 million.

[17] The overall settlement amount of $53 million was therefore not only a reasonable portion of the available insurance monies but virtually the entire available amount. That is, the $53 million settlement, or $26.5 million for the Canadian class members, was not only within a zone of reasonableness, it was demonstrably at the high end of ultimate recoverability.

[18] This additional information about the insurance limits explains why class counsel decided that $26.5 million was fair and reasonable and allows me to conclude without hesitation that the settlement as it pertains to the Ontario class members is very much in the best interests of the class and should be approved. This is an excellent outcome.

Legal fees approval

[19] The retainer agreement provides for the recovery of a 33 per cent contingency fee plus disbursements and taxes. Following the reasoning in *Cannon*[12] I have no difficulty according presumptive validity to this contingency fee arrangement. As I have noted many times, it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice.

[20] Class counsel is entitled to receive one-third of the $26.5 million recovery plus disbursements and taxes. The legal fees request is approved.

[21] I am also pleased to formally approve the Fee and Retainer Agreement, the Consortium and Carriage Agreement and the Carriage and Co-operation Agreement - the latter two agreements were authorized by the Fee and Retainer Agreement.

[22] My congratulations again to counsel on both sides for resolving this matter in such an impressive fashion.

[23] Order to go as per the draft Order that I signed at the conclusion of the hearing.

Belobaba J.

Date: June 6, 2016

[12] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

Tab 25

Pro-Sys Consultations Ltd. v. Infineon Technologies AG

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2016 BCSC 964

Date: 20160531
Docket: L043141
Registry: Vancouver

Between:

Pro-Sys Consultants Ltd.

Plaintiff

And:

Infineon Technologies AG, Infineon Technologies North America Corp., Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co., Ltd. Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Samsung Electronics Canada Inc., Micron Technology, Inc. and Micron Semiconductor Products, Inc. doing business as Crucial Technologies, Elpida Memory, Inc., Elpida Memory (USA) Inc., Nanya Technology Corporation, Nanya Technology Corporation USA, NEC Corporation, NEC Corporation of America, NEC Canada, Renesas Electronics Corporation fka NEC Electronics Corporation, Renesas Electronics America Inc. fka NEC Electronics America, Inc., Hitachi, Ltd., Hitachi America, Ltd., Hitachi Electronic Devices (USA), Inc., Hitachi Power Systems Canada Ltd. Renesas Electronics Canada Ltd., Mitsubishi Electric Corporation, Mitsubishi Electric Sales Canada Inc., Mitsubishi Electric & Electronics USA, Inc., Toshiba Corporation, Toshiba America Electronics Components Inc., Toshiba of Canada Limited, Winbond Electronics Corporation and Winbond Electronics Corporation America

Defendants

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice D. M. Masuhara

Ruling

Counsel for the Plaintiff (British Columbia):	J.J. Camp, QC R. Mogerman
Counsel for the Defendants:	No appearance
Place and Date of Hearing:	Vancouver, B.C. May 5, 2016
Place and Date of Judgment:	Vancouver, B.C. May 31, 2016

I. Introduction:

[1] This Ruling deals with post-settlement matters including a claim for legal fees for which there is a holdback from the settlement proceeds. The same applications have been made in parallel proceedings before Justice P.C. Gagnon of the Quebec Superior Court and Justice P. Perell of the Ontario Superior Court. In short, the overall settlement of this class action was approximately $80 million and counsel legal fees approved were approximately $24 million plus disbursements. A $3 million communications plan was approved to provide eligible class members to access the settlement funds. The most recent update from counsel indicates that 1.1 million claims have been made and over 915,000 claims have been approved by the Claims Administrator.

[2] The applicant/plaintiffs have brought applications for the following:

(a) any claims by Other DRAM Purchasers calculated by the Claims Administrator be valued at less than $20 be increased to $20;

(b) the Settlement Amounts, plus accrued interest and less the fees and disbursements and applicable taxes of Class Counsel as approved by the Courts, the Claims Administrator's fees and disbursements and applicable taxes, any costs of notice and any income taxes due on accrued interest (the "Net Settlement Funds") shall be distributed by the Claims Administrator as follows:

i. All approved and timely claims shall be paid at full value from their respective funds to the extent possible;

ii. The surplus monies in the EMS and Other DRAM Purchaser funds (the "Surplus Amounts") shall be pooled and distributed as follows:

a. sufficient monies from the Surplus Amounts shall be allocated to the End Consumers Fund to pay all approved claims advanced against the fund at full value; and

b. all Standard Form Claims shall be increased by their pro rata share of the balance of the Surplus Amounts;

(c) The claim of Mr. Helmar Wex shall be paid at the amount approved by the arbitrator appointed under the Administration Protocol, subject to pro-ration as set out in subpara. (b) above; and

(d) The approval for payment of $1 million plus accrued interest of $18,509.46 plus applicable taxes to Class Counsel of the legal fee holdback ordered by the Court;

(e) The approval of payment of Class Counsel disbursements of $84,199.70 plus applicable taxes;

(f) The approval of payment of $57,500 inclusive of taxes for the legal services of Paliare Roland Rosenberg Rothstein LLP incurred on behalf of the class;

(g) The approval of a hold back of $25,000 from the DRAM Settlement Amount for further disbursements (and taxes) likely to be incurred prior to completion of the claims process; and

(h) that the above terms be contingent upon the issuance of parallel or equivalent orders by the Ontario Superior Court of Justice in *Kahlid Eidoo and Cygnus Electronics Corporation v. Infineon Technologies AG*, Court file No.: 05-CV-4340 and *Khalid Eidoo and Cygnus Electronics Corporation v. Hitachi Ltd.*, Court file No.: 10-CV-15178 and by the Superior Court of Quebec, district

of Montreal in *Option Consommateurs v. Infineon Technologies AG No: 500-06-000251-047*.

[3] Pursuant to the agreement of the Class Counsel in the respective class actions, before writing this ruling, I conferred with Justices Gagnon and Perell. We each will issue our own Reasons for decision.

II. Discussion

[4] The sought after terms are approved with two exceptions. The first is the request for approval of Class Counsel disbursements of $84,199.70. The second is the request for the approval for payment of $57,500 inclusive of taxes for legal services out of the Settlement Amount; i.e. the balance of the Paliare Roland Rosenberg Rothstein LLP account.

[5] With respect to the disbursements, further details are required such as describing the relationship of each item to the activity of counsel; the nature of the outside professional/expert disbursement, and the nature and purpose of the travel expenses.

[6] With respect of the legal services expense, it is my view that this is a cost that is to be absorbed by Class Counsel. The expense relates to a defence against a negligence allegation against Class Counsel which arose in the context of an allegation that the Distribution Protocol contravened Ontario's *Human Rights Code*. When alleged Class Counsel advised their professional errors and omissions insurer and retained Paliare Roland. Though the negligence assertion arose from a complaint that Class Counsel had put forth a Distribution Protocol that breached the Ontario *Human Rights Code*, the involvement of Paliare Roland was prompted by the allegation of professional misconduct of Class Counsel. But for the allegation of negligence, the additional legal costs would have been part of Class Counsel's retainer, for which it has been paid, to deal with issues concerning the Distribution Protocol. In this regard, I note that Class Counsel appeared before the British Columbia, Ontario and Quebec courts in respect to the complaints regarding the

Distribution Protocol. The account from the Paliare Roland amounted to $265,000 inclusive of taxes. The professional errors and omissions insurers have paid inclusive of taxes $207,500 towards the account leaving a balance of $57,500.

[7] Indemnification for costs to defend against a negligence claim is not in my view within the scope of the costs approved by the court in this case. I note that Class Counsel have insurance for such risks. There may be instances where such indemnification would be warranted; however, I do not see that in this case.

[8] If such additional costs were recoverable, then it would be my view that the costs incurred fall within the total fees that have already been approved which included attendant risks to the conclusion of the legal work. The materials indicate that the total docketed time of all class counsel from inception through March 2016 is $9,467,788.55 against fees approved of approximately $24 million. The fee approved represents a 30% contingency fee.

"The Honourable Mr. Justice Masuhara"

Tab 26

Ramdath v. George Brown College of Applied Arts and Technology

CITATION: Ramdath v. George Brown College, 2016 ONSC 3536
COURT FILE NO.: CV-O8-363847-CP
DATE: 20160531

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KATRINA RAMDATH, ZSOLT KOVESSY and ASHISH SINGH	)	*Won J. Kim, Aris Gyamfi and Glenn Brandys* for the Plaintiffs
	)	
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY	)	*Robert Bell and Jonathan Chen* for the Defendant
	)	
	)	
	)	
	)	
Defendant	)	
	)	

HEARD: May 30, 2016

Proceeding under the Class Proceedings Act, 1992

SETTLEMENT AND LEGAL FEES APPROVAL

Justice Belobaba:

[1] After eight years of precedent-setting trials and hard-fought appeals, this class action has settled. The class members will be fairly, indeed generously, compensated. I am satisfied that the proposed settlement is fair and reasonable and very much in the best interests of the class. The settlement amount, the requested honoraria for the three representative plaintiffs and class counsel's legal fees are all approved.

[2] This is that rare class action that actually went to trial and in doing so generated new law in consumer protection and aggregate damages. The class counsel team worked tirelessly and deserve special commendation for their legal acumen, their unrelenting commitment to the best interests of the class members and for the superior results that were achieved.

Brief background

[3] The class action stems from misrepresentations made by George Brown College ("GBC") in the 2007-08 and 2008-09 course calendars about the benefits of the International Business Management Program. GBC falsely stated that by completing the eight-month Program, students would obtain three industry designations[1] in addition to the GBC graduate certificate. The Program attracted students from around the world. The students soon discovered that GBC had no agreements in place with any of the industry associations and no such additional designations would be awarded.

[4] Three of the students commenced an action in 2008. The action was certified as a class proceeding in 2010.[2] The class was defined to include the 119 students (two-thirds of whom were foreign students) that had enrolled in the three affected "cohorts" - the first cohort (September, 2007 to April, 2008), the second cohort

[1] Specifically, a CITP (Certified International Trade Professional); a CCS (Certified Customs Specialist); and a CIFF (Certified International Freight Forwarder).

[2] *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019.

(January, 2008 to August, 2008), and the third cohort (September, 2008 to April, 2009). Eleven students have opted out of the action, leaving 108 class members.

[5] I conducted the common issues trial in 2012. At the conclusion of the common issues trial, I found that GBC had engaged in an unfair practice under the *Consumer Protection Act*[3] and that the students had prevailed on the negligent misrepresentation claim.[4] These findings were upheld on appeal.[5] When the matter returned before me for the damages trial, class counsel advised they would be proceeding solely on the basis of the consumer protection claim. I conducted the damages trial in early 2014 and concluded that damages could be assessed in the aggregate for two of the four categories – "direct expenses" and "residual value" – but not for "foregone income" or "delayed entry" and only for the first two cohorts, but not the third.[6] In a follow-up decision I concluded that the residual value of the GBC diploma standing alone was about 15 per cent.[7] On appeal, the Court of Appeal affirmed the aggregate damages and residual value analysis but reversed my exclusion of the third cohort. The Court referred the assessment of damages relating to the third cohort back to me. [8]

[6] The defendant's insurer meanwhile decided to seek leave to appeal from the Supreme Court of Canada. It was at that point that the parties settled.

Settlement approval

[7] The defendant (through its insurer) has agreed to pay $2.725 million to the 108 class members in the three affected cohorts. The claims process is designed to be fast and easy. Simply by submitting a one-page claim form, with no need for

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[3] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A.

[4] *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 6173.

[5] *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468.

[6] *Ramdath v. George Brown College of Applied Arts and Technology,* 2014 ONSC 3066.

[7] *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 4215.

[8] *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921.

supporting documentation, the class members will be reimbursed for all of the direct costs of entering into the Program[9], and up to 40 per cent of the income that they lost taking the Program. The domestic students who graduated from the Program will be entitled to a maximum of $16,427 and the international students a maximum of $22,484.

[8] The overall settlement falls within a zone of reasonable because:

(i) At the time of settlement, class counsel's knowledge base about the ongoing risks and rewards was at its highest possible point. In other words, this was not an early stage settlement where the court is understandably "suspicious."[10] Here the settlement was negotiated and achieved after the completion of discovery, two trials and numerous appeals. Class counsel's recommendations were thus less likely to be tainted with self-interest and more likely to be in the best interests of the class.

(ii) The amount that is allocated for "direct costs" includes three categories of expenses that were not awarded by the court in the aggregate damages decision, namely public transportation costs, increased living expenses, and visa/immigration fees.[11] That is, the direct costs component in the settlement is much higher than in the amount decided by this court.

(iii) The provision allowing claimants to recover up to 40 per cent in the "foregone income" category is very generous given that less than 10 per cent of the class was able to produce any documentation on this point. And now they will be receiving reimbursement of up to 40 per cent of "foregone income" on their word alone.

(iv) The fact that no monies are being allocated under the third category, "delayed entry into the workforce," is really of no consequence. In the damages decision, I effectively foreclosed this additional source of compensation because I was not persuaded on the evidence before me that

---

[9] Less the 15% residual value of the college diploma as determined at the damages trial, *supra,* note 7.

[10] See the discussion in *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 26-31.

[11] *Supra,* note 6.

> a "delayed entry" of eight months at age 25 "cannot be mitigated over a lifetime in the workforce".[12] Pursing this claim in a further individual damages trial would be expensive and challenging, to say the least.

[9] In sum, I agree with class counsel that when one considers the increased value of the "direct costs" component and the risk that class members may not able to prove any of their indirect damages at individual damage assessments, the settlement herein is very much in the class members' best interest.

Approval of honoria

[10] Class counsel is requesting a $10,000 honorarium for each of the three representative plaintiffs, to be paid out of the settlement fund.[13] I have no difficulty with this request. The record shows that Katrina Ramdath, Zsolt Kovessy and Ashish Singh went far beyond what is normally required of a representative plaintiff in advancing a class action. In addition to their usual duties as representative plaintiffs they endured three extensive examinations when most representative plaintiffs are only subjected to one (i.e. cross-examination on their affidavit in support of certification); they remained in contact with class members, via email, telephone and in-person meetings throughout the litigation to provide updates and answer questions; they assisted class counsel in publicizing the notice of the settlement approval hearing and locating class members whose contact information was out of date so that they could receive notice of the proposed settlement and have an opportunity to participate; and they have handled a large number of media inquiries.

[11] I also note that Mr. Singh attended the settlement approval hearing, expressed his gratitude to class counsel and spoke eloquently about his experience in this litigation and the reasonableness of the overall settlement.

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[12] *Supra*, note 6, at para. 66.

[13]When honoraria are paid to representative plaintiffs, they should be paid out of the settlement fund and not out of class counsel's legal fees award: see generally Morabito, "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives," (2014) Queen's L.J. 341.

[12] The requested payment of a $10,000 honorarium to each of the three class representatives is approved.

Approval of class counsel's legal fees

[13] Class counsel asks for the payment of legal fees on the basis of the 30 per cent contingency that is set out in the retainer agreement. The amount being sought, $773,412 plus disbursements and taxes, is a small portion of the actual time that was docketed by class counsel over the eight years of protracted litigation.[14]

[14] The legal fees request is more than reasonable and easily approved.

Disposition

[15] The settlement, the payment of honoraria to the three class representatives and the payment of class counsel's legal fees are all approved.

[16] Order to go as per the draft Order that I signed at the conclusion of the hearing.

[17] I thank counsel on both sides again for their assistance and for the quality of their written and oral advocacy during the motions and trials in a matter that I was pleased to hear and even more pleased to see concluded.

---

[14] That is why I concluded in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 that contingency fee agreements of up to one-third should generally be accorded presumptive validity and enforced by the court. Over a period of years, plaintiff-side class action firms will win cases and lose cases. Or, like here, they will win the case but end up taking a large loss on the legal fees award. The "risk" that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A "large" contingency recovery in one case will offset the loss or losses in other cases. That is why the "multiplier" approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled.

Belobaba J.

Released: May 31, 2016

CITATION: Ramdath v. George Brown College, 2016 ONSC 3536
COURT FILE NO.: CV-O8-363847-CP
DATE: 20160531

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KATRINA RAMDATH, ZSOLT KOVESSY and ASHISH SINGH

Plaintiffs

- and -

THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Defendant

REASONS FOR JUDGMENT

Justice Edward P. Belobaba

Released: May 31, 2016

Tab 27

Riddle v. Canada

Federal Court Cour fédérale

Date: 20180621

Docket: T-2212-16

Citation: 2018 FC 641

Ottawa, Ontario, June 21, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This litigation is "historically unique" and was "inherently fraught with risk". This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Edward Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation (compensation) when what is at stake is a people's children's cultural identity. [T]his is the largest award ever to answer the grievance of a people's children's loss of cultural identity.
>
> (Affidavit of M. Brown, at paras 43-44, Exhibit "113" to the Settlement Approval Affidavit of D. Rosenfeld, at para 252, Motion Record (Settlement Approval), Tab 6(113), p 2107.)

The precedents in *Brown v Canada* of Justice Belobaba are historically exemplary in their understanding of cultural identity as essential to the human personality. (The certificate decision is *Brown v Canada (Attorney General)*, 2013 ONSC 5637. The summary judgment decision establishing Canada's legal liability in tort is *Brown v Canada (Attorney General)*, 2017 ONSC 251.)

II. Introduction

[2] Subsequent to the conclusion of Settlement discussions and the proposed Foundation, in principle respectively, Prime Minister Justin Trudeau addressed the United Nations General Assembly at the United Nations headquarters on September 21, 2017. In a historic first, the Prime Minister apologized for Canada's most shameful abuse perpetrated. The Prime Minister specified the devastating legacy of the treatment of the Indigenous population.

[3] On October 6, 2017, Crown-Indigenous Relations and Northern Affairs Minister, Carolyn Bennett, made the announcement as to the Agreement-in-Principle reached on the Settlement and proposed Foundation.

[4] The travesty of Indigenous children “scooped” from their homes, communities and families was already identified and specified in Patrick Johnson’s 1983, Canadian Council on Social Development Report and also, in Justice Edwin Kimelman’s 1985 report, No Quiet Place.

[5] The loss of cultural identity of children taken from their traditional homes led to a loss of belonging. Loss of culture, language and identity led to a loss of personal and collective essence for vulnerable children who were “scooped” from 1951 to 1991. The loss of belonging took away the reason and purpose for life of individuals who lost the direction for a life journey before it could even begin. It also led to a sense of not being able to identify, thus, a loss of persona. The attempt to commit “cultural genocide” of entire Indigenous nations, as stated by former Chief Justice Beverley McLachlin, is that which she defined as “the worst stain in Canada’s human rights record”.

[6] “The most glaring blemish on the Canadian historic record related to our treatment of the First Nations that lived here at the time of colonization”. These words were spoken by the former Chief Justice of Canada at the fourth annual Pluralism Lecture of the Global Centre for Pluralism in 2006 (all of which took place under the auspices of the Aga Khan, spiritual leader of Ismaili Muslims, who founded the Centre together with the Federal Government). The Chief Justice continued by categorically stating that Canada had developed an “ethos of exclusion and cultural annihilation”.

[7] Let us not forget that which was said by the First Prime Minister of Canada, John A. Macdonald, that it was important to solve the “Indian” problem by having “to take the Indian out of the child”.

[8] The aim was to remove aboriginal, religious and social traditions; forbid children to speak their native languages, not allow them to dress traditionally and subject them, thus, to a loss of a sense of belonging.

[9] Most significant when one loses one’s roots, one loses the potential for wings, to soar and fulfill dreams, hopes and aspirations.

[10] A Foundation is proposed in the Settlement Agreement reached by the class representatives and the Federal Government. On the Development Board of the Foundation, the undersigned judge is simply there to implement the terms of the Agreement for the Foundation to be transferred entirely into Indigenous hands. As the Chief Justice of the Supreme Court of Canada, Beverly McLachlin, specified a judge is not only to render a judgment but to ensure that it is implemented. A judge is seized to ensure that a judgment is put into effect. The Foundation is to ensure the claim of cultural identity brings about a living entity for all Indigenous peoples in Canada, including the Métis, by which to claim a return to Indigenous languages, cultures, spiritual traditions, in addition to changing the paradigm in Canada in respect of all Indigenous peoples. To ensure that the suffering of the past will not be forgotten; that, every story, that can be told, will be told, to be remembered. That, all be done, for tears recalled of individuals not to be lost to the annals of history, but to be recorded to be remembered. This, for such an aberration

never to take place again in that which we call, civilized Canada! Every history text book from primary, secondary, college and university must include this sordid chapter of Canadian history. It is important to recall that justice cannot exist without truth; and, truth cannot exist without compassion.

[11] Reconciliation is proposed by the creation and establishment of the proposed Foundation. Thereby, to build bridges between the generations in Indigenous families and communities; thereby, to ensure that divided generations understand what had happened. The bridges, to be constructed, between the generations in Indigenous families and communities, will then produce a climate by which to understand hidden pain and suffering that caused hurt in subsequent generations. Also, a dialogue is proposed to take place between the children of victims and the children of perpetrators to ensure truth and reconciliation are brought about for a healing of our nation. (This will include the work of health professionals.)

[12] The general population, when aware of abuse, lost its humanity. A loss of conscience was thus perpetrated in the general population aware of the perpetration. Individuals of the Indigenous nations lost their cultural identity which must be made available for a homecoming for those who lost their internal and external homes.

III. Factual Background

[13] A summary of class actions in respect of the Sixties Scoop appears below:

A. *The Class Actions*

[14] Twenty-three class proceedings across Canada are at different stages in respect of the Sixties Scoop. The Federal Court and provincial Court jurisdictions are seized of the subject matter. As stated clearly and categorically by Justice Belobaba, these actions "seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown" (*Brown v Canada (Attorney General)*, 2013 ONSC 5637 at para 10). The proceedings, summarized below, reflect the basis of both jurisdictions, federal and provincial, thereon:

(1) The Ontario Proceedings

[15] A proposed class action was initiated on February 9, 2009, in *Brown v Canada (Attorney General)*. Damages were sought against the Federal Crown and the plaintiffs' motion for certification was conditionally approved by Justice Belobaba of the Ontario Superior Court of Justice, on May 26, 2010. Leave to appeal the certification was granted and the Ontario Divisional Court allowed the appeal in December 2011.On July 15 and 16, 2013, the parties appeared before Justice Belobaba for the purpose of rehearing the motion to certify the action as a class proceeding and the Court certified that action. On February 14, 2017, the Ontario Superior Court granted a summary judgment to the plaintiff and the class. As part of the 1965 Agreement, Canada had a common law duty of care to act reasonably in order to prevent "Indian" children in Ontario from losing their aboriginal identity.

(2) The Manitoba Proceedings

[16] A proposed class action was initiated on April 20, 2009, in *Thompson et al v Manitoba et al* by the Merchant Law Group. A second proposed class action was initiated on March 13, 2015, also by the Merchant Law Group. A proposed class action was initiated on April 20, 2016, in *Meeches et al v Canada* with Koskie Minsky LLP and Troniak Law. According to the Court, "[t]he selection of the Meeches action and the consortium to act as lead counsel will, in my opinion, best serve the interests of the putative class and the policy objectives of the *CPA*" (Affidavit of D. Rosenfeld, at paras 44-45, Motion Record, Tab 6, pp 190-191). On July 21, 2017, the Manitoba Court of Appeal dismissed the appeal of the carriage order. On October 10, 2017, a National Settlement Agreement-in-Principle had been reached under the auspices of the Federal Court of Canada and the representative class parties; thus, the certification motion return dates were no longer required.

(3) The Saskatchewan Proceedings

[17] A proposed class action was then initiated on August 22, 2011, in *Thompson v Canada* by the Merchant Law Group. Another proposed class action was initiated on December 17, 2014, in *Blue Waters v Saskatchewan et al* in Regina also by the Merchant Law Group. A proposed class action on October 7, 2016, in *Ash v Attorney General of Canada* by Koskie Minsky LLP and Sunchild Law, was also initiated. In respect of a May 18, 2017 Blue Waters Action, notice of motion was filed to quash the Ash Action appeal. On September 14, 2017, Koskie Minsky LLP informed Justice Keene that the motion for carriage should be adjourned on a *sine die* basis because an Agreement-in-Principle had by then been reached with Canada on August 30, 2017.

(4) The Alberta Proceedings

[18] On August 18, 2011, an action was initiated in the Court of Queen's Bench of Alberta in *Van Name v Alberta et al* by the Merchant Law Group. On October 6, 2016, the Koskie Minsky LLP and Ahlstrom Wright Oliver & Cooper initiated in *Glenn v Canada*. On September 5, 2017, due to the National Agreement-in-Principle, Koskie Minsky LLP specified to the Court that the decision under reserve was no longer needed.

(5) The British Columbia Proceedings

[19] On May 30, 2011, a proposed class action was initiated in *Russell v Her Majesty the Queen* by the Klein Law Firm. Furthermore, on December 16, 2016, another class action proceeding, *Tanchak v HMQ*, was initiated by the Merchant Law Group; and on March 24, 2017, a proposed class proceeding, *Jones v HMQ*, was also brought forward by the Stephen Bronstein Professional Corporation; and, on May 19, 2017, the Klein Law Firm initiated an application in the British Columbia Supreme Court to have the Tanchak and Jones Actions stayed.

B. *The Mediation*

[20] On February 1, 2017, the Federal Government announced its intention to initiate mediation in regard to the Sixties Scoop litigation across the country (Affidavit of D. Rosenfeld, at paras 124-126, 128, Motion Record, Tab 6, p 203). The Federal Court Dispute Resolution mediation took place by order of Justice Michael Manson of the Federal Court, as dated on May 3, 2017; and then, further, by consent of all plaintiff parties, and the Defendant party, the

Canadian Federal Government, Justice Michel M.J. Shore, by order of Justice Manson dated May 3, 2018, presided over the motion for settlement approval in the White Action, the Riddle Action and the Charlie Action pursuant to Rule 391 of the *Federal Courts Rules*, SOR/98-106, wherein all parties to the action consented to such with Court approval. During the mediation, a wide, all-encompassing range of comprehensive topics were discussed and negotiated:

a) confidentiality of the process;

b) carriage issues;

c) class definition;

d) class size;

e) existing programs available to status Indians;

f) the comprehensive Foundation and healing, truth-reconciliation issues;

g) the mandate of the Foundation;

h) eligibility;

i) compensation;

j) the claims process;

k) the claims of the deceased;

l) the verification process and the extent of same;

m) administration;

n) notice; and

o) settlement implementation issues.

(Affidavit of D. Rosenfeld, at para 139, Motion Record, Tab 6, pp 205-206.)

[21] By an order dated January 4, 2018, Justice Michel M.J. Shore consolidated the White, Riddle and Charlie Actions.

C. *The Settlement Agreement*

[22] Class Counsel and the Representative Plaintiffs have recommended that the Settlement and the Foundation be approved by this Court as fair, reasonable and in the best interests of the Class Members. The entire Settlement is found in Appendix A and the Foundation in Appendix B at the end of the Reasons for Judgment. The essential terms of the Settlement are as follows:

(1) The Foundation

[23] The purpose of the Foundation is to enable change and reconciliation as well as access to healing/wellness, commemoration and education activities for communities and individuals so as to ensure that the events giving rise to the Sixties Scoop are not repeated anywhere in Canada. The Foundation will provide funding for activities and services such as:

- (Reconciliation) assisting Sixties Scoop survivors to reunite with their families and communities;
- (Healing and Wellness) providing them opportunities to gather to participate in sharing and healing activities;
- (Commemoration) organizing conferences and expositions in order to raise awareness about the Sixties Scoop;
- (Education) and establishing scholarships to enable research, publication, learning and teaching in relation to the history of the Sixties Scoop.

(2) Eligible Class Members

[24] To be eligible to make a claim for compensation through the Settlement, one must:

- be a registered Indian (as defined in the *Indian Act*, RSC 1985, c I-5) or Inuit person or person eligible to be registered as an Indian or Inuit who was removed from their home in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents; and
    - who was adopted or made a permanent ward and was alive on February 20, 2009.

(3) The Compensation Scheme

[25] At the outset, Canada shall transfer $500M for payment of claims to the Administrator. Depending on the number of Eligible Class Members, the Administrator will make Individual Payments to each approved claimant in the amount of either a Base Payment or an Adjusted Payment; however, Canada will not be required to pay more than seven hundred and fifty million dollars ($750,000,000.00). Depending on the number of Approved Claimants, each Eligible Class Member who submits a claim shall receive a compensation of maximum $50,000.

(4) The Claims Process

[26] The Claims Process is intended to be simple, paper-based, cost effective, user-friendly and to minimize the burden on the applicant by a one page form. Each Eligible Class Member will receive an Individual Payment by simply submitting an Individual Payment Application to the Administrator.

(5) Releases

[27] The class members agree to release Canada from any and all claims that have been pleaded or could have been pleaded with respect to their placement in foster care, Crown wardship or permanent wardship, and/or adoption.

(6) Opt-outs

[28] Should 2,000 class members opt out, Canada, in its sole discretion, may decide not to proceed with the Settlement Agreement and shall have no further obligations in this regard.

(7) Legal Fees

[29] Canada had agreed to compensate the counsel representative parties to this Agreement in respect of their legal fees and disbursements to significantly lower fees than originally put forward by counsel, through a payment equal to fifteen percent (15%) of the Designated amount plus applicable taxes. Class counsel further agrees to perform any additional work required on behalf of class members at no additional charge. The payment of Class Counsel is from a separate Fund, created by the Federal Government, not from the Class Members.

(8) Settlement Approval

[30] The Parties agree that the Settlement per approval in *Brown v Canada* in the Ontario Superior Court of Justice and in the action constituted in the Federal Court be consistent with the terms of the Settlement Agreement.

IV. Analysis

A. *Law on Settlement Approval and Analysis*

[31] In this present application, the Court must determine whether the Settlement should be approved in accordance with Rule 334.29 of the *Federal Courts Rules*. The legal test to be applied for the approval of the Settlement "is whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533, [2017] FCJ No. 773 at para 16 [*Merlo*]). In order to approve the Settlement, this Court acknowledges that it is guided by the following factors in the evaluation of the proposed Settlement (*Châteauneuf v Canada*, [2006] FCJ No. 363 at para 5 [*Châteauneuf*]):

a) the likelihood of success or recovery with continued litigation;

b) the amount and nature of discovery evidence or investigation;

c) settlement terms and conditions;

d) recommendations and experience of counsel involved;

e) future expense and likely duration of contested litigation;

f) the number and nature of any objections;

g) the presence of good faith and the absence of collusion;

h) the dynamics of, and positions taken during, the negotiations;

i) the risks of not unconditionally approving the settlement.

[32] The parties argue that the Settlement is fair, reasonable and in the best interests of those affected by it. The parties submit that "[t]he Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between

the two parties" (*Châteauneuf*, above, at para 7). "[A] less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation" (*Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No. 2811 at para 30). The parties remind the approving Court that it is not its role to differ from the terms of the Agreement "or to impose its own terms upon them" (*Manuge v Canada*, 2013 FC 341 at para 19 [*Manuge*]). The Court must also refrain from considering the interests of certain class members over the comprehensive interests of the whole class (*Manuge*, above, at para 5).

[33] It is recognized that the Settlement is presumed to be fair as it is recommended by reputable counsel with expertise *(Serhan (Trustee of) v Johnson & Johnson*, 2011 ONSC 128 at para 55). In cases such as this, "[…] a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed" (*Semple v Canada*, 2006 MBQB 285 at para 3). According to the evidence, it is undeniable that "bringing closure is critical" for the survivors of the Sixties Scoop (Affidavit of Maggie Blue Waters, at paras 67, 92, Motion Record, Tab 4, pp 101, 109). Other risks may also be involved in cases such as this, where this type of settlement agreement would not be at the heart of this process:

> (a) a national certification order may not be granted;
>
> (b) a fiduciary duty may be found not to be owed, as in Ontario;
>
> (c) liability might not be established;
>
> (d) statutory limitation periods could bar many or all of the class' claims;
>
> (e) an aggregate award of damages could be denied by the court forcing class members through lengthy and protracted individual assessment;

> (f) proven damages could be similar to or far less than the settlement amounts;
>
> (g) ordering reconciliation, commemorative or healing initiatives, of the nature the Foundation is tasked with, would have been outside the jurisdiction or purview of any court to order.
>
> (Memorandum of Fact and Law of the Plaintiffs (Settlement Approval), at para 110.)

[34] Consequently, the Court acknowledges that without a settlement agreement, there lies the uncertainty of "further litigation and appeals" (Affidavit of J. Wilson [filed under separate cover]). "There is no assurance that at the end of this process [class members] will receive any more than they will get under these Settlement Agreements" (*McKillop and Bechard v HMQ*, 2014 ONSC 1282 at para 28 [*McKillop*]).

[35] The parties also submit that the features of the Settlement are reasonable and "multi-dimensional" as they reflect the historical and sensitive nature of these proceedings, as well as the unique circumstances of class members:

> (a) there are both monetary and non-monetary benefits to the class;
>
> (b) the claims process is simple and paper-based which avoids class members having to re-live their experiences in the same way a trial or examination would require;
>
> (c) the claims process does not require proof of "harm" or "loss";
>
> (d) certain historical and unprecedented initiatives, to be overseen and implemented by the Foundation, will form part of the settlement, initiatives for the benefit of generations of indigenous persons across Canada;
>
> (e) assurances to be sought from provincial governments that there shall be no social assistance governmental claw-backs on settlement funds received; and

> (f) no class member will be required to pay counsel to assist with the claims process, meaning any compensation determination shall not be subject to a legal fee deduction.
>
> (Memorandum of Fact and Law of the Plaintiffs (Settlement Approval), at para 116.)

[36] As mentioned above, the Settlement presents a paper-based claims process. The most important feature of the Settlement allows class members to complete their forms confidentially without fear of having to testify or appear in a court in lengthy procedures. The evidence reveals that class members are often disinclined to share their tragic experiences publicly to avoid any embarrassment and humiliation (Affidavit of D. Rosenfeld, at paras 170-172, Motion Record, Tab 6, p 212).

[37] Another particular aspect of the Settlement concerns the eligibility of class members for compensation. The Settlement Agreement established an Exceptions Committee to ensure payment in compensation to Eligible Class Members, particularly, for long-term placement with non-Indigenous families resulting in cultural loss identity (Affidavit of D. Rosenfeld, at paras 185-186, Motion Record, Tab 6, pp 214-215). Evidence on this motion further explains why the provision in the Settlement solves an important issue in respect of the harm experienced by class members:

> [T]he settlement is sensitive to the nuance of child welfare law that some indigenous children, who were neither adopted nor made crown or permanent wards, still experience long-term placement in non-indigenous homes, thereby suffering the same harm. There is an ‘exceptional circumstances’ provision within the settlement that answers these persons’ needs.
>
> (Affidavit of Kenneth Richard, at para 5, Exhibit “114” to the Affidavit of D. Rosenfeld, at para 258, Motion Record, Tab 6(114), p 2117.)

[38] The parties submit that although “no court has yet recognized the loss of language and culture as a recoverable tort” (*Quatell v Attorney General of Canada*, 2006 BCSC 1840 at para 9 [*Quatell*]), compensation should also involve damages for loss of language and culture due to identity loss. It is noteworthy that class members may not, however, obtain a similar benefit through contested litigation. On the basis of a limitations period, the Settlement also intends to avoid injustice by including class members, who were alive as of February 20, 2009; and, their estates can submit claims for compensation in the event that individuals have since passed away. In fact, the parties submit that there is a possibility that the “ultimate limitation” period in each province would legally forbid claims from being heard. For instance, the ultimate statutory limitation period in Alberta is 10 years pursuant to its *Limitations Act*, RSA 2000, c L-12, s 3(1)(b). The parties, therefore, reiterate the unprecedented element of this negotiated class definition that claims include events, experiences which occurred between 1951 and 1991. Lastly, the parties submit that class members will receive compensation for their pain and suffering in respect of the culture identity loss; and, it is important to mention that the payment will be considered as non-taxable income.

[39] As previously stated, the Settlement Agreement provides non-monetary benefits that will allow survivors to heal, to obtain education, to reconcile and to commemorate. In order to do so, a Foundation will be implemented in accordance with the *Canada not-for-profit Corporations Act*, SC 2009, c 23 (Final Settlement Agreement, Preamble s 3.01(2)). The Foundation shall ensure that all survivors of the Sixties Scoop will benefit from it, including Métis and non-status Indians. The purpose of the Foundation is to continue to assist survivors, as well as all Indigenous communities and individuals, on their journey of change, healing and reconciliation

(Final Settlement Agreement, Preamble s 3.01(3)). "[I]f the matter proceeds to trial, the non-monetary issues would be outside the jurisdiction of the Court" to grant (*Rideout v Health Labrador Corp.*, 2007 NLTD 150 at para 70). The Foundation provides "an invaluable opportunity for Canada-at-large, and especially indigenous people, […] by ensuring that those harms are not ever repeated" (Affidavit of Dr. R. Sinclair, at paras 7-9, Exhibit "115" to the Affidavit of D. Rosenfeld, Motion Record, Tab 6(115), p 2177).

[40] With regard to the fiduciary duty and common-law duties of care of Canada, the Supreme Court of Canada has held that it is more difficult to prove breach of fiduciary duty against a government than it is against a private actor (*Alberta v Elder Advocates of the Alberta Society et al*, 2011 SCC 24 at para 62). In fact, in a trial context, the Plaintiffs would have had to demonstrate that either (i) the fiduciary duty arose as a result of Canada's assumption of discretionary control over a specific Aboriginal interest, or (ii) that there had been an undertaking by Canada to act in the best interests of the class members (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 80 and 85). Bearing this in mind, in *Brown v Canada (Attorney General)*, 2017 ONSC 251 at para 68, Justice Belobaba concluded in the same vein on the notion of fiduciary duty:

> In my view, a fiduciary duty under the first category cannot be established in this case. The aboriginal interest in question is not an interest in land and the action herein is not being advanced as a communal claim but as a class action seeking individualized redress.

[41] Finally, the parties address the risks that are involved with future delays. Given the survivors' advanced ages, it becomes highly substantial to carefully consider this factor under the circumstances (*McKillop*, above, at para 28). "[I]t is apparent that the time and resources

committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued" (*Parsons et al v Canadian Red Cross Society et al*, [2000] OJ No. 2374 (SCJ) at paras 37-38). The parties submit that their recommendations ought to be approved, because "the closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable and in the best interests of the class" (*Clegg v HMQ Ontario*, 2016 ONSC 2662 at paras 34-35).

B. *Legal Framework on the Fees and Analysis*

[42] In order for this Court to determine whether the legal fees sought are fair and reasonable, in accordance with Rule 334.4 of the *Federal Courts Rules* (*Manuge*, above, at para 28), the following factors are to be taken into account by the Court (*Smith Estate v National Money Mart Co.*, 2011 ONCA 233 at para 80):

(a) the legal and factual complexities of the action;

(b) the risks undertaken, including that the action might not be certified;

(c) the degree of responsibility assumed by Class Counsel;

(d) the monetary value of the matters at issue;

(e) skill and competence demonstrated by Class Counsel;

(f) the results achieved;

(g) ability of the class to pay and the class expectations of fees;

(h) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.

[43] The Court has considered the fact that the fees were discussed during a judicial mediation and that "[t]here is a prima facie presumption of fairness when a proposed settlement is negotiated at arms-length" (*CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman*, [2002] OJ No. 1855 (SCJ) at para 18).

[44] Firstly, the parties submit the total legal fee amount represents less than ten percent (10%) of the overall global payment of the Defendant (Affidavit of J. Wilson, at para 79, p 15 [filed under separate cover]). The fees sought represent approximately eight percent (8%) (Equivalent to $75 million) of the total value of the global Settlement Agreement, whereas evidence shows that the applicable Retainer Agreements mention percentage rates of 20% to 33% of the total payment (Affidavit of D. Rosenfeld, at para 107, Motion Record (Fee Approval), Tab 6, p 114). The "use of a percentage [for Class Counsel Fees] appears to be preferred because it tends to reward success and to promote early settlement" (*Manuge*, above, at para 47). This Court did consider previously approved percentages by different Courts in other cases, namely in *Dolmage, McKillop and Bechard v HMQ*, 2014 ONSC 1283 with an approval of 20.68% and in *Stanway v Wyeth Canada Inc.*, 2015 BCSC 983 with 33.33%.

[45] Secondly, the Court acknowledges the parties' insistence on the importance of providing free legal assistance to any claimant in need of assistance throughout the claims process. The parties have agreed to respect the provision (section 11.02) contained in the Settlement Agreement in this regard. Without the prior approval of the Federal Court, this provision is intended to ensure "that individual class members will get to keep the full amount of the compensation awarded to them under the settlement" (Affidavit of C. Charlie, at para 12, Motion

Record (Fee Approval), Tab 2, p 11). By providing claimants with an assistance of counsel at no charge, Counsel will need to be at their disposal for the next twelve to eighteen months until the enactment of the Settlement in order to assist class members with claim forms and to communicate with them in case they have questions (Fee Approval Affidavit of D. Rosenfeld, at para 59, Motion Record (Fee Approval), Tab 6, pp 103-104).

[46] Thirdly, this litigation is "historically unique" and was "inherently fraught with risk". This Court must take into account the fact that the claims in this class action refer to a loss of cultural identity, as it is the first time that this issue has been brought forward in *Brown v Canada (Attorney General)* in Ontario in 2009 and acknowledged as such by Justice Belobaba.

> [T]his is the first case in the Western world to hold government responsible for consultation when what is at stake is a people's children's cultural identity. [T]his is the largest award ever to answer the grievance of a people's children's loss of cultural identity.
>
> (Affidavit of M. Brown, at paras 43-44, Exhibit "113" to the Settlement Approval Affidavit of D. Rosenfeld, at para 252, Motion Record (Settlement Approval), Tab 6(113), p 2107.)

[47] The Court accepts that these cases, never presented in front of a Court before, undoubtedly pose a significant litigation risk to be assumed by Class counsel (*Manuge v Canada*, 2014 FC 341 at para 34).

[48] The Court also accepts the "risk of continued and perpetual delay in obtaining relief". Class members can benefit from the proposed settlement on which Class Counsel had worked. "Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated" (*McKillop*, above, at para 28). This

class action implicates a historical event that began in 1951 and “inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice” (*Anderson et al v Canada*, 2016 NLTD(G) 179 at para 53). The Court accepts that this class proceeding has given rise to specific risks with regard to the timing and the uncertainty of potential individual hearings, as well as uncertain results at trial. Class Counsel and the Federal Government’s commitment in the inauguration of this Settlement, as well as its incessant efforts in negotiating the Settlement, is one of the reasons why the result achieved was successful. Class Counsel and the Federal Government were able to avoid delays and expensive costs associated with individual hearings by which to compensate class members.

[49] Class Counsel provided proof to this Court in order to demonstrate that the results achieved are in fact exemplary. These factors include a significant compensation fund with a simple one-page claims process, as well as non-monetary benefits to the class, including reconciliation, healing and commemorative activities and services in the amount of $50 million by which to begin such work. The parties protected the privacy of the claimants throughout the settlement process (*Merlo*, above, at para 27). The terms of the Settlement Agreement, the compensation fund, the simple paper-based claims process, as well as the non-monetary benefits are all compelling factors which prove that the legal fees are fair and reasonable in the case at bar:

> [N]o legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community.
>
> (*Fontaine v Canada*, 2006 NUCJ 24 at para 61 [*Fontaine*].)

[50] Lastly, the legal fees are intended to "[…] encourage counsel to take on difficult and risky class action litigation" (*Abdulrahim v Air France*, 2011 ONSC 512 at para 9). It was also concluded in *Griffin v Dell Canada Inc.*, [2011] OJ No. 2487 (SCJ) at para 53 that "[…] class actions simply will not be undertaken by first rate lawyers […] unless they are assured of receiving fair – and […] "generous" – compensation in appropriate cases".

C. *Opposition to the Settlement*

(1) The right to opt-out

[51] Class members, as individuals, may opt out assuming that they are not in agreement with the proposed Settlement. "[If] they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts" (*Fontaine*, above, at para 59). Bearing in mind that settlements are compromises that intend to resolve contested claims, it is not uncommon that the parties involved will not be satisfied with every element inherent in the settlement (*Quatell*, above, at paras 5-7). Class members may therefore become objectors if they oppose to the Settlement. The parties reminded this Court that it must determine whether the Settlement is fair, reasonable, and in the best interests of the class as a whole. It is therefore important that this Court carefully analyzes the benefits that the proposed Settlement will bring to the class as a whole.

(2) Individual compensation range of $25,000 to $50,000

[52] Some object to the individual damages ranging between $25,000 and $50,000. The parties submit that the quantum of compensation is fair and reasonable. As per the evidence on

this motion, even with the approval of the Settlement by Justice Belobaba in the Brown action in Ontario, “Justice Belobaba was indicating amounts in the $10,000 to $25,000 range […] and that the average paid on the common experience payment regarding Indian Residential Schools was $22,000” (Affidavit of M. Blue Waters, at para 112, Motion Record (Settlement Approval), Tab 4, p 112). Considering that the claimants would not be required to prove harm or loss in order to receive compensation, the proposed sums are “meaningful amounts of money”, as per the evidence.

(3) Capped Settlement Fund at $750 Million

[53] Certain objectors disagree with the capped Settlement Fund. The parties submit that it is appropriate to cap the Settlement fund at such a high amount of $750 million as it will allow every eligible class member to receive no less than $25,000. In fact, caps on settlement funds offer benefits (i.e. interests accruing from the capped settlement fund) to class members in such a way that they receive a sum of money in excess of $25,000, and up to $50,000. The parties also submit that it is reasonable to cap the Settlement fund in this case as the feature has allowed them to establish a simple, non-complex, claims process which would otherwise not have been available in uncapped settlements. It is recognized by this Court that no amount of money whatsoever can compensate for a loss of cultural identity. This is a symbolic payment and, not one that could, with any sum, recompense suffering for the loss of persona, family, nation and thus identity.

(4) Exclusion of Métis and Non-Status Individuals

[54] Certain individuals have raised the objection that the Métis and non-status Indians are not included in the Settlement. The Settlement Agreement only applies to status Indians, according to the *Indian Act*, and the Inuit. The parties submit that the Settlement Agreement is fair for the following reasons with which the Court agrees due to that reflected below:

i. The Settlement contains a Foundation that has been implemented in Canada to serve for the benefit of every survivor of the Sixties Scoop, including Métis and non-status Indians. As per the evidence states, the purpose of the Foundation is to allow healing and reconciliation for all survivors of the Sixties Scoop;

ii. Some federal-provincial child welfare agreements do not apply to Métis and non-status Indians since the provinces do not provide child welfare services to Indians without reserve status. In *Brown v Canada (Attorney General)*, Justice Belobaba also concluded that the Ontario agreed to fund the development of the provincial welfare services only to "Indians with reserve status" (*Brown v Canada (Attorney General)*, 2013 ONSC 5637 at paras 63-71);

iii. Currently, there is no way of determining whether Métis and non-status Indians would be allowed to receive compensation;

iv. The Settlement Agreement does not affect the claims of Métis and non-status Indians against Canada. The evidence clearly states that "[n]othing in this Settlement bars a claim by Métis against the federal government, or a claim against the provincial authorities by those physically or sexually abused when adopted in

state wardship" (Affidavit of M. Brown, at para 42, Exhibit "113" to the Affidavit of D. Rosenfeld, at para 257, Motion Record, Tab 6(113), pp 2106-2107).

(5) Release of Claims for Physical and Sexual Abuse While in Care

[55] Some objectors have criticized Canada for the release of the physical and sexual abuse claims. The Court agrees that "the compensation offered by Canada in exchange for the release of all claims is fair and reasonable" (Responding Memorandum of Fact and Law of the Plaintiffs, at para 35). It is explained that Canada is not to be held liable for the physical and sexual assault experienced by the Sixties Scoop survivors as it would not be in accordance with the federal-provincial agreements. The arrangements that were set forth between the federal Crown and the provinces require only that the provinces inaugurate welfare programs available to all Indians (*Brown v Canada (Attorney General)*, 2010 ONSC 3095 at para 31). Canada, on the other hand, is responsible to provide the provinces with the necessary funding and is not to be held accountable for breach of common law duty of care.

[56] The first Sixties Scoop class action in Ontario, *Brown v Canada*, also did not implicate allegations of physical and sexual abuse while class members were in care. Evidence shows that "[Class Counsel] chose not to expand it to include a law suit for damages for abuse. […] Our claim in Ontario was limited to a loss of cultural identity and did not include the element of abuse as part of the assertion of federal liability" (Affidavit of M. Brown, at paras 31 and 42, Exhibit "113" to the Affidavit of D. Rosenfeld, Motion Record (Settlement Approval), Tab 6(113), pp 2103 and 2107). Consequently, class members can still present such claims against

the provinces, not Canada, in order to receive compensation for the physical and sexual abuse suffered.

(6) Claimants' Choice of Counsel through Claims Process

[57] Certain individuals have raised the objection that they are entitled to choose their own lawyers for these class proceedings, and that these lawyers should be paid from the compensation granted to claimants. According to section 11.03 of the Settlement Agreement, "[n]o fee may be charged to Class Members in relation to claims under this Agreement by counsel not listed on Schedule "K" without prior approval of the Federal Court". As a result, pursuant to Rule 369 of the *Federal Court Rules*, leave from the Court is required if legal fees are to be paid from claimants' individual compensation. The parties submit that the purpose of section 11.03 is to protect the claimants from lawyers' misconduct and to prevent the overcharging of legal fees which had arisen from the Indian Residential Schools Settlement claims process. The evidence on this motion clearly indicates that "[t]he structure of the proposed settlement is such that an amount for legal fees will be paid up front by Canada, with no counsel being permitted to charge further legal fees against individual payments, without prior authorization from the court" (Affidavit of M. Reiher, at para 33, Motion Record (Settlement Approval), Tab 5, p 156).

[58] According to the evidence on this motion, "the court will be called on to approve fees that are proposed to be charged so that amounts are reasonable and claimants are not surprised by dramatically reduced pay outs" (Affidavit of M. Reiher, at para 35, Motion Record (Settlement Approval), Tab 5, p 156). Class counsel from all across Canada made a commitment to assist,

free of charge, every class member in the understanding of the Settlement Agreement, as well as in the completion of the claim forms. Class members will also have access to free legal services provided by twelve Indigenous Liaison Officers in each province and territory (Plan of Administration, Exhibit "A" to the Affidavit of L. Seto, Supplemental Motion Record (Settlement Approval), Tab 6(A), p 53).

(7) Legal Fees to Class Counsel

[59] Some object to the quantum of legal fees. The Court agrees that the fees sought are fair and reasonable, mainly because class counsel will remain available to the claimants following the approval of the Settlement and because the requested fees are less than 10% of the overall global payment. All of which the Court accepted, recognizing that no legal fees whatsoever would be permitted against individual payments without prior authorization of this Court.

(8) Class Definition and Cut-Off Date for the Deceased

[60] Some individuals object to the cut-off date of February 20, 2009, because they claim that persons (or their estates) who were deceased prior to this date should also be considered as eligible claimants. It is accepted by the Court that one of the reasons why the parties chose the cut-off date to be February 20, 2009 is due to the Brown action which was commenced on that same date in Ontario. Moreover, in *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 (SCJ) at paras 82-84, Justice Winkler addressed a similar objection such as the one at bar:

> […] The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. […] While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of

> distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[61] Therefore, the Definition of "Eligible Class Member", as found in the Settlement, allows estates to make claims, whereas, without the inclusion of such date, they would not have been eligible to receive any funds.

(9) Claimants' Ability to Retrieve Personal Records

[62] Certain objectors are concerned about the difficulty and the complexity in retrieving personal records in order to make their claim for compensation. These records are held with Canada, the provinces and the provincial Children's Aid Society. The parties did acknowledge this hardship and took the necessary actions in order to accommodate the class members. "[W]ith the Settlement's provision [the] burden to obtain records is not upon the Class member, rather, it is upon the governments" (Affidavit of K. Richard, at para 7, Exhibit "A" to the Affidavit of J. Riddle, Motion Record (Settlement Approval), Tab 7(A), p 2198). Said otherwise, the evidence clearly states that survivors of the Sixties Scoop will not be encumbered by the task of requesting their official records in order to establish the fact of permanent wardship or adoption (Affidavit of Dr. Raven Sinclair, at para 12(e), Exhibit "115" to the Affidavit of D. Rosenfeld, at para 254, Motion Record (Settlement Approval), Tab 6(115), p 2178). Further steps, it is agreed by the Court, have also been taken in such a way that the process for verification of class members will be streamlined. By shifting the burden of proof onto the governments, it is recognized that "if [class members] have no record, [it] creates a process that assures me no indigenous person who lost their spirit and being will be denied recognition because of no record" (Affidavit of M.

Brown, at para 40(i), Exhibit "113" to the Affidavit of D. Rosenfeld, at para 257, Motion Record (Settlement Approval), Tab 6(113), pp 2106-2107).

(10) Maintaining a Historical Archive of Stories and Experiences

[63] Certain individuals are concerned with the loss of personal stories and experiences present in the historical record. One of the main and key, primary objectives of the Foundation is to encourage survivors of the Sixties Scoop to share their stories for the purposes of commemoration and healing. Past jurisprudence demonstrates that none of the Foundation's initiatives would have been available to class members through contested litigation (*Rideau v Health Labrador Corp.*, 2007 NLTD 150 at para 70). The importance and value of the Foundation were also described by a class member, stating that "the work of the Foundation, the Agreement which is only the beginning of reconciliation, is part of taking us home – to be ourselves – to reclaim our languages, to reclaim our culture – the wrongs (sic) to continue to grow our essence" (Affidavit of M. Blue Waters, at para 96, Motion Record (Settlement Approval), Tab 4, p 110).

(11) Mediator as Settlement Approval Judge

[64] Certain individuals were dissatisfied that the undersigned, Justice Michel M.J. Shore, was not only the mediator for the proposed Settlement, but was also the presiding judge at the Settlement approval hearing. With respect to Rule 391 of the *Federal Court Rules*, all parties (Class Counsel and the Respondents) to the action had given their consent prior to the hearing for Settlement approval. An order, confirming the parties' consent, had been signed and approved by

Justice Manson. The evidence also demonstrates that Justice Shore, through an order of the Court, on May 3, 2017, was designated to conduct the Dispute Resolution Conference by Justice Manson prior to sitting on the approval of the Settlement by order of May 3, 2018, exactly one year later.

(12) Consultation

[65] Certain objectors stated their discontent for not being formally consulted about the Settlement Agreement. According to jurisprudence in class actions, such legal duty is non-existent for such proceedings (*Sondhi v Deloitte Management Services LP*, 2018 ONSC 271 at para 78); however, class members were given the opportunity to be heard by the Court, as solely to objections to the Settlement. Moreover, survivors of the Sixties Scoop will continue to be consulted for the inauguration of the Foundation as some of them are also members of the Development Board. The Foundation intends to "provid[e] survivors of the Sixties Scoop and their families with "Telling Our Stories" platforms that promote their own healing and that serve as a gift to future generations". This is to ensure that each and every story that can be told, will be told; and, kept in the annals of Canadian history. By the recounting of the stories, suffering will, at least, have meaning, by a duty to keep the stories alive for those whose stories can be told, as voices of witnesses to history that will thereby remain alive, through narratives to be kept; and, suffering never to be forgotten.

[66] For all the reasons specified above, this Court certifies this action as a class proceeding, approves the Settlement with modification as per the order of the undersigned of May 11, 2018, in respect of dissemination of information of the Settlement to every part of Canada where

Indigenous individuals reside, or can be found, in addition to meticulous oversight in respect of funds to be distributed, to ensure that each and every eligible person as per the Settlement receives the payment allotted for such. The Court also dismisses the action against Canada on a without costs basis.

ORDER in T-2212-16 rendered on May 11, 2018

WHEREAS by Order of Justice Michael D. Manson of this Court, dated May 3, 2018 and by consent of the parties before the Court, the mediator, Justice Michel M.J. Shore, shall preside over the motion for settlement approval in this action in accordance with section 391 of the *Federal Courts Rules*;

AND WHEREAS the Plaintiffs and the Defendant have entered into the Settlement Agreement in respect of the Plaintiffs' claims against the Defendant;

AND WHEREAS this Court approved the form of notice and plan for distribution of the notice of this motion by Order dated January 11, 2018 (the "**Notice Order**");

UPON HEARING the motion made by the Plaintiffs, on consent, for an order: (a) certifying this action as a class proceeding for settlement purposes; (b) approving the settlement agreement dated November 30, 2017 between the parties (the "**Settlement Agreement**" or "**Settlement**"); and (c) approving the notice of this settlement, the opt out and claims period and other ancillary orders to facilitate the Settlement;

AND UPON READING the joint motion records of the parties and the facta of the parties;

AND UPON BEING ADVISED of the Defendant's consent to the form of this Order;

AND WITHOUT ADMISSION OF LIABILITY on the part of the Defendant;

AND UPON HEARING the oral submissions of counsel for the Plaintiffs, counsel for the Defendant, all interested parties, including objections, written and oral.

IT IS ADJUDGED THAT:

1) For the purposes of this Order, the following definitions shall apply:

(i) "**Approval Date**" means the date that this Court approved the Settlement Agreement;

(ii) "**Approval Orders**" means this order and the order approving the Settlement Agreement in *Brown v Canada* (Court File No. CV09-00372025-00CP);

(iii) "**Brown Class Members**" means members of the class proceeding in the Ontario Superior Court of Justice, *Brown v Canada* (Court File No. CV-09-00372025-00CP) who did not opt out of that proceeding;

(iv) "**Canada**" means the Defendant, the Government of Canada, as represented in this proceeding by Her Majesty the Queen;

(v) "**Class Actions**" mean:

(a) *Wendy Lee White v The Attorney General of Canada* (Court File No. T-294-17);

(b) *Jessica Riddle v Her Majesty the Queen* (Court File No. T-2212-16);

(c) *Catriona Charlie v Her Majesty the Queen* (Court File No. T-421-17);

(d) *Meeches et al v The Attorney General of Canada* (Court File No. CI 16-01-01540);

(e) *Maggie Blue Waters v Her Majesty the Queen in Right of Canada et a.* (Court File No. QBG 2635/14);

(f) *David Chartrand, Lynn Thompson, and Laurie-Anne O'Cheek v Her Majesty the Queen et al* (Court File No. CI 15-01-94427);

(g) *Pelletier v Attorney General of Canada* (Court File No. QGB 631/17);

(h) *Simon Ash v Attorney General of Canada* (Court File No. QBC 2487/16);

(i) *Ashlyne Hunt v Her Majesty the Queen in Right of Alberta* (Court File No. 1101-11452);

(j) *Sarah Glenn v Attorney General of Canada* (Court File No. 1601-13286);

(k) *Skogamhallait also known as Sharon Russell v The Attorney General of Canada* (Court File No. VLC-S-S113566);

(l) *Linda Lou Flewin v Attorney General of Canada e al* (Court File No. Hfx 458720);

(m) *Sarah Tanchak v Attorney General of Canada et al* (Court File No. 186178 Victoria);

(n) *Mary-Ann Ward v The Attorney General of Canada et al* (Court File No. 500-08-000829-164 Montreal); and

(o) *Catherine Morriseau v Her Majesty the Queen in Right of Ontario and Attorney General of Canada* (Court File No. CV-16-565598-00CP).

(vi) "**Class**" or "**Class Members**" means all Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v The Attorney General of Canada* (Court File Number CV-09-00372025CP);

(vii) "**Implementation Date**" means the latest of:

(a) thirty (30) days following the expiry of the Opt Out Period;

(b) the date following the last day on which a Class Member may appeal or seek leave to appeal either of the Approval Orders;

(c) the date of a final determination of any appeal brought in relation to the Approval Orders.

(viii) "**Opt Out Period**" or "**Opt Out Deadline**" means the period commencing on the Approval Date and ending ninety days after the Approval Date, during which a Class Member may opt out of this class proceeding, without leave of this Court;

(ix) "**Releasees**" means individually and collectively, Canada, and each of the past, present and future Ministers of the federal government, its Departments and Agencies, employees, agents, officers, officials, subrogees, representatives, volunteers, administrators and assigns;

(x) "**Settlement Agreement**" means the Settlement Agreement dated November 30, 2017, attached as **Schedule "A"** to this Order; and

(xi) "**Settlement Fund**" means the settlement fund established pursuant to section 4.01 of the Settlement Agreement.

2) All applicable parties have adhered to and acted in accordance with the Notice Order and the procedures provided in the Notice Order have constituted good and sufficient notice of the hearing of this motion.

CERTIFICATION

3) This action is hereby certified as a class proceeding for the purposes of settlement pursuant to section 334.16(1) of the *Federal Courts Rules*.

4) The Class is defined as:

> All Indian (as defined in the *Indian Act*) and Inuit persons who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and placed in the care of non-Indigenous foster or adoptive parents excluding any members of the class action in the Ontario Superior Court of Justice styled as *Brown v The Attorney General of Canada* (Court File Number CV-09-00372025CP).

5) The representative plaintiffs hereby appointed are Wendy White, Jessica Riddle, and Catriona Charlie who constitute adequate representative plaintiffs of the Class.

6) Klein Lawyers LLP, Koskie Minsky LLP and Merchant Law Group LLP are appointed as Class Counsel.

7) The claims asserted on behalf of the Class against the Defendant are: (a) negligence; and (b) breach of fiduciary duty.

8) For the purposes of settlement, this proceeding is certified on the basis of the following common issue:

Did the Defendant have a fiduciary or common law duty of care to take reasonable steps to protect the Indigenous identity of the Class Members?

9) The certification of this action is conditional on the approval of the Settlement Agreement in Ontario in accordance with section 12.01 of the Settlement Agreement. Should the Settlement Agreement be set aside, all materials filed, submissions made or positions taken by any party are without prejudice to any future positions taken by any party on a certification motion.

SETTLEMENT APPROVAL

10) The Settlement Agreement is fair, reasonable and in the best interests of the Plaintiffs and the Class Members.

11) The Settlement Agreement, which is expressly incorporated by reference into this Order, shall be and hereby is approved and shall be implemented in accordance with this Order and further orders of this Court.

12) The claims of the Class Members and the Class as a whole, shall be discontinued against the Defendant and are released against the Releasees in accordance with section 10.01 of the Settlement Agreement, in particular as follows:

(i) Each Class Member and his/her Estate Executor and heirs (hereinafter "**Releasors**") has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any such Releasor ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to the Sixties Scoop and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor or by any other person, group or legal entity on behalf of or as representative for the Releasor.

(ii) This Agreement does not preclude claims against any third party that are restricted to whatever such third party may be directly liable for, and that do not include whatever such third party can be jointly liable for together with Canada, such that the third party has no basis to seek contribution, indemnity or relief over by way of equitable subrogation, declaratory relief or otherwise against Canada.

(iii) For greater certainty, the Releasors are deemed to agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, RSO 1990, c N-1, or its counterpart in other jurisdictions, the

common law, Quebec civil law or any other statute of Ontario or any other jurisdiction in relation to the Sixties Scoop, including any claim against provinces or territories or other entities for abuse while in care; then, the Releasors will expressly limit their claims to exclude any portion of Canada's responsibility.

(iv) Canada's obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in this Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

13) This Settlement Agreement does not compromise any claims that Class Members have against any Province, Territory or any other entity, other than as expressly stated herein.

14) This Agreement does not affect the rights of:

(i) Class Members who opt out of any class action that is certified pursuant to this Settlement Agreement; or

(ii) Individuals who are not Class Members.

15) This Order, including the releases referred to in paragraph 12 above, and the Settlement Agreement are binding upon all Class Members, including those persons who are under a disability.

16) The claims of the Class Members are dismissed against the Defendant, without costs and with prejudice and such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

17) This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all of the Class Members, and the Defendant for the limited purposes of implementing the Settlement Agreement and enforcing and administering the Settlement Agreement and this Order.

18) Save as set out above, leave is granted to discontinue this action against the Defendant without costs and with prejudice, and that such discontinuance shall be an absolute bar to any subsequent actions against the Defendant in respect of the subject matter hereof.

19) Collectiva Class Action Services Inc. shall be and hereby is appointed as Claims Administrator pursuant to the Settlement Agreement. A complete, significant, and detailed review must take place in regard to the Administrator for all eventual work pertaining to the Administrator's responsibilities, to ensure accurate and effective, wide dissemination of meaningful and pertinent information to the attention of all those who have gone through the "Sixties Scoop" and heirs to those who have been subjected to the "Sixties Scoop" as specified in the Settlement; and, in addition, to supervise and monitor all future work that must be carried out by the Administrator as it pertains to individual payments to Class Members, heirs and others as respectfully specified in the Settlement who will be part of the Exceptions category. The fees, disbursements and applicable taxes of the Claims Administrator shall be paid by the Defendant in accordance with section 6.06 of the Settlement Agreement.

20) No person may bring any action or take any proceeding against the Administrator, the Foundation Table, the Exceptions Committee or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, for any matter in any way relating to the Settlement Agreement, the administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

21) In the event that the number of persons who appear to be eligible for compensation under the Settlement Agreement who opt out of this class proceeding and the Ontario Action exceeds two thousand (2,000), the Settlement Agreement will be void and this judgment will be set aside in its entirety, subject only to the right of Canada, at its sole discretion, to waive compliance with section 5.09 of the Settlement Agreement.

22) Rule 334.21(2) does not apply to the plaintiffs in the Class Actions, and those plaintiffs are not excluded from this proceeding despite not having discontinued their parallel Class Actions prior to the Opt Out Deadline.

23) The fees payable to Class Counsel are hereby set at $37,500,000.00 ($37.5 million) in respect of legal fees plus applicable taxes, inclusive of disbursements, payable as follows:

(i) $12,500,000.00 to Klein Lawyers LLP;

(ii) $12,500,000.00 to Koskie Minsky LLP; and

(iii) $12,500,000.00 to Merchant Law Group LLP.

24) The amounts set out in paragraph 23 shall be paid by the Defendant to Class Counsel on the Implementation Date in accordance with the Settlement Agreement. The amounts set out in paragraph 23 shall be in addition to the funding in section 4.01 of the Settlement Agreement.

25) No counsel or law firm listed in **Schedule "K"** to the Settlement Agreement or who accepts a payment for legal fees from Canada will charge any Class Member any fees or disbursements in respect of an Individual Payment. Each counsel listed in **Schedule "K"** to the Settlement Agreement undertakes to make no further charge for legal work for any Class Member with respect to claims under this Agreement.

26) Notice in the manner attached hereto as **Schedule "B"** shall be given of this judgment, the approval of the Settlement Agreement, the opt out period and the claims period by the commencement of the Notice Plan attached here to **Schedule "C"**, at the expense of Canada.

27) This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Settlement Agreement and this Order.

28) Class Counsel shall report back to the Court on the administration of the Settlement Agreement at reasonable intervals not less than semi-annually, as requested by the Court and upon the completion of the administration of the Settlement Agreement.

29) The representative Plaintiffs Wendy White, Jessica Riddle, and Catriona Charlie shall each receive the sum of $10,000 as an honorarium to be paid by the Defendant out of the settlement fund.

30) The proposed representative plaintiffs in the Provincial Class Actions shall each receive the sum of $10,000 as an honorarium to be paid by the Defendant out of the settlement fund.

31) This Order will be rendered null and void in the event that the Settlement Agreement is not approved in substantially the same terms by way of order of the Ontario Superior Court of Justice.

32) The statutory provisions of the *Federal Courts Act*, RSC 1985, c F-7 and the *Federal Courts Rules*, SOR/98-106 shall apply in their entirety to the supervision, operation, and implementation of the Settlement Agreement and this Order.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2212-16
STYLE OF CAUSE:	JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MAY 10 AND 11, 2018
ORDER AND REASONS:	SHORE J.
DATED:	JUNE 21, 2018

APPEARANCES:

E. F. Anthony Merchant Evatt Merchant	FOR THE PLAINTIFF (JESSICA RIDDLE)
Celeste Poltak Garth F. Myers Kirk M. Baert	FOR THE PLAINTIFF (WENDY LEE WHITE)
David A. Klein Angela Bespflug	FOR THE PLAINTIFF (CATRIONA CHARLIE)
Catharine Moore Travis Henderson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Merchant Law Group Saskatoon, Saskatchewan	FOR THE PLAINTIFF (JESSICA RIDDLE)
Koskie Minsky Barrister and Solicitor Saskatoon, Saskatchewan	FOR THE PLAINTIFF (WENDY LEE WHITE)
Klein Lawyers Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE PLAINTIFF (CATRIONA CHARLIE)
Attorney General of Canada Saskatoon, Saskatchewan	FOR THE DEFENDANT

Tab 28

Romeo v. Ford Motor Co.

Romeo v. Ford Motor Co.

Ontario Judgments

Ontario Superior Court of Justice

E.M. Morgan J.

Heard: March 18, 2019.

Judgment: March 21, 2019.

Court File No.: CV-15-539855-00-CP

[2019] O.J. No. 1416 | 2019 ONSC 1831

RE: Rebecca Romeo, Joe Romeo, Diane Béland, Elyse Choiniere, Linda Goodman, and Tracy Corsi, Plaintiffs, and Ford Motor Company and Ford Motor Company of Canada, Limited, Defendants

(42 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Settlements — Approval — Settlements — Approval — Motion by plaintiffs to approve class settlement agreement allowed — Plaintiffs alleged that they suffered repair costs arising from defects in automobile transmissions — Proposed settlement was in best interests of class — Terms were in many respects more advantageous to class members than individual remedies — Claims-made compensation program eliminated concern that ceiling would be reached with respect to claims — Class Proceedings Act, s. 29(2).

Motion by the plaintiffs to approve a class settlement agreement and class counsel fees. The plaintiffs alleged that they suffered significant repair costs and other damages arising from defects in automobile transmissions. The settlement was structured on a claims-made basis and the benefits varied in accordance with class members' histories with their vehicles.

HELD: Motion allowed.

The proposed settlement was in the best interests of the class. The terms were in many respects more advantageous to the class members than the individual remedies available to them. The claims-made compensation program eliminated any concern that a ceiling would be reached with respect to claims. In general, class members would not have to prove all of the elements of a contested breach of warranty claim with its inevitable expense, uncertainty, risk of an adverse costs ruling and delay. The compensation payments were relatively generous and claimants could keep their vehicles if they wished and thereby retain the residual resale value. The class would be spared the costs and inherent delays of future litigation. Neither the 1.85 multiplier-based fee being paid by the defendants nor the 10 per cent fee being paid by the class was out of line with the reasonable expectations of the class members or the case law.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, *SO 1992, c. 6, s. 29*, s. 29(2)

Civil Code of QuÚbec, C.C.Q.-1991, Article 1726, Article 1730

Counsel

Theodore Charney and Remissa Hirji, for the Plaintiffs.

Hugh DesBrisay, for the Defendants.

SETTLEMENT APPROVAL

E.M. MORGAN J.

I. The Settlement Agreement

1 This motion is brought by the Plaintiffs under s. 29(2) of the *Class Proceedings Act*, *1992*, SO 1992, c. 6 ("CPA") for approval of the Settlement Agreement they have entered into with the Defendants effective November 5, 2018. The Settlement Agreement has come about as a result of two days of mediation with Professor Eric Green in Boston on April 9 and 20, 2018, as well as settlement discussions both preceding and subsequent to the mediation. Class counsel also move for approval of their fees and for approval of honoraria for the representative Plaintiffs.

2 In my certification judgment of November 15, 2018, I summarized the basics of the Plaintiffs' claims as follows:

> [2] The claim arises out of allegedly non-repairable defects in the transmissions of Ford Focus and Ford Fiesta automobiles containing a Powershift Dual-Clutch Transmission ("Class Vehicles"). Plaintiffs contend in the Statement of Claim that the defects in the transmissions can cause serious vehicle performance issues and represent a safety hazard. They allege that the current and former owners of the Class Vehicles have suffered significant repair costs and other damages. They have brought the action on behalf of all persons in Canada who purchased or leased one of these types of vehicles.
>
> [3] The Class Vehicles were sold to the Plaintiffs and other potential class members with a Ford Canada Limited New Vehicle Warranty (the "Warranty"). The Warranty guaranteed that the Defendants would "repair, replace or adjust those parts on Ford cars and light trucks that are found to be defective in materials or workmanship made or supplied by Ford for the coverage periods". The Warranty contains a section entitled "Powertrain Coverage" in which the transmission is specifically covered for five years or 100,000 kilometres. Furthermore, the Warranty is transferrable with the ownership of the vehicle if the vehicle is sold prior to the Warranty's expiry, thereby expanding the class to all first and subsequent owners.
>
> *Romeo v Ford Motor Co*., 2018 ONSC 6772, at paras 2-3.

3 The class is defined in the certification judgment as all persons in Canada who purchased or leased from the Defendants a Ford Fiesta or Ford Focus vehicle with a Dual Clutch Transmission, for the model years 2011-2016 (the "Class Vehicles"). The settlement adopts this definition, with the exception of the following persons excluded from the class for settlement purposes: (1) Ford's employees, officers, directors, agents, and representatives, and their family members; (2) presiding judges and Class Counsel; (3) persons who have sued Ford Motor Company or Ford of Canada in a court or who commenced a proceeding under CAMVAP in relation to the Powershift Transmission or the DPS6 Transmission in a Class Vehicle and (4) all those otherwise in the class that properly opt out of the settlement class.

4 The Settlement Agreement provides compensation to the class members for breaches of contract/warranty at common law, and, for Quebec residents, breach of articles 1726 and 1730 of the *Civil Code of Quebec*, CQLR c. C-1991 ("CCQ"). It has been entered into on a national basis; the representative Plaintiffs in the actions in other

provinces have not opted out of the settlement, and so the release that accompanies the Settlement Agreement will ultimately dispose of those actions as well as the Ontario action.

5 In considering settlement approval under s. 29(2) of the CPA, the court must examine the fairness and reasonableness of the Settlement Agreement. This is done with a view to ascertaining whether it is in the best interests of the class having regard to the claims and defences and any objections raised to the settlement: *Baxter v Canada (Attorney General)* *(2006), 83 OR (3d) 481*, at para 10 (SCJ).

6 In evaluating the Settlement Agreement, the court may take into account, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, the number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Lavier v MyTravel Canada Holidays Inc*., *2011 ONSC 1222*, at para 21 [citations omitted].

7 The Certification Order granted approval of a short-form and a long-form Notice of Class Action and Settlement Proposal (the "Notice") addressed to the class. Both forms of Notice were disseminated by the claims administrator, RicePoint Administration Inc., in accordance with the terms of the Certification Oder -- i.e. by email to known email addresses of persons under warranty and publication in newspapers across the country. In addition, the short-form Notice was sent in English and French by the Claims Administrator to some 164,543 mailing addresses from the list of potential class members provided by the Defendants. This number reflects the number of persons who purchased or leased new Class Vehicles directly from a Ford dealership, or who purchased or leased used Class Vehicles and who registered as owners or lessees with Ford of Canada.

8 Counsel for both sides attended at a two-day mediation with Professor Eric Green of Boston on April 9 and 20, 2018. They thereafter engaged in protracted settlement discussions, finally reaching a proposed settlement on November 5, 2018. Of the 164,543 class members who were mailed the Notice, there were 414 op-outs (0.25% of the Class) and 5 objections. While I have looked at each of the objections and taken them seriously, none of them raised a cogent point with respect to the settlement at large.

9 One objector misconstrued the settlement and thought that the warranties on the Class Vehicles would be cancelled, another sought a lifetime warranty on his vehicle, another did not seem to realize that even vehicles older than those automatically covered by the settlement may submit a claim if they do so within 6 months of the claims commencement date, while another complained that certain alternative benefits are only open to vehicle owners with 3 or more repairs when in fact many such benefits are open to owners with only 2 repairs. One or two of the objectors had understandable complaints from their subjective point of view but raised no issue with respect to the class overall -- e.g. one said compensation should be specifically tailored to the distance the owner lives from a dealer rather than number of times the vehicle had to be brought in for service, and another wanted compensation for software flashes to commence with just 1 software flash whereas the case law and the parallel U.S. settlement calls for compensation after 2 flashes.

10 The terms of settlement are, of course, laid out in detail in the Settlement Agreement. The settlement is structured on a claims-made basis, so that there is no finite global amount that can be identified as the settlement amount. Different categories of vehicle owners with different types of experiences with transmission repairs will receive specifically defined benefits under the agreement, which the Defendants will fund as the claims come in.

11 The benefits to class members are therefore varied in accordance with their history with their vehicle. These benefits range from partial refunds if the class member's vehicle's transmission continues to malfunction after multiple repairs attempts, to reimbursement of the costs of out-of-warranty replacements, to compensation for the inconvenience of having their vehicle serviced. The particulars of the payments are provided in sections H.B. and

H.C of the Settlement Agreement and some examples of cash payment calculations are set out in sections H.F. thereof.

12 The Plaintiffs have described these benefits in affidavits supporting this motion, which in turn provide an explanatory background to the specific provisions of the Settlement Agreement. All of this is summarized at paragraphs 35-55 of the Plaintiffs' factum, as follows [references omitted]:

> **Terms of the settlement -- cash payments**
>
> [35] ... In brief, a Class Member who has made service visits to an authorized Ford dealership for three or more THRs, or for three or more Software Flashes (as defined in the Settlement Agreement), within the first seven years or 160,000 kilometres from the Class Vehicle's delivery to its first retail owner, may recover cash payments.
>
> [36] For three or more THRs, a qualifying Class Member is entitled to cash payments in the amount of $252 (for the third visit) up to $725 (for the eighth visit), for a total of $2,932. Alternatively, a Class Member can elect to receive an Owner Appreciation Certificate for twice the value of the cash payment ($504 up to $1,450, for a total of $5,864). Owner Appreciation Certificates are discount coupons that may be applied toward the purchase of a new Ford vehicle from an authorized Ford Dealer. The amount stated on the Certificate will be deducted from the vehicle's purchase price. An Owner Appreciation Certificate expires within twelve (12) months of issuance.
>
> [37] For three or more qualifying Software Flashes, a Class Member is entitled to cash payments of $65 for each service visit, for a total of $780. Class Members cannot receive these Software Flash cash payments if they receive THR cash or certificate payments or Alternative Benefits.
>
> [38] For Class Vehicles manufactured after June 5, 2013, if: a Class Member had two or more clutch replacements performed by a Ford dealership while they owned or leased the Class Vehicle and within five years or 100,000 kilometers; a Ford Dealership performs appropriate diagnostic procedures and determines an additional clutch replacement is needed; and the Class Member pays for the additional clutch replacement, then the Class Member is entitled to reimbursement for out-of-pocket costs for the additional clutch replacement if it is performed by a Ford dealership while they owned or leased the Class Vehicle, and within seven years or 160,000 kilometers of the Warranty Start Date (as defined in the Settlement Agreement). The new clutch will also be subject to a two-year warranty.
>
> [39] Claims for cash payments must be submitted within 180 days of the commencement of the claims period for service visits which have already occurred. For future qualifying service visits, the claims for those cash payments must be submitted within 180 days of the service visit.
>
> **Terms of the settlement -- Alternative Benefits**
>
> [40] Alternative Benefits provide eligible current owners with a partial refund of the purchase price and provide eligible current lessees with a partial refund of lease payments. An owner can recover the purchase price, less a reduction for usage and a reduction for its residual value. Owners will continue to own their vehicle, hence the reduction for residual value. A lessee can recover all lease payments, less a reduction for usage, with the vehicle being returned to Ford.
>
> [41] Particulars of the Alternative Benefits program can be found in sections II.H to II.I of the Settlement Agreement. In brief, a Class Member who is a current owner or lessee of a Class Vehicle which has undergone at least two THRs (for newer models) or three THRs (for older models), but is continuing to experience performance issues with the Dual Clutch Transmission, can submit a claim for Alternative Benefits.
>
> [42] Class Members must fall into one of five categories in order to be eligible for Alternative Benefits. These categories, which are defined at section II.H.1 of the Settlement Agreement, are designed to address the varying circumstances amongst the Class Members, due to the expiry of the Ford New Vehicle Warranty for some model years, the advanced age of some of the vehicles, and the number of THR repairs.

[43] Categories 1 and 2 cover the more recent 2013-2016 Fiesta and Focus model years. For the most part, these model years remain under the original five-year warranty or the extended seven-year warranty. A Class Member who falls under category 1 or 2 is eligible for Alternative Benefits if their Class Vehicle has undergone at least two THRs with that owner/lessee within the first five years or 100,000 kilometres (the warranty period). For the 2013 model year Class Vehicles, the five years have likely elapsed, but owners/lessees of 2014-2016 model year Class Vehicles likely have anywhere from a few months up to calendar year 2021 before the eligibility period for two or more THRs expires. The claim must be submitted within seven years or 160,000 kilometres (potentially up to calendar year 2023 for 2016 model year Class Vehicles); or, for those outside those parameters, within 180 days of the claims administration commencement date.

[44] Categories 3 and 4 cover the older 2011-2012 Fiesta and 2012 Focus model years. These Class Vehicles have been on the road as far back as 2010; therefore, they must have undergone at least three THRs in order for their owners/ lessees to be eligible for Alternative Benefits. These THRs must have taken place within seven years or 100,000 kilometres (versus five years or 100,000 kilometres for categories 1 and 2). The claim must be submitted within seven years or 160,000 kilometres; or, for those outside those parameters, within 180 days of the claims administration commencement date.

[45] Category 5 covers all model years of the Class Vehicles where the current owner or lessee has undergone four or more THRs within the first five years or 100,000 kilometres. The claim must be filed within the first six years; or, for those outside the deadline, within 180 days of the claims administration commencement date.

[46] For all claimants, their Class Vehicle must first undergo a three-part Transmission Diagnostic Test to confirm that it is actually experiencing transmission performance issues. The Transmission Diagnostic Test is routinely administered at Ford dealerships before a THR under warranty is authorized by Ford, and it is intended to diagnose: (i) fluid leaks contaminating the clutches, (ii) excessive r.p.m. fluctuations on either clutch, and (iii) Transmission Control Module error codes. If the Transmission Diagnostic Test identifies: (i) fluid contamination of a clutch, (ii) r.p.m. fluctuations on either clutch in excess of 250 r.p.m., or (iii) any Transmission Control Module error codes, then the Class Vehicle shall be considered to have 'failed' the Transmission Diagnostic Test.

[47] If the Class Vehicle 'passes' the Transmission Diagnostic Test at the initial claims stage, the Class Member may elect to have a second Ford dealership perform the Transmission Diagnostic Test again on the Class Vehicle (the 'Second Opinion Test'). The Class Member has 30 days from the date of the first passed Transmission Diagnostic Test to conduct a Second Opinion Test.

[48] A Class Member can apply for Alternative Benefits anytime during the time limits set out in the Settlement Agreement for filing a claim. There is also the ability to re-apply once for Alternative Benefits during the claim period. Therefore, if the Class Vehicle passes the Transmission Diagnostic Test at the initial stage but the performance issues subsequently become worse within the claim period for that Class Vehicle, the Class Member can re-apply for Alternative Benefits and re-start the testing process.

[49] For claimants under Categories 1-4, whose vehicles fail the initial Transmission Diagnostic Test, Ford will have one more chance to repair the Dual Clutch Transmission in their Class Vehicle (the 'Subsequent Repair', as defined in the Settlement Agreement). Following the Subsequent Repair, Ford must pay Alternative Benefits if the Class Vehicle experiences a recurrence of transmission performance issues within one year, as demonstrated by a Subsequent Failed Transmission Diagnostic Test. For claimants who submit under Category 5, Alternative Benefits are available without any opportunity for a Subsequent Repair.

[50] The Transmission Diagnostic Tests must be performed by a Ford dealership, but a Class Member has the option of choosing which Ford dealership will perform the Transmission Diagnostic Test. Ford will pay for the Transmission Diagnostic Test(s) if the Class Vehicle is within seven (7) years or 160,000 kilometres of the Warranty Start Date (whichever occurs first).

[51] If a Class Member qualifies for an Alternative Benefits payment, then Ford will, subject to its right to make an offer to repurchase the Class Vehicle, make a payment based on the following formula:

a) For Original Owners: Alternative Cash Payment (Original Owner) = Purchase Price -- ((mileage (in km) on the vehicle's odometer at the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Purchase Price) -- Residual Value of Vehicle.

a) *[sic]* For Subsequent Owners: Alternative Cash Payment (Subsequent Owner) = Purchase Price -- ((mileage (in km) on the vehicle's odometer from the date of the Subsequent Owner's Purchase of the Class Vehicle to the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Purchase Price) -- Residual Value of Vehicle.

b) For Lessees: Ford will repurchase the Class Vehicle from the lessor, pay off the amount currently owing to the lessor in accordance with the lease agreement and make an Alternative Cash Payment (Lessee) based on the following formula: Alternative Cash Payment (Lessee) = Lease Payments -- ((mileage (in km) on the vehicle's odometer at the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Lease Payments).

[52] For those who qualify in Category 5, the mileage calculation will be completed using the mileage (in km) on the vehicle's odometer at the time of the initial failed Transmission Diagnostic Test.

[53] For Class Vehicle owners, the Residual Value of the Class Vehicle will be determined as follows:

c) for vehicles with current odometer readings placing them in the Extra Clean, Clean, Average or Rough Canadian Black Book (''CBB'') value categories, the Residual Value will be equivalent to the CBB trade-in Rough value at the time the Alternative Benefits award becomes owing; or

d) for vehicles with current odometer readings placing them in the Beyond Rough or 'equivalent rough with mileage adjustment' CBB value categories, the Residual Value will be equivalent to the CBB trade-in Beyond Rough or 'equivalent rough with mileage adjustment' values at the time the Alternative Benefits award becomes owing.

[54] Ford may elect to make an offer to repurchase the Class Vehicle from an eligible claimant on terms set by Ford. The Class Member may then elect to either accept such offer or demand the Alternative Cash Payment pursuant to the formula set out above.

[55] A Class Member can apply for cash payments and Alternative Benefits at the same time. The Class Member would (if eligible) receive cash payments while the Alternative Benefits claim is ongoing. If the Class Member recovers Alternative Benefits, any cash payments received are credited against the Alternative Benefits claim. The denial of an Alternative Benefits claim has no impact on eligibility for cash payments.

13 The settlement was negotiated by the parties with the help of an experienced mediator. Class counsel are very experienced class action lawyers. The Defendants undertook a broad disclosure process, including their entire database, current to May 2016, of warranty repair data.

14 Plaintiffs' economist, Edward M. Stockton, an expert well recognized in the courts, filed an affidavit in support of this approval motion in which he expressed the view that the settlement is a fair and reasonable one. Counsel for the Plaintiffs have summarized his expert evidence at para 60 of their factum, as follows [references omitted]:

[60] In his affidavit sworn in support of this motion for settlement approval, Mr. Stockton opined as follows:

a) the cash payments benefit schedule in the Settlement 'reasonably reflects the concepts that a vehicle that has a higher repair incidence likely exhibited more periods of diminished performance, and that owners and lessees of these vehicles experienced higher consequential costs in order to address maintenance and performance issues with their [Class Vehicles]';

b) the graduated benefit schedule for THR repairs in the Settlement 'offers expanded benefits for consumers with both a more severe past vehicle performance and reliability experiences and

poorer future ownership prospects', which is consistent with the AWS warranty repair data, which shows that certain of the Class Vehicles exhibit tendencies to require multiple repairs or to be unable to accommodate a successful repair;

c) with regard to the Alternative Benefits awards calculation, the calculation of Residual Value is conservative and offers many Class Members a larger benefit than if the residual value was based on the actual value category for each Class Vehicle;

d) that, based on his educated sample calculations, the Alternative Benefits payments for persistently troubled Class Vehicles that are not repairable will foreseeably exceed $5,000 in most cases and potentially even $10,000; and

e) in conclusion, '...the proposed settlement agreement provides substantial compensation in connection with the nature of the alleged defect, overpayment effects experienced, and the quality of consumers' ownership experiences. Overall the settlement benefits are reasonable, substantial and correlated with individual experiences.'

15 The test for approval of a settlement under s. 29 of the CPA is whether, in all of the circumstances, the proposed settlement is fair, reasonable, and in the best interests of the class: *Parsons v Canadian Red Cross Society* *(2000), 49 OR (3d) 281*, at para 69. In making this assessment, I am to take into account the claims and defences raised by the parties as well as any objections expressed to the proposed settlement: *Baxter v Canada (Attorney General)* *(2006), 83 OR (3d) 481*, at para 10. Since a settlement is by its very nature a compromise, it does not have to be perfect, but it must be within a range of reasonableness given these factors: *Eklund v Goodlife Fitness Centres Inc*., *2018 ONSC 4146*, at para 29.

16 As my colleague Horkins J. pointed out in *Wein v Rogers Cable Communications Inc*., *2011 ONSC 7290*, it is not the court's responsibility to independently concoct an optimal settlement or to send the parties back to the drawing table for an improved settlement. "Where the parties are represented, as they are in this case by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation": *Ibid*., at para 20.

17 In the present case, the terms set out in the Settlement Agreement are in many respects more advantageous to the class cembers than the individual remedies available to them at common law or under the CCQ for breach of warranty. The fact that this is a claims-made compensation program eliminates any concern that a ceiling will be reached with respect to class members' claims. In general, the settlement will alleviate class members of the burden of proving all of the elements of a contested breach of warranty claim, with its inevitable expense, uncertainty, risk of an adverse costs ruling, and delay. The compensation payments are relatively generous, and the claimants are allowed to keep their own vehicles if they wish to do so and thereby retain their residual resale value. Moreover, like all settlements, the present arrangement spares the class the costs and inherent delays of future litigation, which can, of course, be substantial.

18 Taking all of these factors into account, I am of the view that the proposed settlement is in the best interests of the class. It should be approved and the claims administrator be appointed.

II. Late opt-outs

19 I will add a note about the opt-out requests that arrived after the March 5, 2019 deadline for opting out. Class counsel advise that there were 5 individuals making such requests, at least one of which was through independent counsel. They have indicated in various ways that the Notice of the settlement did not come to their attention in time for them to exercise their opt-out right in a timely way.

20 I sympathize with these individuals and acknowledge that, taking each one on its own, there would be little cost to waiving the deadline and allowing the opt-out. As counsel point out, however, there are precedential ramifications of making such an allowance. If one can permit a flexible deadline for a week or two then why not for a month or

two or even for a year or two, provided that the person making the request is *bona fide* in his or her claim not to have known about the settlement earlier? This would be unduly cumbersome for the administration of the claims, but at the same time there is no principled reason why such late claims should be distinguished from the 5 that I have before me.

21 This is a case where all of the potential class members were known to the Defendants, and they opened their data banks to the claims administrator to ensure that everyone received notice of the settlement. The only truly principled way to address class members' opt-out is to enforce the deadline for all claimants. If the cut-off date cannot be overlooked for all, it cannot be overlooked for any one.

22 I will not allow any opting out of the settlement after the deadline set out in the Notice.

III. Class counsel fees

23 The fact that the settlement is being made on a claims-made basis rather than as a single, global settlement, puts a slightly different gloss on Plaintiffs' counsel's fees than is usually the case. Here, the fees are being paid in part by the Defendants and in part by the class.

24 This type of arrangement, while not typical, is not, however, entirely unique. Courts have on previous occasions approved such fee arrangements where the fees paid were determined to be reasonable: see *Glover v Toronto (City)*, *2014 ONSC 305*. It has for at least a decade been the case that the court must, in exercise of its settlement approval jurisdiction under s. 29 of the CPA, approve every aspect of a settlement including class counsel fees even where those fees are paid by the Defendant and do not come out of the funds set aside for the class: *Killough v The Canadian Red Cross*, *2007 BCSC 941*.

25 As class counsel explain it, the Defendants will contribute $2,000,000 plus HST, and, in addition, will make a $1,000,000 advance (inclusive of HST) on the fees that class counsel will recover out of the claims program. In all, this amounts to a 1.85 multiplier on class counsel's billable time, which sits at $1,555,496.

26 In addition, class counsel will collect an additional fee of 10% of the paid claims (inclusive of HST, reducing this to 8.85% going to class counsel). This additional fee will be deducted from the compensation payment made to each Class Member who submits a valid claim within the terms of the Settlement Agreement. Likewise, another 10% of the paid claims will go to the Law Foundation in return for the funding of disbursements that was provided to class counsel.

27 In analyzing whether a fee arrangement is reasonable, I must keep in mind that class counsel undertakes risk in taking on a class action on a contingency basis. While there was some financial support in this case from the Class Action Fund, that pool of funds covers disbursements, not class counsel fees. Here, there was, as in all contingency fee cases, "the risk of receiving no compensation for the time...invested in the case": *Green v Canadian Imperial Bank of Commerce*, *2016 ONSC 3829*, at para 14.

28 In addition, I must keep in mind the results that class counsel have achieved for the class in concluding a settlement with the Defendants. Here, the Settlement Agreement represents compensation and justice for many thousands of consumers in a situation where the size of each claim would doubtless have discouraged or impeded litigation for most of those individuals. That is the type of access to justice that the CPA was designed to foster.

29 A settlement of this nature, in which the Defendants have committed many millions of dollars to compensatory payments, will also reflect the goal of behavior modification. Given these accomplishments, and the fact that the settlement itself reflects a commitment to judicial efficiency in resolving cases, class counsel has set the groundwork for having its fees approved: *Bancroft-Snell v Visa Canada Corp*, *2015 ONSC 7275*, at para 49.

30 Neither the multiplier-based fee being paid by the Defendants nor the 10% fee being paid by the Class Members is out of line with the reasonable expectations of the Class Members or the existing case law. The 1.85

multiplier over the base fee is well below the maximum suggested by the Court of Appeal in *Gagne v. Silcorp (1998), 41 OR (3d) 417*, 425, where the Court indicated that "the range of the appropriate multiplier is "slightly greater than one to three or four in the most deserving case." I see no reason to disturb this figure.

31 The class members are paying 10%, all inclusive, of the benefits payable to them by the Defendants. This is not a particularly high figure compared with other percentages that the courts have approved. In fact, contingency fee rates of up to 33.3% have been held to be presumptively valid: *Cannon v Funds for Canada Foundation*, *2013 ONSC 7686*, at paras 7-9. This "provide[s] a real economic incentive to lawyers to take on a class proceeding and do it well": *Sayers v Shaw Cablesystems Ltd.*, *2011 ONSC 962*, at para 37. That kind of analysis is certainly applicable in the present case. I likewise see no reason to disturb the percentage that class counsel proposes recovering in fees from Class Members.

32 The one issue that gives me pause in respect of legal fees is that in a claims-made settlement one cannot know in advance what the ultimate settlement amount will be. That means that one equally cannot know in advance what the ultimate amount of fees will be. While counsel do not expect the settlement to go beyond $50,000,000, they cannot be certain that it will not escalate beyond their present expectations.

33 At the $50,000,000 settlement point, the fees calculated as a percentage of the award may become so large as to require revisiting. As Belobaba J. stated in *Brown v Canada (Attorney General)*, *2018 ONSC 3429*, at para 61, citing *Richardson v Low (1996), 23 BCLR (3d) 268*, at para 35, "the question 'What is the reasonable fee?' at least in mega-fund cases must be answered 'not as a percentage but in dollars.'" Counsel must make an appointment to come back and speak to the matter if the overall settlement amount reaches that point.

IV. Honoraria for representative Plaintiffs

34 Class counsel request a $7,500 honorarium for lead Plaintiff Rebecca Romeo and $5,000 honoraria for each of the other five representative Plaintiffs. These payments are proposed as "a recognition that the representative plaintiffs meaningfully contributed to the Class Members' pursuit of access to justice": *Johnston v The Sheila Morrison Schools*, *2013 ONSC 1528*, at para 43.

35 The representative Plaintiffs were active participants in this litigation and in the mediation that culminated in the Settlement Agreement. They were not promised any payment in taking on the task. This Court has previously awarded similar honoraria to representative plaintiffs in recognition of their efforts: see *Hislop v Canada (Attorney General) [2004] O.J. No 1867*, at para 22; *Elkund v Goodlife*, *supra*, at para 53. I see no reason not to grant class counsel's request.

V. Notice of settlement

36 The settlement calls for notice to be provided to class members. There will be publication in newspapers across Canada and with updates on class counsel's website devoted to this class proceeding. However, there will not be a further mass mailing of notices to class members. They have recently received a mailing of the Notices of certification, which in turn alerted them to the settlement and to class counsel's website for updates on the settlement. There is no reason to repeat that exercise at this point.

37 The notice of settlement approval should allow a sufficient waiting period to allow the appeal period for this motion to run its course.

VI. Disposition

38 The Settlement Agreement is hereby approved.

39 The deadline for opting out of the settlement is not waived.

40 Class counsel's fees payable partly by the Defendants and partly by the class, as described in paras 23-24 above, are hereby approved.

41 The honoraria for the representative Plaintiffs, as described in para 31 above, are hereby approved.

42 The Notice of settlement approval is approved, with a change in its terms to allow a 45-day waiting period rather than a 30-day period as originally proposed.

E.M. MORGAN J.

End of Document

Tab 29

Smith Estate v. National Money Mart Co.

Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, et al. v. National Money Mart Company et al.

[Indexed as: Smith Estate v. National Money Mart Co.]

106 O.R. (3d) 37

2011 ONCA 233

Court of Appeal for Ontario,
Moldaver, R.P. Armstrong and Juriansz JJ.A.
March 28, 2011

Civil procedure -- Class proceedings -- Compensation for representative plaintiff -- Motion judge erring in ordering representative plaintiff's compensation to be paid out of class counsel fees rather than out of settlement fund.

Civil procedure -- Class proceedings -- Fees -- Counsel fee -- Fee agreement in class proceeding not approved by court and not satisfying requirements of s. 33(4) of Class Proceedings Act -- Determination of counsel fees governed by s. 32(4) of Class Proceedings Act -- Motion judge not erring in failing to apply base fee/multiplier approach in [page38]s. 33(7) -- Settlement of class proceeding consisting of payment of $27.5 million to class, forgiveness of indebtedness, provision of transaction credits to reduce cost of using defendants' services in future, and payment of $3 million to Class Proceedings Fund -- Motion judge entitled to reject class counsel's submission that settlement had value of $120 million and to find that class counsel's claim for fees in amount of $27.5 million was not reasonable -- Class counsel's appeal from all-inclusive award of $14.5 million dismissed -- Class

Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32(4), 33(4), (7).

Civil procedure -- Class proceedings -- Fees -- Disbursements -- Motion judge not erring in failing to give effect to contingency fee agreements entered into by class counsel and non-counsel and in treating those fees as disbursements -- Class Proceedings Act not contemplating contingency fee arrangements with persons other than class counsel and not giving court jurisdiction to allow premium on service providers' fees -- Motion judge not erring in treating fees of other lawyers retained by class counsel to assist them as disbursements where there was no evidence that representative plaintiff made or participated in decision to retain those lawyers.

The plaintiffs brought a class proceeding alleging that they were charged a criminal rate of interest by the defendants for payday loans. The class action was strenuously resisted. Following a mid-trial mediation, the parties agreed to a settlement on the following terms: the defendants would pay $27.5 million to the settlement class; the defendants would forgive the class members' indebtedness to them in the amount of $56,388,071; the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future; the defendants would pay $3 million to the Class Proceedings Fund; and the defendants would pay the costs of administering the settlement, in the amount of $2 million. Class counsel sought approval of a counsel fee of $27.5 million. The motion judge fixed class counsel fees in the amount of $14.5 million, inclusive of GST and disbursements, and allowed the representative plaintiff compensation of $3,000, to be paid out of class counsel fees. Class counsel appealed.

Held, the appeal should be allowed in part.

An uncontested motion for approval of class counsel fees places judges in a difficult position. It would be advisable for motion judges to consider the appointment of amicus curiae to assist them in approving class counsel fees.

The motion judge did not err by failing to apply the base fee/multiplier approach provided for in s. 33(7) of the Class Proceedings Act ("CPA"). In the circumstances of this case, the determination of counsel fees was governed by s. 32(4) of the CPA, not s. 33(7). The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. In this case, the agreement regarding class counsel fees did not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, the agreement stipulated how counsel fees were to be calculated and also stipulated that it would become enforceable only if it were approved by the court under s. 32(2). If it were not approved, then, under s. 32(4) of the CPA, the court could determine the amount owing to counsel. The motion judge in this case did not approve the fee agreement. [page39]

In determining the reasonableness of the claimed counsel fee, the motion judge was entitled to reject class counsel's submission that the settlement had a value of $120 million. The appellants had not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The motion judge did not err in failing to give effect to contingency fee agreements entered into by class counsel and consultants and by treating the consultants' fees as disbursements of class counsel. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

The motion judge did not err in treating the fees of other lawyers retained by class counsel on a contingency basis to assist them as disbursements. There was no evidence that the representative plaintiff made or participated in any decision to retain those lawyers as class counsel. While counsel may

require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel. Moreover, if there was a change in the composition of class counsel, the court was not immediately and directly notified of the changes. Finally, the record did not indicate that those lawyers were intended to have a solicitor-client relationship with the representative plaintiff.

The motion judge erred in ordering that the representative plaintiff's compensation be paid out of class counsel fees rather than out of the settlement fund.

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891, 160 D.L.R. (4th) 186, 62 O.T.C. 71, 21 C.P.C. (4th) 272, 79 A.C.W.S. (3d) 459 (Gen. Div.); Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826, 2009 ONCA 377, 72 C.P.C. (6th) 1, 249 O.A.C. 58; Gagne v. Silcorp. Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182, 167 D.L.R. (4th) 325, 113 O.A.C. 299, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114, 83 A.C.W.S. (3d) 125 (C.A.); Nantais v. Teletronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189, 62 A.C.W.S. (3d) 443 (Gen. Div.), consd

Other cases referred to

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968, 40 C.P.C. (6th) 129, 153 A.C.W.S. (3d) 1044 (S.C.J.); Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62, 154 A.C.W.S. (3d) 542 (S.C.J.); Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (S.C.J.); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 2001 BCSC 198, 85 B.C.L.R. (3d) 233, 102 A.C.W.S. (3d) 655; Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 2001 BCSC 1060, 91 B.C.L.R. (3d) 309, 106 A.C.W.S. (3d) 787; Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 2009 ONCA 690, 78 C.P.C. (6th) 208, 311 D.L.R. (4th) 323, 257 O.A.C. 39 (C.A.); Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349, 106 A.C.W.S. (3d)

193 (S.C.J.); McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.); Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976); Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208, 138 A.C.W.S. (3d) 20 (S.C.J.); Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991); Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 10 O.T.C. 375, 3 C.P.C. (4th) 369, 65 A.C.W.S. (3d) 207 (Gen. Div.); Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004) [page40]

Statutes referred to

An Act Respecting Champerty, R.S.O. 1897, c. 327

Class Action Fairness Act of 2005, 28 U.S.C. (2005), 1712(d)

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, (1), (2), (3), (4), (a) 33, (1), (2), (3), (4), (5), (6), (7), (a), (b), (c), (8), (9)

Criminal Code, R.S.C. 1985, c. C-46 [as am.]

Payday Loans Act, 2008, S.O. 2008, c. 9 [as am.]

Solicitors Act, R.S.O. 1990, c. S.15 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.02

Authorities referred to

Law Society of Upper Canada, Rules of Professional Conduct, rule 2.08(8)(a)

Watson, Gary, "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008)

Winkler, Warren K., and Sharon D. Matthews, "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008)

APPEAL by class counsel from the order of Perell J., [2010] O.J. No. 873, 94 C.P.C. (6th) 126 (S.C.J.) fixing counsel fees in class proceedings.

Terrence J. O'Sullivan and James Renihan, for appellants.

Chris Hubbard, for Money Mart (not participating in appeal).

Mahmud Jamal and Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal).

The judgment of the court was delivered by

[1] JURIANSZ J.: -- This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

[2] By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements, including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

[3] The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. [page41]The date December 15, 2009 is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the Criminal Code's [R.S.C. 1985, c. C-46] provisions prohibiting criminal rates of interest.

[4] Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel -- who had provided their services on a contingency basis -- treated as a component of the class counsel base fee rather than as disbursements, to have the fees of consultants -- who had also

provided their services on a contingency basis -- increased by the multiplier the court awarded to class counsel and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

[5] For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

[6] I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of amicus curiae or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

Background

[7] In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e., a finance charge, a cash chequing fee and an item fee, should be characterized as interest under the Criminal Code's provisions prohibiting criminal rates of interest.

[8] The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal and three leave applications to the Supreme Court of Canada. The issues litigated included whether the order for service of the claim, ex juris, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants and whether the plaintiffs were entitled to partial summary judgment.

[9] The trial began on April 27, 2009 and proceeded for 17 days. It was established that during the class period, class

[page42]members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

[10] Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

(i) the defendants would pay $27.5 million to the settlement class;

(ii) the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;

(iii) the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;

(iv) the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10 per cent of the transaction credits as they are used, and 10 per cent of the unused transaction credits after the expiration date; and

(v) the defendants would pay the costs of administering the settlement, in the amount of $2 million.

[11] At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

Issues

[12] The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services

to the class and that it is important that class counsel be able to retain, on a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a [page43]representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

[13] I summarize the appellants' arguments as follows:

(i) the motion judge erred by failing to apply the base fee/ multiplier approach provided for in s. 33(7);

(ii) the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;

(iii) the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

(iv) the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

(v) the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

[14] There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

The non-adversarial forum

[15] Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees

in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

[16] The motion judge was troubled by what he described at one point as the "ex parte" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that [page44]it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

[17] Winkler J. in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, 8 C.P.C. (5th) 349 (S.C.J.) also compared unopposed motions in class action to ex parte proceedings. After referring to authorities that highlighted that [at para. 20] "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in ex parte proceedings. He stated:

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the

record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

[18] In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in ex parte motions. An order obtained ex parte is very often brought back before the court by an interested party not present at the ex parte hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 311 D.L.R. (4th) 323 (C.A.).

[19] On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

[20] Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to appoint [page45]an amicus. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint amicus to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a guardian ad litem for the settlement fund.

[21] An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The

lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

[22] I discuss each of these strategies briefly.

Amicus

[23] The court has jurisdiction to appoint an amicus to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of amicus in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing amicus to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008), argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

[24] Another significant paper is "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", authored by Winkler C.J.O. and Sharon D. Matthews (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008) and available online at http://www.ontariocourts.on.ca/ coa/en/ps/speeches/caught.htm. The authors note the effect of the absence of an adversary in these situations and suggest the use of amicus: [page46]

Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either

> settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. . . . It may be appropriate to appoint amicus curiae to assist courts in understanding the merits of the settlement generally and as it relates to fees in particular.

[25] The only Canadian case that actually discusses the appointment of an amicus in the context of approving a class settlement or class counsel fees seems to be Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 85 B.C.L.R. (3d) 233 (S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an amicus in motions to approve class counsel fees [at para. 14]:

> In my opinion, there is merit in [the] submission that amicus curiae should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that amicus would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

[26] He found the appointment of an amicus was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing (see Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 91 B.C.L.R. (3d) 309 (S.C.), at para. 40), K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and

disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

Monitors

[27] Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (S.C.J.) [page47]and Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62 (S.C.J.), court-appointed monitors are included in the list of those appearing before the court, but no mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

[28] Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

Guardian ad litem

[29] American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint amicus: see, e.g., Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991). However, the predominant American approach appears

to be the appointment of a guardian ad litem for the settlement fund.

[30] The landmark case seems to be the 1976 decision Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a guardian ad litem for the members of the class, saying [at p. 535 F.R.D.], "The appointment of a guardian ad litem is appropriate where there is litigation between a Guardian and Ward -- herein, the attorneys for the class and the class". Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed [at p. 535 F.R.D.]:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role.

[31] The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), [page48]which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see 1712(d).

Independent counsel

[32] Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent

advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in Killough.

[33] It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of amicus or a guardian is neither necessary nor desirable in every case.

Application to this case

[34] A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an amicus or monitor. Non-monetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the non-monetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file [page49]and dealing with it. Class counsel had not placed before the court any

independent evidence of the value of the various components of the settlement.

[35] No doubt, the motion judge faced a difficult task.

[36] In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in McCarthy [at para. 21] are worth repeating: "The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself." A court must also guard against appearing confrontational by embarking on a cross-examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

[37] The motion judge, after underscoring that [at para. 33] "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA [Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA")] could allow a premium for service providers engaged by class counsel on a contingency basis. He declined [at para. 87] to deal with that question on "what is essentially an ex parte motion where the voices against any change are not being heard". He added [at para. 87] that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion".

[38] The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed amicus and invited intervention from interested groups, such as the Law Society, in regard to the interpretation of its Rules of Professional Conduct.

[39] Before leaving this topic, I add the observation that the

adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be included in the appeal book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set [page50]of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113, [See Note 1 below] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

[40] This court, no less than the motion court, had the discretion to appoint an amicus or guardian to articulate opposition to the appeal. In hindsight, the appointment of amicus or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

[41] With that preface, I turn to the issues raised by the appellants.

Quantum of fees

[42] The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

[43] First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the

analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

[44] Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

Sections 32 and 33 of the CPA

[45] In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base [page51]fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

[46] The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee, the court may consider a number of factors, including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors -- the degree of risk undertaken and the degree of success achieved -- in determining the multiplier to be applied to the base fee.

[47] The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

[48] In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion

judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

[49] I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

[50] As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. [page52]
>
> Interpretation: success in a proceeding
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
>
> (b) a settlement that benefits one or more class members.
>
> Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest

calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding. [page53]

[51] It is readily apparent that the motion judge did not proceed in the manner contemplated by s. 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

[52] While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

Fees and disbursements

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or

not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

[53] Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements must be in writing and must state the terms under [page54]which fees and disbursements are to be paid, must provide an estimate of the expected fee and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are prima facie unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e., one that is approved by the court, are a first charge on any settlement moneys or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to

direct the manner in which class counsel fees are to be determined or calculated.

[54] The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

[55] In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result -- the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

[56] The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in Crown Bay Hotel Ltd. Partnership v. Zrich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891 (Gen. Div.), observed [at para. 11] that "[t]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In Crown Bay Hotel, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

[57] In an earlier case, Nantais v. Telectronics Proprietory (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386 (Gen. Div.), Brockenshire J. commented [at para. 11] that the arrangement of ss. 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4)

[page55]through (9)". That is because s. 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the Solicitors Act, R.S.O. 1990, c. S.15 and An Act Respecting Champerty, R.S.O. 1897, c. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful".

[58] In Crown Bay Hotel, Winkler J. quoted and approved of Brockenshire J.'s comments in Nantais.

[59] Cullity J. in Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 56 C.P.C. (6th) 357 (S.C.J.), at para. 16 said:

> Section 32 is concerned with fee agreements -- contingent or otherwise -- in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

[60] I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I observe that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor [at para. 15] "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

[61] Illustrative of a fee agreement to which s. 33(7)

applies is the fee agreement that was before this court in Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182 (C.A.). Gagne is the main authority on which the appellants relied in this appeal. In Gagne, Goudge J.A. provided the following description of the fee agreement [at para. 8]:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to [page56]that base fee. Finally, the agreement described two examples of how this might work[.]

(Emphasis added)

[62] In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7) (c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
>
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;

plus

(iv) applicable taxes.

[63] This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if para. 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one-third of the recovery.

[64] Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: . . . (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

[65] The distinction is not merely technical. Class members may understand the phrase "[t]he Act . . . may permit a solicitor to be paid . . . a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely [page57]within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

[66] The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client,

and all members of the Class who do not opt out of the Action." Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

[67] It is interesting to note the difference between para. 8, which deals with costs paid by the defendants, and para. 9, which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike para. 8, does not state that counsel fees are subject to the approval of the court.

[68] I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier, but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved, then, under s. 32(4), the court could determine the amount owing to counsel.

[69] In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

[70] There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under para. 9 would be a first charge on the settlement fund by virtue of s. 32(3) of

the [page58]CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3) makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

[71] Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

[72] I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". Gagne, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as a multiplier, as Cumming J. suggested in Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.). It is, however, a matter of discretion.

[73] I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

[74] Before leaving this issue, I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

[75] The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a [page59]contingency fee of at least one-third of the amount recovered in the class action". The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel". Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

[76] Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

[77] Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been advanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount -- namely, $27.5 million.

[78] I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

Reasonableness of class counsel fees

[79] I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

[80] At para. 25 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the [page60]class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[81] There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

[82] The motion judge found that the class proceeding dealt

with matters of high factual and legal complexity, had a substantial monetary value, was important to the class and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that risk should be rewarded. He also attached weight [at para. 127] to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

[83] The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated [at para. 118] that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described [at para. 17] the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent". He added [at para. 93] that an objecting class member "was right in expressing disappointment about the settlement".

[84] The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

[85] The motion judge also observed [at para. 97] that the transaction credits could be viewed "as a business promotion [page61]scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but

"obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of $5 in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

[86] The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

[87] The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded [at para. 97] that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding".

[88] The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

[89] The motion judge did recognize [at para. 104] that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

[90] These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. [page62]The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

[91] Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

[92] Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted [at para. 127], does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee". In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed [at para. 96] that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

[93] The motion judge found [at para. 130] that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case". He concluded [at para. 130] that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

[94] The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

[95] For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the Criminal Code prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's Payday Loans Act, 2008, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation [page63]legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

[96] The motion judge could have explained more clearly why he commented [at para. 99] that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement, but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said [at para. 100]:

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which

was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

[97] I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional $2. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

[98] In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

[99] The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said [at para. 122]:

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already [page64]explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

[100] I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of

such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5 million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

[101] None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

[102] The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The fees of PWC and Mr. Anand

[103] Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multiplier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before

distribution of any fees to the team members.

In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

[104] The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. [page65]The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

[105] By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

[106] Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and disbursements, granting service providers a contingency premium should result in a redistribution of the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service

providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

[107] As I mentioned earlier, the motion judge considered [at para. 87] it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an ex parte motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class [page66]counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out [at para. 85] that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society of Upper Canada's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not "directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the non-lawyers might well be champertous. The motion judge pointed out that An Act Respecting Champerty was still in effect.

[108] I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

[109] While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

[110] Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

[111] Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation to the solicitor for the risk undertaken. Under s. 33(7)(c), the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to [page67]others for risk incurred in undertaking work on the action on a contingency basis.

[112] Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing to the solicitor in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result -- fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

[113] The grammatical and ordinary sense of ss. 32 and 33,

read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

[114] As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say, I agree with the motion judge that what the appellants seek [at para. 87] "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

[115] I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers. [page68]

The fees of FMC and Prof. Krishna

[116] Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and $10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were

retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

[117] Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

[118] The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy and David Stratas of Heenan, Blaikie.

[119] The appellants rely on this court's decision in Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826 (C.A.) to submit that no court approval was required to enlarge the class counsel group to include FMC and Prof. Krishna. Fantl merits closer examination. In Fantl, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said [at para. 47] that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel". Yet, he immediately added, "However, I am of the view that the

case management judge charged with responsibility for [page69]the supervision of the proceeding should be immediately and directly notified of such a change."

[120] Fantl is of little assistance to the appellants in this case.

[121] First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In Fantl, what was in issue was the client's choice of new counsel. Winkler C.J.O. said, at para. 44 of Fantl, that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report". I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

[122] Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as Fantl indicates is required.

[123] Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

[124] The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]". It adds that other lawyers from other firms "assisted class counsel as required".

[125] The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

[126] In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others", the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international [page70]taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs". The affidavit does not mention FMC.

[127] The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta . . . . [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member . . . with the responsibility of defending the action for the objector[.]

[128] The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an

individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

[129] The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to

> . . . use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

[130] I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in Fantl that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

[131] The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna [page71]and FMC are not included as part of class counsel for the purposes of this appeal.

[132] The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof.

Krishna as disbursements rather than as part of class counsel's base fee.

Compensation for the representative plaintiff

[133] The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

[134] In advancing this argument, class counsel relied upon the decision of Sharpe J. in Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 3 C.P.C. (4th) 369 (Gen. Div.). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in Garland v. Enbridge Gas Distribution Inc., supra, and McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.), and Cumming J. in Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

[135] I take the view that as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

[136] In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly. [page72]

Conclusion

[137] I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

Appeal allowed in part.

Notes

Note 1: There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

Tab 30

Swedish Hosp. Corp. v. Shalala

1 F.3d 1261
United States Court of Appeals,
District of Columbia Circuit.

SWEDISH HOSPITAL CORPORATION, et al., Appellants,
v.
Donna E. SHALALA, Secretary of Health and Human Services.
SWEDISH HOSPITAL CORPORATION, et al.
v.
Donna E. SHALALA, Secretary of Health and Human Services, Appellant.

Nos. 92–5061, 92–5155.
|
Argued April 5, 1993.
|
Decided Aug. 10, 1993.

Synopsis
Hospitals brought class action to attack Department of Health and Human Services (HHS) policy concerning reimbursement by HHS for photocopying costs incurred by hospitals in meeting requirements of Medicare program. Following settlement, the United States District Court for the District of Columbia, Louis F. Oberdorfer, J., awarded $2 million in fees to class counsel. Hospitals appealed, and Secretary of HHS cross-appealed. The Court of Appeals, Sentelle, Circuit Judge, held that: (1) proper measure of contingent counsel fees in class actions resulting in creation of common fund payable to plaintiffs is percentage of fund; (2) district court acted within its discretion in setting percentage of fund at 20% for attorney fees; (3) district court was within its discretion in basing its fee calculation only on that part of fund for which counsel was responsible; and (4) substantial evidence supported district court's conclusion that attorneys were responsible for only $10 million in added value to fund.

Affirmed.

Ginsburg, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (12)

[1] **Federal Civil Procedure** Result; prevailing parties; "American rule"

In general, each party to litigation bears its own attorney fees, absent specific fee-shifting statute.

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** Compensation from Funds in Court; Common Fund

Attorneys and Legal Services Reimbursement of Expenses

"Common fund doctrine" allows party who creates, preserves, or increases value of fund in which others have ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees.

21 Cases that cite this headnote

[3] **Attorneys and Legal Services** Compensation from Funds in Court; Common Fund

Underlying justification for attorney reimbursement from common fund is that unless costs of litigation were spread to beneficiary of fund they would be unjustly enriched by attorney's efforts.

10 Cases that cite this headnote

[4] **Federal Civil Procedure** Result; prevailing parties; "American rule"

When awarding attorney fees, federal courts have duty to ensure that claims for fees are reasonable.

18 Cases that cite this headnote

[5] **Attorneys and Legal Services** Reimbursement of Expenses

Following settlement of hospitals' class action attacking Department of Health and Human Services (HHS) policy concerning reimbursement by HHS for photocopying costs incurred by hospitals in meeting requirements of Medicare program, Government had standing to challenge counsel fees awarded out of common fund, even though fund had been established and Government had surrendered all control over it.

3 Cases that cite this headnote

[6] **Attorneys and Legal Services** Lodestar and percentage methods compared or combined

Proper measure of contingent counsel fees in class actions resulting in creation of common fund payable to plaintiffs is percentage of fund, as opposed to lodestar analysis.

63 Cases that cite this headnote

[7] **Federal Civil Procedure** Result; prevailing parties; "American rule"

In general, trial court enjoys substantial discretion in making reasonable attorney fee determinations.

9 Cases that cite this headnote

[8] **Federal Courts** Costs and attorney fees

In determining reasonableness of attorney fees to be paid out of common fund established in class action, Court of Appeals will not review each district court's degree of familiarity with case to decide how much deference to grant to its findings and conclusions.

12 Cases that cite this headnote

[9] **Federal Courts** Costs and attorney fees

Normal degree of deference was due with respect to district court's determination of reasonable attorney fee to be awarded out of common fund established in class action, even though case settled before trial, where judge had high degree of familiarity with case, since he was not only responsible for case throughout 18 months of pretrial preparation but was also the trial judge in another case in which same primary legal issue was decided.

8 Cases that cite this headnote

[10] **Attorneys and Legal Services** Specific Services and Particular Cases

District court did not abuse its discretion in finding that 20% was proper percentage when awarding attorney fees out of common fund created in class action brought by hospitals against Department of Health and Human Services (HHS) to challenge HHS policy concerning reimbursement for photocopying costs incurred by hospitals in meeting requirements of Medicare program.

64 Cases that cite this headnote

[11] **Attorneys and Legal Services** Specific Services and Particular Cases

Attorneys and Legal Services Reimbursement of Expenses

In awarding reasonable attorney fees from common fund established in class action brought by hospitals to attack Department of Health and Human Services (HHS) policy concerning reimbursement by HHS for photocopying costs incurred by hospitals in meeting requirements of Medicare program, district court acted within its discretion in basing its fee calculation only on that part of fund for which counsel was responsible; district court concluded that, to considerable extent, case rode "piggyback" on another case.

33 Cases that cite this headnote

[12] **Attorneys and Legal Services** Specific Services and Particular Cases

Substantial evidence supported district court's conclusion that attorneys were responsible for only $10 million in added value to $27.8 million common fund created by settlement of hospitals' class action attacking Department of Health

and Human Services (HHS) policy concerning reimbursement by HHS for photocopying costs incurred by hospitals in meeting requirements of Medicare program, and, thus, that attorneys' percentage fee would be based on that $10 million amount; at time that lawsuit was brought, HHS had proposed regulation that would have paid $.0498 per page, whereas eventual settlement agreement provided payment of $.07 per page.

11 Cases that cite this headnote

***1262** ****95** Appeals from the United States District Court for the District of Columbia, No. 89–01693.

Attorneys and Law Firms

J. Mark Waxman, Los Angeles, CA, of the bar of the Supreme Court of California, pro hac vice, by special leave of Court, argued the cause for appellant/cross-appellee. With him on the brief were Margaret M. Manning and Robert A. Klein, Los Angeles, CA.

Frank A. Rosenfeld, Attorney, U.S. Dept. of Justice, Washington, DC, argued the cause for appellee/cross-appellant. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty. at the time the brief was filed, and William Kanter, Attorney, U.S. Dept. of Justice. John D. Bates, R. Craig Lawrence, and Susanne Marie Lee, Asst. U.S. Attys., Washington, DC, also entered appearances for appellee/cross-appellant.

Before: D.H. GINSBURG, SENTELLE, and RANDOLPH, Circuit Judges.

Opinion

***1263** ****96** Opinion for the Court filed by Circuit Judge SENTELLE.

Separate opinion concurring in part and dissenting in part filed by Circuit Judge D.H. GINSBURG.

SENTELLE, Circuit Judge:

This appeal raises important questions about the reasonable calculation of contingent counsel fees in class actions resulting in the creation of a common fund payable to plaintiffs. We hold that the proper measure of such fees in a common fund case is a percentage of the fund. In addition, on the facts before us, we conclude that the District Court did not abuse its discretion in calculating both the percentage to be used and the amount of the fund that resulted from the efforts of counsel. Therefore, we affirm.

I. Introduction

This case is the endgame in a series of lawsuits attacking a Department of Health and Human Services ("HHS," the "Department," or the "Secretary") policy concerning reimbursement by HHS for photocopying costs incurred by hospitals in meeting requirements of the Medicare program. In the underlying case, plaintiff hospitals and HHS entered into a settlement agreement, approved by the District Court, in which HHS agreed to pay $27.8 million to the hospitals. Today's dispute is over what portion of that pie goes to plaintiffs' lawyers.

The District Court applied a "percentage-of-the-fund" method in determining a reasonable fee award for class counsel, and decided that the attorneys should receive twenty percent of the common fund produced by their efforts. However, the court awarded only $2 million in fees, reasoning that because the efforts of plaintiffs' attorneys had contributed only $10 million to the value of the settlement fund, the attorneys were entitled to twenty percent of only that amount.

Plaintiffs appeal, arguing that their attorneys were entitled to twenty percent of the entire $27.8 million fund, or about $5.6 million. The Secretary cross-appeals, arguing that the fees awarded were too high; that under governing circuit and Supreme Court precedent, class counsel's fee should be limited to the product of the hours reasonably spent by the attorneys and their reasonable hourly rates (the "lodestar"), resulting in a fee of no more than $619,000.

II. Background

The Social Security Amendments of 1983 require all hospitals participating in the Medicare program to enter into agreements with Medicare "peer review organizations" ("PROs"), which review the quality and medical necessity of hospital services rendered to Medicare beneficiaries. 42 U.S.C. § 1395cc(a)(1)(F) (1988). The

statute directs HHS to reimburse hospitals for the costs of maintaining such agreements. *Id.*

From the outset, however, HHS has refused to reimburse some costs incurred by hospitals in maintaining PRO agreements. One regulation, known as the "photocopying rule," specifically prohibited reimbursing costs incurred by hospitals in furnishing photocopies of medical records to PROs for mandatory review. 42 C.F.R. § 466.78(b)(2) (1985), *as amended by* 57 Fed.Reg. 47,779 (1992) (codified at 42 C.F.R. § 466.78(b)(2) (1993)).

Several hospitals filed a series of lawsuits challenging the legality of the photocopying rule. In *Burlington Memorial Hosp. v. Bowen,* 644 F.Supp. 1020 (W.D.Wis.1986), a district court concluded that the photocopying rule was arbitrary and capricious because the Department's basis for denying reimbursement for photocopying costs mandated by the statute—that these costs were already reimbursed in other payments—was without any reasonable basis in the rulemaking record. The court accordingly enjoined the Secretary's enforcement of the rule. HHS appealed the *Burlington* decision, but later dropped the appeal and settled with the seventeen plaintiffs in that case, agreeing to pay ten cents per page for PRO photocopies.

Because HHS did not change its photocopying rule, hospitals filed at least six other cases seeking reimbursement. In *Beverly Hosp. v. Bowen,* Medicare & Medicaid Guide (CCH) ¶ 36,738, 1987 WL 192217 (D.D.C.1987), a consolidation of four of those cases involving several hundred hospitals, the district ***1264 **97** court held the photocopying rule illegal. That court, however, denied plaintiffs' requested relief of prospective and retrospective reimbursement, holding that the rulemaking process would provide an adequate remedy. The hospitals appealed.

During the pendency of the *Beverly* appeal, HHS issued a notice of proposed rulemaking, proposing to reimburse hospitals for photocopies furnished to PROs at the rate of $.0498 per page. 53 Fed.Reg. 8,654 (1988). The proposed rule would have limited retrospective relief to the previous three years, and would have imposed a number of procedural and substantive restrictions on hospitals seeking relief.

We rejected HHS's proposed approach, and remanded the case to the District Court "with instructions to assure that the agency affords the hospitals a fair opportunity to recover photocopying costs they were made to pay due to the Secretary's unlawful regulation." *Beverly Hosp. v. Bowen,* 872 F.2d 483, 487 (D.C.Cir.1989) (per curiam). We defined the Department's "task ... [as] conscientiously to remold the situation to approximate fairly what it should have been initially." *Id.*

Beverly, by its terms, applied only to the few hundred hospitals which were plaintiffs in that case. Perceiving that HHS was likely to pursue a policy of "non-acquiescence," several hospitals brought this class action, seeking declaratory and injunctive relief and damages for all other hospitals participating in the Medicare program. Two principal issues separated the parties: how much HHS should pay per page and how to calculate retroactively the number of pages copied going back to 1984. Most hospitals kept records of the relevant copying expenses starting in 1987, but the parties could not agree how to calculate the number of copies made between 1984 and 1987. HHS initially insisted on documentation for all copies reimbursed, whereas the hospitals urged, and eventually the settlement embraced, an extrapolation formula for determining the number of copies in the earlier years.

Shortly before the trial was scheduled to begin, after eighteen months of litigation involving considerable discovery, the parties entered a settlement agreement requiring HHS to pay prospectively for relevant copying costs, and to pay $27.8 million into a settlement fund for distribution to the class for copies made between 1984 and 1991. Before approving the settlement agreement, the District Court ordered notice of the proposed settlement sent to class members. In a separate mailing, class members received the details of the petition for attorneys' fees, requesting twenty percent of the common fund. The fee petition notice advised class members of their right to file objections to any element of the proposed settlement or fee petition. None of the plaintiff hospitals objected to class counsel receiving twenty percent of the common fund; indeed, a number of hospitals, including several of the class members with the largest economic stake in the fund, submitted declarations affirmatively favoring that disposition.

The District Court, applying a percentage-of-the-fund methodology, granted plaintiffs' requested twenty percent share as a rate, but concluded that counsel could "claim credit only for enhancing the fund" by payment at roughly $.07 per page instead of approximately $.0498 per page "which was apparently on the table when negotiations opened." *Swedish Hosp. Corp. v. Sullivan,* Medicare & Medicaid Guide (CCH)

¶ 39,730, at 28,743, 1991 WL 319154 (D.D.C.1991). As that difference generated a "fund for which ... counsel is responsible" of approximately $10 million, rather than the $28 million, the twenty percent rate produced a fee of $2 million.

The district judge based his assessment of the attorneys' contribution to the fund on a number of factors. He found that plaintiffs in this case were at least in part piggybacking on the success of the *Beverly* plaintiffs; that plaintiffs' attorneys never faced the risk of zero recovery because the central issue of the illegality of HHS's photocopying rule was resolved in *Beverly;* that because the government was the defendant, plaintiffs and their attorneys never faced a risk of nonpayment; and that "the government acquiesced early in the treatment of the dispute as a class action." *Id.* The court also observed that the class members "were not paupers, unable to pay counsel for their time in the ***1265** ****98** remote event of no recovery beyond" the Secretary's initial offer. Finally, the court was of the opinion that plaintiffs' attorneys had exhibited no extraordinary legal skills in their representation.

Both parties appeal the fee award, plaintiffs arguing it is too small and HHS that it is too large.

III. Discussion

This case raises two main questions. The first is whether the District Court erred in not utilizing the lodestar to determine the appropriate fee. Because the answer is "no," we must address a second question, whether the District Court abused its discretion in setting a twenty percent fee in this case, and in choosing to apply that percentage only to that part of the fund for which counsel was responsible. The answer to this question is "no" as well. We address both questions in turn below.

A. Lodestar Versus Percentage of the Fund

1. General Principles Governing Fee Awards

[1] **[2]** **[3]** In general, each party to litigation in the United States bears its own attorneys' fees absent a specific fee-shifting statute. Over time, courts have fashioned several equitable exceptions to this "American rule." One of the earliest, and still most common, exceptions is the "common fund" doctrine typically applied in class actions like the present one. *See Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 164, 59 S.Ct. 777, 779, 83 L.Ed. 1184 (1939) (fee award from fund generated is within "the historic equity jurisdiction of the federal courts"). That doctrine allows a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees. It is by now well established that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980). The underlying justification for attorney reimbursement from a common fund, as explained by the Supreme Court in three early cases, is that unless the costs of litigation are spread to the beneficiaries of the fund they will be unjustly enriched by the attorney's efforts. *See Sprague,* 307 U.S. at 166–67, 59 S.Ct. at 779–80; *Central R.R. & Banking Co. of Georgia v. Pettus,* 113 U.S. 116, 126–27, 5 S.Ct. 387, 392–93, 28 L.Ed. 915 (1885); *Trustees v. Greenough,* 105 U.S. 527, 532, 26 L.Ed. 1157 (1882).

[4] **[5]** When awarding attorneys' fees, federal courts have a duty to ensure that claims for attorneys' fees are reasonable. *See Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); *Pettus,* 113 U.S. at 127, 5 S.Ct. at 392–93. Special problems exist in assessing the reasonableness of fees in a class action suit since class members with low individual stakes in the outcome often do not file objections, and the defendant who contributed the fund will usually have no interest in how the fund is divided between the plaintiffs and class counsel.[1]

2. The Percentage–of–the–Fund Method for Calculating Fees

Historically, courts exercised considerable discretion and applied a reasonableness standard, focusing upon the particular circumstances of a case, in determining the amount of a common fund fee award. The percentage-of-the-fundddddddddd ****99** d method of calculating attorneys' fees in common fund cases was most common. *See Pettus,* 113 U.S. at 128, 5 S.Ct. at 393 (paying successful attorneys a percentage ***1266** of the fund recovered for the class). *See also Court Awarded Attorney Fees, Report of the Third Circuit Task Force,* 108 F.R.D. 237, 242 (1986) ("*Third Circuit Task Force Report* ").

3. The Lodestar and Twelve–Factor Tests

The application of a percentage-of-the-fund approach sometimes resulted in large fee awards, and in the 1970s several courts began a movement to alternative methods of calculating attorneys' fees. In 1973, the Third Circuit led the way in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3d Cir.1973), instructing judges in that circuit to first compute the product of the reasonable hours expended and the reasonable hourly rate to arrive at the "lodestar." That amount could then be adjusted upward or downward, based upon additional factors such as the contingent nature of the case and the quality of the attorneys' work. This so-called "lodestar/multiplier" approach thus shifted the emphasis from a fair percentage of recovery to the value of the time expended by counsel.

A year later in a case involving a fee-shifting statute rather than a common fund, the Fifth Circuit identified twelve factors as relevant to determining a reasonable fee award: 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal services properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or other circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974), *abrogated in part on other grounds, Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989).[2]

After the emergence of *Lindy* and *Johnson,* the federal courts experimented with combinations of the *Lindy* lodestar and *Johnson* twelve-factor approaches in both common fund and fee-shifting contexts. In the context of the fee-shifting statutes, the lodestar approach but without enhancement for the *Johnson* factors has emerged as the prevailing method of fee calculation. *See, e.g., City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *King v. Palmer,* 950 F.2d 771 (D.C.Cir.1991) (en banc), *cert. denied,* 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). However, at the same time, many courts and commentators have noted differences between the fee-shifting and common fund cases, raising questions as to whether the same methodology should apply. A Third Circuit task force appointed to compare the respective merits of the lodestar and percentage-of-the-fund approaches concluded that the lodestar technique, at least as encumbered with the *Johnson* factors, is a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar." *Third Circuit Task Force Report,* 108 F.R.D. at 255.

The task force enumerated nine deficiencies in the lodestar process: 1) it "increases the workload of an already overtaxed judicial system"; 2) the elements of the process "are insufficiently objective and produce results that are far from homogeneous"; 3) the process "creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law"; 4) the process "is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount"; 5) the process, although designed to curb abuses, has led to other abuses, such as "encouraging lawyers ***1267 **100** to expend excessive hours engag[ing] in duplicative and unjustified work, inflat[ing] their 'normal' billing rate[s], and includ [ing] fictitious hours"; 6) it "creates a disincentive for the early settlement of cases"; 7) it "does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered"; 8) the process "works to the particular disadvantage of the public interest bar" because, for example, the "lodestar" is set lower in civil rights cases than in securities and antitrust cases; and 9) despite the apparent simplicity of the lodestar approach, "considerable confusion and lack of predictability remain in its administration." *Id.* at 246–49.

The task force, though recommending the retention of a lodestar approach in statutory fee cases, concluded that in common fund cases the best determinant of the reasonable value of services rendered to the class by counsel is a percentage of the fund. *Id.* at 255.

The Eleventh Circuit has, after reviewing criticisms of the lodestar method and the findings of the Third Circuit task force, specifically established the percentage-of-the-fund, not the lodestar, approach as applicable in all common fund cases in that circuit. *Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir.1991). Other cases also offer evidence of a trend toward percentage-of-the-fund calculations in common fund cases. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 271 (9th Cir.1989) (setting attorney fee benchmark of 25%

of common fund); *Brown v. Phillips Petroleum Co.,* 838 F.2d 451 (10th Cir.) (holding fee award representing 16.5% of fund not a per se abuse of discretion), *cert. denied,* 488 U.S. 822, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988); *In re Avon Prods., Inc. Sec. Litig.,* Fed.Sec.L.Rep. (CCH) ¶ 97,061, 1992 WL 349768 (S.D.N.Y.1992) (awarding 30% fee); *In re Workers' Compensation Ins. Antitrust Litig.,* 771 F.Supp. 284 (D.Minn.1991); *In re SmithKline Beckman Corp. Sec. Litig.,* 751 F.Supp. 525 (E.D.Pa.1990); *In re Activision Sec. Litig.,* 723 F.Supp. 1373, 1377–78 (N.D.Cal.1989) (adopting policy of awarding 30% of the fund "absent extraordinary circumstances that suggest reasons to lower or increase the percentage"); *Mashburn v. National Healthcare, Inc.,* 684 F.Supp. 679 (M.D.Ala.1988); *Pray v. Lockheed Aircraft Corp.,* 644 F.Supp. 1289, 1311 (D.D.C.1986); *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 749–50 (S.D.N.Y.1985), *aff'd,* 798 F.2d 35 (2d Cir.1986); *In re Superior Beverage/Glass Container Consol. Pretrial,* 133 F.R.D. 119 (N.D.Ill.1990); *see generally Third Circuit Task Force Report,* 108 F.R.D. at 247 n. 32 (listing cases).

[6] Neither this Court nor the Supreme Court has recent authority clearly controlling the question of the appropriate fee award methodology in the common fund context. We have at times applied a lodestar approach in common fund cases. *See, e.g., National Treasury Employees Union v. Nixon,* 521 F.2d 317, 320–22 (D.C.Cir.1975). More recently, we engaged in both a lodestar/multiplier analysis and a percentage-of-the-fund calculation in the same case using the results of each to bolster the other. In *Bebchick v. Washington Metro. Area Transit Comm'n,* 805 F.2d 396, 406–07 (D.C. Cir.1986), we awarded a fee representing twenty-five percent of the common fund which, we noted, approximated the lodestar plus a sixty percent enhancement for the contingency of success and compensation, the high quality of representation, and the public benefit involved.[3]

The Supreme Court, while frequently dealing with the lodestar approach in the fee-shifting context, *see, e.g.,* cases collected in *Burlington v. Dade,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), has not lately spoken to the common fund fee issue. However, ***1268** ****101** the latest guidance from the High Court counsels the use of a percentage-of-the-fund methodology. In *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), where the Court approved the use of the lodestar method in a statutory fee-shifting context, the Court distinguished the common fund cases stating: "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the fee-shifting statute before the Court] reflects the amount of attorney time reasonably expended on the litigation." *Id.* at 900 n. 16, 104 S.Ct. at 1550 n. 16. Although this language is dicta, as *Blum* involved no common fund, it is entirely consistent with the Court's decision four years earlier in *Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), in which the Court approved a fee award based on the percentage-of-the-fund method in a common fund case. More importantly, the *Blum* footnote makes it plain that that decision's approval of the lodestar method in the fee-shifting context was not intended to overrule prior common fund cases, such as *Boeing.*

HHS argues that *Burlington* and *King,* though involving fee-shifting statutes, supply reasoning applicable to common fund fee awards because both situations require the court, rather than the market, to determine the value of the lawyer's services. According to HHS, in a common fund case such as this, the only possible reason to pay counsel more than the lodestar is to compensate them for the risk that they would recover nothing. But, HHS argues, *Burlington* and *King* "prohibit paying an attorney's fee higher than the lodestar when such an enhancement is designed to compensate counsel for the risk that they would lose the case and thus receive no fees." HHS Br. at 22–23. The Secretary argues that because *Burlington* and *King* abandon prior methods of calculating the lodestar and then enhancing it for risk of loss in a common fund fee award, and because *Burlington* deals in detail with the theoretical and practical concerns of court-ordered fees higher than the lodestar in contingent situations, it, rather than the brief footnote in *Blum,* supplies the controlling law. HHS concludes that the hospitals' attorneys cannot receive more than the $619,000 they have already been paid, which constitutes the District Court's already generous calculation of the lodestar.

We disagree with the proposition that *Burlington* and *King* mandate an unenhanced lodestar approach in common fund cases. An important assumption underlying the Secretary's assertion that *Burlington* and *King* forbid the award of attorneys' fees beyond the lodestar—that fee-shifting cases are in all relevant respects similar to common fund cases—does not withstand scrutiny. In our judgment, *Burlington* and *King* do not govern common fund awards because of several important, and ultimately decisive, differences between the two types of cases.

First and most obviously, there is often no resulting fund in fee-shifting cases, so the alternative of using a percentage-of-the-fund method to calculate attorneys' fees is not necessarily available. As a leading treatise on attorney fee awards explains:

> Fee awards authorized by statute are payable by a losing defendant whether or not there has been any monetary recovery for the named plaintiffs or for a class, in contrast to common fund fee awards that are payable of the fund recovered. Because statutory fees are payable to prevailing parties to encourage private enforcement of statutes and deter violations, and because the results obtained are often nonmonetary or modest recoveries, *a formula for a reasonable statutory fee award based on a percentage of the recovery is not usually available to the courts.*

Newberg, Attorney Fee Awards § 1.10, at 17 (1986) (emphasis added) (footnotes omitted).

Second, and perhaps more importantly, using the lodestar approach in common fund cases encourages significant elements of inefficiency. First, attorneys are given incentive to spend as many hours as possible, billable to a firm's most expensive attorneys. Second, there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts. *See* ***1269 **102** *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.,* 724 F.Supp. 160, 167 (S.D.N.Y.1989); *In re Activision Sec. Litig.,* 723 F.Supp. 1373 (N.D.Cal.1989). Arguably, the lodestar method may encourage *some* inefficiency even in the fee-shifting context, but there the risk is not as great nor the alternative as readily available as in the common fund cases. So far as the degree of risk of inefficiency, attorneys in fee-shifting cases not involving a common fund know that the two most determinative factors affecting their fees after *Burlington* are winning, without which there is no award, and reasonableness of time expended and rate as determined in adversarial context. Working additional hours beyond those efficiently allocated to the case does not appreciably enhance the first yet risks unrewarded effort determined in the second.

In the common fund case, by contrast, victory is still the key factor, but, as in the present case, the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award. That is, in the common fund case, if a percentage-of-the-fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them. On the other hand, if we apply the lodestar method to the common fund case, then the attorney inefficiently expending an excess amount of time does stand to gain by that inefficiency if the awarding court does not ultimately recognize the inefficiency in the far-from-exact testing of the fee award hearing. The danger that the court will not recognize unreasonably expended hours is magnified by the fact that in the common fund case the only party having an adverse interest at the time of the award will be the attorney's own clients, often a diverse and scattered group with small individual stakes. The opposing party in the common fund case, unlike the loser in a fee-shifting case, stands to lose no more if the attorneys' fee award is greater and therefore cannot be relied upon to provide an adversarial approach to deleting unreasonable time entries.

Furthermore, a percentage-of-the-fund approach more accurately reflects the economics of litigation practice. The district court in *Howes v. Atkins,* 668 F.Supp. 1021 (E.D.Ky.1987), noted that "[p]laintiffs' litigation practice, given the uncertainties and hazards of litigation, must necessarily be result-oriented. It matters little to the class how much the attorney spends in time or money to reach a successful result." *Id.* at 1025 (internal quotation marks omitted). Making a similar point, Judge Posner has recently argued that a percentage-of-the-fund approach most closely approximates the manner in which attorneys are compensated in the marketplace for these types of cases. Writing for the court in *In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 572 (7th Cir.1992), he noted:

> The judicial task might be simplified if the judge and the lawyers spent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character.... The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome.

Obviously, a court setting a fee does not perfectly replicate the marketplace by assigning counsel a percentage of the common fund, but the device can approximate the market with reasonable accuracy. Mechanisms which may facilitate a judge in more closely approximating the market include: encouraging class counsel to enter into preliminary non-binding fee agreements with class members; surveying class members for their views about appropriate levels of compensation; and, as the Third Circuit task force suggests, considering the fee issue early in the litigation. Although the district judge in this case did not employ exactly those mechanisms, his approximation of the market appears well

supported, especially given the notice to and response of the class.

Additionally, a percentage-of-the-fund approach is less demanding of scarce judicial resources than the lodestar method. The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination ***1270 **103** about whether the time devoted to the litigation was necessary or reasonable. This Court has reiterated the Supreme Court's warning that " '[a] request for attorney's fees should not result in a second major litigation.' " *Bebchick, supra,* at 401 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)). It is much easier to calculate a percentage-of-the-fund fee than to review hourly billing practices over a long, complex litigation.

A related weakness in the lodestar approach is that it often results in a substantial delay in distribution of the common fund to the class. The lodestar procedure requires detailed involvement by the District Court, evaluating the reasonableness of expenditure of attorney time and effort, and making comparative inquiries on reasonable rates for those services. Given the complexity of many class action lawsuits, combined with the degree of detailed review required and considering the heavy workload of most district court judges, lodestar calculation is likely to cause significant delay between the creation of a common fund and remuneration of class counsel. In contrast, the application of a percentage-of-the-fund methodology is relatively straightforward and much less time consuming.

For similar reasons, a percentage-of-the-fund approach is less subjective than the lodestar approach; under the former, the court need not second-guess the judgment of counsel as to whether a task was reasonably undertaken or hours devoted to it reasonably expended. *See Third Circuit Task Force Report,* 108 F.R.D. at 246 ("The elements of the *Lindy* process are insufficiently objective and produce results that are far from homogeneous.").

HHS advances two further arguments in support of its conclusion that the attorneys' fees in this case should be limited to the lodestar, which we briefly address. First, HHS reminds this Court that it has "a high obligation to do equity," and urges that we should not grant a fee award that excessively diverts money from the common fund to pay for the lawyers. HHS asserts that the portion of the fund awarded to attorneys "could otherwise have been used by [the hospitals] for many far better purposes, such as to improve their service or their facilities, to provide medical care to the indigent, or to help them gain control over their costs." HHS also suggests that we have a special obligation to "do equity" because the government, and by extension taxpayers, are the source of the common fund.

We find this argument to be without merit for multiple reasons. First, there is no evidence on how the money reimbursed to the hospitals will be spent. To the extent such a consideration is even appropriate or relevant, there is no reason on the record before us to conclude the hospitals would use the money they recover from the common fund for purposes any "better" than class counsel would. Second, HHS has failed to cite any case law or other authority for the novel proposition that a common fund case such as this one should be treated differently than other common fund cases simply because it successfully challenged illegal *government* action. Third, we are not convinced that a percentage-of-the-fund methodology will necessarily, or even routinely, result in larger fees. Admittedly it does in this case, but the Secretary provides, and we can discern, no reason to believe that this will be the general rule. We adopt a percentage-of-the-fund methodology not because it will pay lawyers more, but primarily because it is more efficient, easier to administer, and more closely reflects the marketplace.

Fourth, HHS's argument can be made with equal validity (or invalidity) as to any amount of fee and in no readily discernable way distinguishes between this method and any other. We further note that the Secretary's stated concern for money getting to the hospitals rings particularly hollow here given the history of this litigation. HHS would have this Court ignore the fact that the government, left to its own devices, would have paid nothing to reimburse hospitals for their photocopying expenses. HHS would also have us ignore the lengths to which the Department has gone, through repeated litigation, to avoid its statutory obligations in this matter.

***1271 **104** HHS's second argument is that this Court should assign no relevance to the fact that none of the plaintiff hospitals objected to their attorneys receiving twenty percent of the entire $27.8 million dollar fund. HHS asserts that the average economic stake in the fee issue for any hospital is only about $900, which is too small an amount to justify careful attention to the issue or the trouble of objecting to the proposed fee arrangement. Furthermore, HHS argues, there is no reason to believe that the hospitals who declared their

support for the attorneys receiving twenty percent of the entire fund are a fair, representative sample of the opinions of the roughly 6,000 hospitals in the class.

We find this argument unconvincing as well. First of all, even if no significance is to be found in the hospitals' failure to object to the proposed fee arrangement, this does not at all explain why significance should not be attached to the fact that a large number of hospitals, in contravention of their economic interests, took the trouble to affirmatively support the proposed fee settlement. Second, many of the hospitals, or health care systems, with the largest economic stake in this litigation were among the approximately 450 class members expressly endorsing the requested twenty percent of the common fund as a reasonable fee award.

In sum, we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases. We now turn to the District Court's application of that methodology to this case.[4]

B. Application of Percentage–of–the–Fund Methodology in this Case

The hospitals argue the District Court appropriately employed a percentage-of-the-fund approach in determining the fee, but abused its discretion in applying that methodology because it based the fee award on a number of erroneous factual and legal conclusions. HHS argues that even if a percentage-of-the-fund methodology is appropriate, the trial court abused its discretion in granting twenty percent rather than a smaller percentage of the fund.

We consider three distinct issues: first, whether twenty percent of the fund represents a reasonable fee in this case; second, whether the District Court has the discretion to apply a percentage of the fund only to that part of a fund for which counsel is responsible; and third, whether the District Court reasonably concluded that in this case counsel was only responsible for $10 million of the value of the fund. We conclude the answer to each question is "yes."

1. Standard of Review

[7] In general, a trial court enjoys substantial discretion in making reasonable fee determinations. *See Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). That discretion is premised upon the district court's "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.; see also Pierce v. Underwood,* 487 U.S. 552, 563, 108 S.Ct. 2541, 2549, 101 L.Ed.2d 490 (1988) (holding that abuse-of-discretion standard governs appellate review of the trial court's attorney fee determination).

***1272 **105** The hospitals are of the view that the normal degree of deference is not due here because "this case was unusual in that it required no meaningful substantive participation by the District Court until the stipulation of settlement was offered for approval...." Appellants' Br. at 20. According to appellants, "the District Court simply did not have the opportunity to develop the familiarity with the issues or the positions of the parties that would have resulted from disputatious discovery or a full-blown trial." *Id.*

[8] **[9]** We find this argument to be without merit. We can hardly imagine a more futile and foolhardy endeavor than struggling to review each district court's degree of familiarity with a case to decide how much deference to grant its findings and conclusions. Furthermore, it is far from unusual for a case to settle before trial—in fact, it may be the usual expectation. And, even if we accepted this argument as a general proposition, it would not apply here as Judge Oberdorfer had a high degree of familiarity with this case. Not only was he responsible for this case throughout the eighteen months of pretrial preparation, he was also the trial judge in the *Beverly* case, in which the primary legal issue underlying this litigation was decided.

2. The Twenty Percent Figure

[10] We are of the opinion that the District Court acted within its discretion in setting the percentage of the fund at twenty percent. The twenty percent figure is well within the range of reasonable fees in common fund cases. As suggested in our discussion above, a review of similar cases reveals that a majority of common fund class action fee awards fall between twenty and thirty percent. Also, the already noted supportive response of the class members to the attorneys' fee notice, though not decisive, is relevant to the District Court's reasonableness determination.

[11] We also hold that the court was within its discretion in basing its fee calculation only on that part of the fund for which counsel was responsible. The District Court's conclusion that, to a considerable extent, this case rode "piggyback" on the *Beverly* case is entitled to deference,

especially as Judge Oberdorfer was the district court judge in both cases. The hospitals argue that *Beverly,* by its terms, applied only to the plaintiffs in that case, so the issue of whether HHS was obliged to pay the copying expenses of the hospital plaintiffs in this case was still an open question. This argument is unpersuasive as *Beverly* represented binding precedent in this Circuit when the plaintiffs in this case filed their complaint.

[12] Finally, the hospitals' attorneys argue that the conclusion that they were responsible for only $10 million in added value to the fund was based on misleading information supplied by HHS and misunderstandings of the record. We disagree. The District Court concluded that the method for calculating the number of pages to be reimbursed was not a matter of much dispute. The court also concluded that at the time this lawsuit was brought, HHS had proposed a regulation that would have paid $.0498 per page, whereas the eventual settlement agreement provided payment of $.07 per page. Based on the difference between these two figures, the District Court concluded that class counsel contributed about $10 million to the value of the common fund. We find substantial evidence in the record to support these conclusions and do not think the court abused its discretion in reaching them.

IV. Conclusion

For the reasons stated herein, we conclude that percentage-of-the-fund is the proper method for calculating fees in a common fund case. We also hold that in this case the District Court did not abuse its discretion in calculating either the percentage to be used or the amount of the fund that resulted from the efforts of counsel. Accordingly, we affirm the District Court's judgment in all respects.

So ordered.

Circuit Judge D.H. GINSBURG, concurring in part and dissenting in part:

I join in the opinion of the court insofar as it upholds the district court's decision to reduce the fee award from $5.6 million to $2 ***1273** ****106** million. I dissent, however, insofar as the court relies upon the percentage-of-the-fund approach as the only permissible measure of a reasonable fee in a common fund case.

The authority controlling a common fund case in this circuit is *Bebchick v. W.M.A.T.A.,* 805 F.2d 396, 406–07 (D.C.Cir.1986). Under that precedent, the lodestar is the starting point for calculating a fee award and the percentage-of-the-fund it represents is merely a secondary check upon the reasonableness of the resulting award.

Neither this court nor the Supreme Court has ever in a common case cast doubt upon the continuing vitality of this approach. *Cf. Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (dictum in a statutory fee shifting case). Both *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), and *King v. Palmer,* 950 F.2d 771 (D.C.Cir.1991), were brought under fee-shifting statutes. According to the Supreme Court, the plaintiffs were not entitled to a risk enhancement principally because the statute authorized the award of a fee only to a "prevailing part[y]." Because that constraint is absent in a non-statutory common fund case, we find the question of enhancement in such a case precisely where *Bebchick* left it.

Far from being indicated by the Supreme Court's decision in *City of Burlington,* as the court implies, the percentage-of-the-fund approach seems actually to be at odds with that decision. The Supreme Court there clearly assumed that the lodestar was the appropriate starting point in calculating a reasonable fee. Contrary to my colleague's implication, however, that assumption was not compelled; many cases brought under fee-shifting statutes produce a common fund that could provide the measure of a reasonable fee. *See e.g. Kientzy v. McDonnell Douglas Co.,* 990 F.2d 1051 (8th Cir.1993) ($600,000 award in sex discrimination case); *King v. Palmer,* 950 F.2d 771 (award of back pay). Were a percentage-of-the-fund approach so clearly preferable, it could be applied to such cases, with the lodestar reserved for instances in which there is no fund from which to calculate a reasonable award.

I realize that the percentage-of-the-fund approach is appealingly simple to administer. Whatever the problems associated with applying the lodestar, however, see supra Ct. Op. at 1267, 1268–69, they are no greater in a common fund case than in a fee-shifting case. Moreover, reliance upon the percentage-of-the-fund approach without any regard for the lodestar may produce excessively high awards and thus encourage even relatively non-meritorious cases to be brought. This is a case in point: since the fee award here comes to about 3.3 times what it would be using the lodestar, the case would have been worth bringing (i.e., would have given

counsel an *ex ante* probability of earning the lodestar rate) even if the plaintiff had only a 30% chance of success.

In order to ensure that we do not encourage the litigation of less meritorious claims, any enhancement above the lodestar should be limited to what is reasonable in the particular case —again as illustrated in *Bebchick.* The district court ought to be required to give some special reason for authorizing any amount more than twice the lodestar—which is to say, any amount that makes it remunerative for lawyers to bring cases with less than a 50% chance of success. Perversely, however, the approach adopted by the court today will encourage counsel to bring just such relatively non-meritorious claims. The potential for recovering a fee that is all out of proportion to the resources expended on the litigation means that counsel need win only occasionally in order to make a profit. The result will be to burden with crap-shoot cases a system already overburdened with close cases.

In this case the district court offered no justification whatsoever for an award so disproportionate to (3.3x) the lodestar. I would remand the matter for the district court either to explain or to revise its award of $2 million for legal work that, if billed at counsels' hourly rate, would have fetched only $619,000.

All Citations

1 F.3d 1261, 303 U.S.App.D.C. 94, 62 USLW 2101, 42 Soc.Sec.Rep.Serv. 27A, Med & Med GD (CCH) P 41,593

Footnotes

1 Indeed, it would appear that there is some question whether the government has standing in this case since it is not immediately apparent what the government's interest is in the apportionment of a common fund, once the fund has been established and the government has surrendered all control over it. This issue, however, previously has been resolved in favor of affording the government standing. *See Freeman v. Ryan,* 408 F.2d 1204, 1206 (D.C.Cir.1968); *see also Allen v. United States,* 606 F.2d 432, 434 (4th Cir.1979); *Jackson v. United States,* 881 F.2d 707, 709 (9th Cir.1989) (finding government has “ancillary standing” in fee issue by virtue of its status as party to case in chief). We are bound by the *Freeman* decision.

2 Although *Johnson* is a statutory fee case, rather than a common fund case, a number of courts have applied the *Johnson* analysis to common fund contexts as well. *See, e.g., Brown v. Phillips Petroleum Co.,* 838 F.2d 451 (10th Cir.), *cert. denied,* 488 U.S. 822, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988); *In re Terra–Drill Partnerships Sec. Litig.,* 733 F.Supp. 1127, 1130 (S.D.Tex.1990). *See also* cases collected in Newberg, Attorney Fee Awards, § 2.06 (1986 & Supp.1992).

3 Obviously, we would not exactly duplicate this calculation today as we have generally disavowed the use of enhancement, in recognizing that enhancing factors are reflected in the original lodestar, *King v. Palmer,* 950 F.2d 771 (D.C.Cir.1991) (en banc), *cert. denied,* 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). However, at the time of *Bebchick,* that dual-calculation exercise was consistent with Circuit precedent as established in *Puerto Rico v. Heckler,* 745 F.2d 709 (D.C.Cir.1984), in which we considered both the lodestar and the percentage of the fund as “indicia of overall reasonableness” in calculating a fee award. *Id.* at 714.

4 We recognize, as the separate opinion of Judge Ginsburg points out, that *Bebchick* did begin with a lodestar analysis followed by a percentage-of-the-fund calculation. Nonetheless, the *Bebchick* court did expressly recognize that “where the fees, as here, will come out of a ‘common fund,’ ‘a reasonable fee is based on a percentage-of-the-fund bestowed on the class.’ ” 805 F.2d at 406 (quoting *Blum,* 465 U.S. at 900 n. 16, 104 S.Ct. at 1550 n. 16). Most importantly, the *Bebchick* panel did not find it necessary to choose between the lodestar and percentage-of-the-fund methods as we must do in the present case given the disparity of the results here. Therefore, *Bebchick* does not control this case. We do not intend to imply, as the separate opinion suggests, that *City of Burlington* compels the result we reach today. Rather, it merely supports it as we discuss above. The last Supreme Court pronouncement directly on this subject seems to have been footnote 16 in *Blum* and, while dicta, that pronouncement would seem to support if not compel our result. That the resulting fee may appear high is not to say that the method for calculating it is incorrect.

Tab 31

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.,

COURT FILE NO.: 00-CV-202080CP
DATE: 20050323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)
GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., and MARCY DAVID Plaintiffs **- and -** F.HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-LONZA CANADA INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CANADA LIMITED/LIMITEE and TANABE SEIYAKU CO., LTD. Defendants Proceeding under the *Class Proceedings Act*, 1992 (Biotin)	***Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C.***, ***J. J. Camp Q.C.,*** and ***Joe Fiorante*** for the Plaintiffs in all actions ***Glenn M. Zakaib***, for the Defendant Merck KgaA ***John Callaghan,*** for Sumitomo Chemical Co. Ltd. ***William Vanveen*** and ***François Baril,*** for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd. ***Ariane Farrell***, for Sumitomo Canada Ltd. ***Donald Houston***, for Lonza AG **HEARD:** March 8 and 9, 2005

COURT FILE NO.: 00-CV-200045CP

B E T W E E N:	)

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., OGER AWAD and MARY HELEN AWAD Plaintiffs **- and -** F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A., AVENTIS ANIMAL NUTRITION S.A., RHÔNE-POULENC CANADA INC., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN Defendants Proceeding Under the *Class Proceedings Act*, 1992 (Bulk Vitamins)	***William Vanveen*** and ***François Baril,*** for the Defendants F. Hoffmann-La Roche Ltd. and Hoffmann-La Roche Limited/Limitee ***Glenn M. Zakaib***, for the Defendant Merck KgaA ***Katherine L. Kay*** and ***Eliot N. Kolers***, for the Defendant Eisai Co., Ltd. ***Evangelia Kriaris,*** for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.); Takeda Canada Vitamin and Food Inc. ***Sandra A. Forbes,*** for Aventis Animal Nutrition SA, the Rhone-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd. ***David W. Kent***, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

COURT FILE NO.: 00-CV-198647CP

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID Plaintiffs **- and -** BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN l. ("PETE") FISCHER and ANTONIO FELIX Defendants Proceeding under the *Class Proceedings Act*, 1992 (Choline Chloride)	)	***David W. Kent***, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc. ***Andrew J. Roman,*** for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V. ***George D. Hunter,*** for DCV Inc. and Ducoa L.P. ***James Doris,*** for Bioproducts, Inc. ***Tycho Manson,*** for Chinook Group, Ltd.

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., NOVUS INTERNATIONAL, INC. and AVENTIS ANIMAL NUTRITION S.A.

Defendants

Proceeding under the *Class Proceedings Act*, 1992 (Methionine)

Sandra A. Forbes, for Aventis Animal Nutrition S.A. and the Rhone-Poulenc defendants

F. Paul Morrison and ***J. P. Brown,*** for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G.

S. A. Dawson, for Novus International, Inc.

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:

VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI

Defendants

Proceeding under the *Class Proceedings Act*, 1992 (Niacin)

Donald Houston, for Lonza AG (acting previously discontinued agent) for Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

F. Paul Morrison and ***J. P. Brown,*** for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls AG

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID Plaintiffs **- and -** UCB S.A. and UCB CHEMICALS CORPORATION Defendants Proceedings under the *class Proceedings Act*, 1992 (Supplemental Choline Chloride)	***Donald Houston,*** for UCB S.A. and UCB Chemicals Corporation

COURT FILE NO.: 42267CP

B E T W E E N: GLEN FORD Plaintiff **- and -** NOVUS INTERNATIONAL (CANADA) INC. Defendant Proceeding under the *Class Proceedings Act*, 1992 (Supplemental Ontario Methionine)	***Donald Houston***, for Wippon Soda Co. Ltd. ***Pauline W. Wong*** for Defendant, Mitsui & Co., Ltd. ***S. A. Dawson,*** for Novus International (Canada) Inc.

CLASS PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CUMMING J.

The Motion

[1] This is a motion for approval of class counsel fees in respect of a group of class actions under sections 32 and 33 of the *Class Proceedings Act,* S.O. 1992, c. 6 ("*CPA*").

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

[3] The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <http://www.vitaminsclassaction.com>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[4] The alleged conspiracies remain simply that, i.e. "alleged" conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

[5] The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of fees for class counsel.

[6] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews "(Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

[7] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[8] Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

[9] Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in *Alfresh Beverages Canada Corp. v. Hoechst AG,* [2002] O.J. No. 79.

[10] Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.,* [2000] O.J. No. 4594). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.,* [2002] O.J. No. 298). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.,* [2001] O.J. No. 237). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed ([2003] O.J. No. 868 (C.A.)).

[11] The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the *cy-près* mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

[12] The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

[13] The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage

assessment in excess of $140,000,000 including interest, expenses and costs and results in an expected payment by the Settling Defendants to the Administrator of about $100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

[14] Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

[15] Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees	**$18,000,000**
Plus Fees on Additional Settlements	**$75,000**
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients	**$70,000**
Subtotal	$18,145,000
Less Administration Expenses (actual and estimated)	**($1,390,709)**
Less Quebec Counsel's Disbursements and GST (estimated)	**($40,000)**
Less Class Counsel Disbursements (paid and payable)	**($1,552,392)**
Less interest authorized by CPA s. 33(7)(c)	**Not calculated**
Less GST on Class Counsel Disbursements where applicable	**($94,667)**
Subtotal	$15,067,232
Less GST on Class Counsel Fees and Quebec Counsel Fees	**($985,707)**
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	$14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on $100,000,000 recovery	14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	**($2,000,000)**
Maximum amount available for Class Counsel Fees	$12,081,525
Multiplier inherent in Class Counsel Fees	2.28

[16] An "Expense Fund" of $10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability,

plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

[17] There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

[18] On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

[19] A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

[20] I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "$132.45 million, including an amount of $10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of $10 million."

[21] Section 18.1(1) then proceeds to state, "The $10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is $18 million." Section 18.1(10) states that as a result of this $18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

[22] Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

[23] Class Counsel in their Factum emphasize that they "agreed to an $18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

[24] The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

Solicitor's Fees

4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party costs are awarded, applicable taxes and any interest accruing on account of party and party costs.

5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:

(a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and

(b) 15% of the settlement funds or monetary award plus applicable taxes.

Disbursements

6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

[25] Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

[26] The representative plaintiffs each signed the Settlement Agreement and thereby agreed to $18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the expectations of the Ontario class action representative plaintiffs in doing so are that there is about $100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

[27] Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at $2.18 million, inclusive of taxes and disbursements.

[28] Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given percentages (Direct Purchaser Fund-80%, Methionine Fund-4%, Intermediate Purchaser Fund-8%, and Consumer Fund-8%).

[29] Section 18.1(6) provides that, "Class Counsel Fees and Administration Expenses shall constitute a first charge upon and shall be paid as the first payments from each fund."

[30] In my view, there are some required adjustments to the calculations as shown in the chart above. First, some of the claimed disbursements in reality are notionally properly considered as fees for legal services implicit to the services provided by Class Counsel.

[31] The factum of class counsel in the first instance sought to treat a payment to another Canadian law firm of some $200,000 as a simple disbursement. This payment arose because of an agreement resulting from a commitment by the other law firm to drop out of the contest in respect of the carriage motion back in 2001. There was nothing improper about this arrangement and it was made known to the Court at the point of the agreement. However, the payment should properly come out of the quantum determined as Class Counsel Fees and not be treated as a disbursement before determination of the quantum of Class Counsel Fees.

[32] As well, the factum sought in the first instance to treat the $451,381 to be paid to American law firm advisors as a simple disbursement outside the determination of the quantum of Class Counsel Fees. This amount is notionally for legal services as a part of the overall legal services being provided by Class Counsel. Such amount is properly payable by Class Counsel out of the Class Counsel Fees after the determination of the quantum of Class Counsel Fees. Such amount is not properly treated as a disbursement by Class Counsel outside of the determined quantum of Class Counsel Fees. (It is noted incidentally as well that payment to the Canadian law firm of the $200,000 and to the American law firms of the $451,381 was agreed to by Class Counsel to be contingent upon success in the class actions at hand.)

[33] Class Counsel were first alerted to the alleged conspiracies by several groups of U.S. counsel with experience in prosecuting antitrust cases, some of whom were involved in the prosecution of vitamins anti-trust litigation in the U.S. Federal court. U.S. counsel provided advice and guidance that assisted in a preliminary manner in shaping the general strategy and in developing expert evidence. They provided information about the alleged Vitamin conspiracies that was not readily available, even though not subject to U.S. protective orders. They introduced Class Counsel to some of the representative plaintiffs and to their expert economist, Dr. Beyer. They also assisted in the motion seeking access to evidence in the District of Columbia. The U.S. firms are: Much Shelist Freed Denenberg Ament & Rubenstein P.C.; Freed and Weiss LLC; Gallagher, Shrap, Fulton & Norman; Cohen, Milstein, Hausfeld & Toll P.L.L.C;

Levin, Fishbein, Sedran & Berman; and The Cuneo Law Group. Class Counsel negotiated with some of the U.S. counsel in an attempt to formalize a working relationship with them; however, no agreement was ever finalized and signed.

[34] Thus, in my view, there should be added into the quantum of Class Counsel Fees actually being received the two sums of $200,000 and $451,381 or a total add-in of $651,381. (There is a corresponding deduction to Class Counsel disbursements of this amount of $651,381, resulting in the adjusted anticipated expenses of Class Counsel being only $901,011 (rather than $1,552,392, as shown on the above chart).

[35] Thus, the chart, as properly adjusted in my view, would be as follows:

Amount for Administration Expenses and Class Counsel Fees	$18,000,000
Plus fees on additional settlements	$75,000
Plus estimated costs and interest recovery from Borden and/or his clients	
Plus potential costs and interest recovery on jurisdiction motions	
Subtotal	$18,075,000
Less Administration Expenses (actual and estimated)	($1,390,709)
Less Quebec Counsel's disbursements and GST (estimated)	($40,000)
Less Class Counsel disbursements (paid and payable)	($901,011)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel disbursements where applicable	($63,071)
Subtotal	$15,680,209
Less GST on Class Counsel Fees	($1,025,808)
Maximum amount available for Class Counsel Fees	$14,654,401
Percentage for Class Counsel Fees based on $100,000,000 recovery	14.654%
Less fees of Quebec Counsel (estimated) net of GST and disbursements	($2,000,000)
Estimated amount available for fees of Class Counsel	$12,654,401
Less $651,381 payable to other counsel excluded from the multiplier	($651,381)
Estimated amount available for Class Counsel	$12,003,020
Multiplier inherent in fees of Class Counsel on a base fee of $5,306,189	2.26

[36] The s.18.1 regime as illustrated in the above charts makes Class Counsel Fees the residual amount after the payment of Administration Expenses. Class Counsel know with certainty the specific amounts for disbursements, taxes and administration expenses (having negotiated with the intended Administrator a capped fixed fee – see s.17 of the Agreement). The adjusted chart shows anticipated total Class Counsel Fees of $14,654,401. In my view, it is quite possible that the Administration Expenses will be less than anticipated, which would mean some further increase to the residual calculation of Class Counsel Fees.

[37] Class Counsel estimate that they will expend further time valued at approximately $350,000 and approximately $40,000 in disbursements. These future activities of Class Counsel (excluding the Methionine Actions) will include: preparation for and attendance at the motions

for the approval of the settlement agreements and fees in the three jurisdictions; responding to questions from class members and their lawyers regarding the settlement and questions from, and interacting with, industry and consumer organizations; and bringing motions to declare the settlements operative.

[38] Class Counsel will not be paid any additional fees or disbursements (except in relation to the Methionine Actions) for these further services. Therefore, the estimated value of these future services has been included by Class Counsel in the calculation of the base fee and factored into the calculation of the multiplier, as are their estimated future disbursements.

[39] The result is that the regime set forth in the Agreement for the suggested overall Class Counsel Fees amounts to a reasonable certainty of expectation to Class Counsel of approximately $14,654,401 to $15,000,000.

[40] Subject to the Court's approval, the Agreement allocates a maximum of $18,000,000 for the payment of Administration Expenses and Class Counsel Fees. The chart prepared by Class Counsel assumes the recovery and distribution of about $100 million in settlement funds. A recovery of $100 million is the premise underlying the estimate that Class Counsel Fees will be less than 15% of the recovered amount.

[41] But the s. 18.1 regime is not dependent upon a recovery of $100 million. As drafted, the calculation of Class Counsel Fees does not change if the recovery in fact falls below $100 million due to opt outs. If the total Purchase Price of Vitamins by Direct Purchasers and Distributors who opt out of the Settling Proceedings exceeds the "Opt Out Threshold" the Settling Defendants may elect to terminate the Agreement (s. 15 of the Agreement). However, if there is no termination the s. 18.1 regime provides in effect that the Class Counsel Fees will always be calculated as set forth in the chart which should result in at least $14,654,401. (The "Opt Out Threshold" has been fixed by the agreement of counsel but will remain unknown to others (the set amount has been placed in a sealed envelope deposited with the Court) until the Opt Out date has passed.)

[42] Suppose hypothetically that there is an opt out by Direct Purchasers such that recovery is only $90 million. In such event, Class Counsel Fees of $14,654,401 would be 16.28% of the actual settlement recovery.

[43] In the course of submissions, given concerns expressed by the Court, various possibilities were mooted as alternatives to the proposal of Class Counsel as to a regime to determine the quantum of fees. One alternative considered as a possibility was that of a 'hard cap' in respect of Class Counsel fees, being determined as the least amount resulting from two calculations: first, 15% of the actual recovered amount for the classes and second, $15 million (inclusive of payment to Quebec counsel of $2,180,00.00) (plus any recovery of costs in the Borden court proceedings and the Methionine jurisdiction motion). The concept of a so-called 'hard cap' is based upon the underlying contingency fee agreement of 15% of any recovery of damages (plus any recovery in respect of the so-called "Borden court proceedings," discussed hereafter).

[44] Quebec Counsel would be paid $2,180,000 out of the total fees allowed for counsel or such lesser amount as the Quebec Court directs.

[45] If the British Columbia Court also gives its approval to the proposed settlement and the Quebec Court approves a payment of $2,180,000 to Quebec Counsel for fees, disbursements and taxes, then it is estimated Class Counsel (i.e. counsel for the plaintiff classes apart from Quebec Counsel) would receive under the hypothetical hard cap maximum:

(a) the balance of the $18,000,000 available after payment of Administration Expenses and Quebec Counsel to a maximum of $12,820,000.00 (i.e. the cap of $15 million less Quebec counsel fees of $2,180,000,00); plus

(b) any recovery of the costs and interest in respect of the Borden court proceedings.

[46] The base fee representing the value of Class Counsel's time expended to about February 23, 2005 and their estimated time to completion is $5,306,189. (However, this amount excludes any inclusion for the unknown figure for the time of Quebec counsel.) With a base fee of about $5,306,189, the maximum of $12,003,020 (after a deduction of $651,381 payable to non-class counsel, as their time has not been included in the base fee calculation of $5,306.189) for Class Counsel Fees would imply a multiplier of 2.26 on the base fee.

[47] A court may fix as a fee a lump sum or a base fee increased by a multiplier or a percentage of the recovery. In the case of a lump sum, the court should test the reasonableness of the result by considering it as a multiplier and as a percentage of the amount recovered. *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 at 393 (Ont. Gen. Div.); *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 425 (C.A.).

[48] The adjusted chart shows that, in total, it is estimated Class Counsel and Quebec Counsel would actually receive an amount of about $14,654,401 for fees or a percentage fee of about 14.654% based on a recovery of $100,000,000 after Settlement Credits. To the extent the recovery may be greater than $100 million and/or the estimated charges against the recovery in the above chart are less than the estimates, the fees would increase but could not exceed $15 million if there was a 'hard cap' of that amount.

[49] If there are greater amounts for expenses, disbursements or taxes than as contemplated in the above calculations, such debits will reduce the amount of Class Counsel Fees as they are calculated as the residual after the various deductions as seen in the chart. However, as discussed above, the estimation as to the quantum of expenses, disbursements and taxes seems to have a fair degree of certainty.

[50] Class Counsel express concerns as to a possible hard cap of 15% of the actual recovery. They suggest that if this approach were to be favoured by the Court then a protective proviso would be appropriate. They suggest that to the extent there are opt outs up to $6,000,000 of the

settlement's Direct Purchasers Fund (the figure of $6,000,00 being calculated from $50 million in sales, i.e. 12% of sales) the 15% limiting factor for Class Counsel Fees would not apply. That is, if there were to be a reduction in recovery monies within the range of $100 million to $94,000,000 due to opt outs, the possible 15% hard cap limiting factor would not apply. At $94 million, total Counsel Fees of $14,654,401 would then represent a 15.59% return to Class Counsel and Quebec Class Counsel.

[51] Under this possible regime for Class Counsel Fees, if the opt outs were to exceed $6,000,000 (i.e., the recovery for the classes fell below $94 million) it was mooted in the exchanges with the Court during submissions that an adjusted limiting factor might then apply. The Class Counsel fees would be reduced by a percentage, say perhaps10% hypothetically, times the amount of the shortfall in recovery below $94 million.

[52] For example, suppose only $90 million were to be recovered after the impact of opt outs. Then under this hypothetical regime the Class Counsel Fees of $12,654,401 (after payment to Quebec Counsel of $2,000,000) would be decreased by $4,000,000 ($94,000,000 minus $90,000,000), times 10% = $400,000, leaving an amount of $12,254,401 as Class Counsel Fees. In the example, the total Class Counsel Fees of $14,254,401 would then be 15.84% of the amount recovered, $90 million. However, Class Counsel would also propose that their fees should never be allowed to fall below a given figure, say, $13,500,000.

[53] As I have said, s. 18.1 of the Agreement serves the function of calculating Class Counsel Fees, subject to Court approval. There is an explicit cap in the formula of about $15 million for Class Counsel Fees given the overall ceiling of $18 million for Administration Expenses and Class Counsel Fees. This is arguably appropriate, fair and reasonable. But it is based upon the underlying premise of an actual recovery of $100 million.

[54] There is, however, also an implicit floor in respect of Class Counsel Fees through the s. 18.1 regime. That is, the Class Counsel Fees would always amount to about $15 million, no matter what the actual recovery is through the settlement after possible opt outs, so long as a settlement survives (i.e. the Agreement is not terminated because the Opt Out Threshold is exceeded and the Settling Defendants elect for termination).

The Law

[55] A solicitor and a representative party may enter into a written agreement providing for the payment of fees and disbursements only in the event of success in the class proceeding, that is, on a contingency basis.

[56] Subsection 33(2) of the *CPA* defines success in a class proceeding to include a settlement that benefits one or more class members.

[57] The contingency agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds is set forth above. Each contingency agreement states that counsel fees shall be

"15% of the settlement funds[.]" Class Counsel state that the contingency agreements with B.C. counsel are to be read the same way.

[58] The *CPA* has the following three principal goals:

(a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

(b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and

(c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

(a)

See generally *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27-29.

[59] The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the *CPA*:

> This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier – except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

[60] A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

> Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

[61] If individuals are to have access to capable and effective legal representation, an incentive must be provided for counsel to act for plaintiffs and class members who would not otherwise have the means to retain counsel. In support of this incentive, the *CPA* and the courts have provided the rationale and the means for premium fees to be paid to counsel who are willing to act for class members and who seek payment only in the event of success. Winkler J. has observed:

> In furtherance of the intent of the legislation--that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue it diligently in circumstances where they may never be remunerated for their efforts--it is necessary to reward the successful resolution with a reasonable multiplier of the base fee. Serwaczek, supra, at 399. See also Gagne, supra, at 422-423 and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.).

[62] Courts must be cognizant of many problematic factors, including: whether legal fees are based on the benefits actually received by class members and are not illusory; whether fees awarded to class counsel are proportionate to what class counsel actually accomplish for the benefit of the class members; whether the proposed settlement is reversionary with repayment to the defendant of unclaimed monies such as to potentially reduce the claimed settlement; whether the defendant agrees to pay class counsel's fees or purports to set their fees; and the expectations of class counsel and the representative plaintiffs as reflected in any fee agreement.

[63] I turn now to a further consideration of the structure of the proposed settlement before the Court.

[64] There is explicit expert economic evidence from Dr. Thomas Ross that the damage suffered by the class members is in the range of $103,000,000 to $138,000,000. The settlement is based on a total value of $140,676,928 (including interest) and a total payable to the Administrator of about $100,000,000 after Settlement Credits.

[65] Significantly, the settlements have no reversionary aspect for unclaimed monies. That is, no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed *cy-prés*.

[66] The negotiations underlying the settlement of the class actions at hand were long and adversarial and involved mediation.

[67] Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of the fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

See generally *Serwaczek, supra,* at 393; *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 at 376 (Gen. Div.); *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 at paras. 44-89 (S.C.).

[68] The classes in the class actions at hand are comprised of three groups: Direct Purchasers numbering in the thousands, Intermediate Purchasers numbering in the tens of thousands and Consumers numbering in the millions.

[69] The legal issues have proven to be complicated and challenging. The litigation approach was designed to maximize recovery for the classes by first quantifying the overcharges on all

Canadian Vitamin sales and, thereafter, to distributing the amount recovered under court supervision.

[70] Factual complexities arose because of the global nature of the alleged conspiracies among major corporations and some individuals. The carriage action involved a novel situation at the time for a Canadian court. The challenges to the jurisdiction of the Ontario Court and the need to attend outside of Canada for cross-examinations added cost and expenses, as did the attempts of some of the Defendants to block the plaintiffs' from gathering evidence in the United States.

[71] When fixing class counsel fees after a settlement is reached, the Court should look at the matter not only from the present perspective of the conclusion but should also be mindful of the challenges and risks that confronted class counsel at the outset and over the course of the action. The risks involved in prosecuting the class action should be assessed as they existed when the litigation commenced and as it continued. Risk ought not to be assessed with the benefit of hindsight. See *Gagne*, *supra*, at 423, Goudge J.A.; *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 at 311 (Gen. Div.).

[72] In addition to the traditional analysis which addresses litigation risk, the Court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable. *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at 293, 295 (S.C.J.).

[73] Some of the risks affecting Class Counsel in respect of the class actions at hand included:

(a) the fact of the multiplicity of actions in Ontario (seven), British Columbia (seven) and Quebec (two);

(b) the fact of the multitude of Defendants in different jurisdictions;

(c) the possibility that certification might be denied generally, a national class might not be certified or certification might be denied in Quebec or British Columbia or Ontario (in particular, that certification for a class of consumers seemed problematical, given the decision in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, and if certification was denied in one of the provinces, the Canada-wide approach to damages would have been problematical;

(d) the possibility the actions, or some of them, might be dismissed at a trial of the common issues;

(e) the possibility that actual recovery might be much smaller than that seen through the settlement;

(f) the chance that the value of counsels' time expended might be disproportionate to the amount involved;

(g) the possibility the litigation might be delayed, resulting in any recovery being postponed for a significant period of time.;

(h) the possibility of liability for wasted significant out-of-pocket disbursements (including for expert reports);

(i) the possibility that some of the Non-Settling Defendants could object to the settlement because of the form of the proposed bar order;

(j) the possibility that objectors might persuade the court not to approve the settlement;

(k) the possibility the settlement may not be approved in British Columbia and Quebec giving some of the Settling Defendants the right to terminate the Amended Settlement Agreement; and

(l) the possibility the Opt Out Threshold may be exceeded and the settlement thereby declared null and void.

[74] Class Counsel assumed significant risk in undertaking the class actions at hand. At the time the actions were commenced, price fixing civil litigation was novel in Canada (although the American experience served as a beacon of possibility for Canadian class action counsel). During the course of this litigation, other price-fixing actions have been defended in Ontario. There has been a refusal to certify an action brought on behalf of consumers that alleged the defendant sought to maintain prices of various audio-visual products in breach of Canadian competition laws. *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (S.C.J.). The Ontario Court of Appeal declined to certify an action brought on behalf of a group of consumers who alleged that manufacturers conspired to fix the price of iron oxide. *Chadha v. Bayer Inc., supra.*

[75] Risks continue even if the settlements are approved in all three Courts. The "blow out" provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded.

[76] Although the expert economic evidence applied in respect of all of the class actions, it was necessary to draw separate motion material seeking certification in each of the actions because the factual underpinnings for each were different.

[77] There are about 21 firms defending in Ontario and 15 firms in British Columbia. In the context of settlement negotiations, it was necessary to deal with many of these firms.

[78] The interests of each of the Defendants differed depending upon the Vitamin involved. For example, the "Degussa" Defendants settled the Niacin Actions but refused to settle the Methionine Actions.

[79] The definition of class in Ontario includes Quebec corporations but not individuals. The considered view is that the class action legislation in Quebec in 1999 only allowed class actions for the benefit of individuals: Book IX, C.C.P. That is, corporations could not then be members of any Quebec class action. Consequently, the definition of the class in Ontario includes Quebec corporations. For this reason, and also because of the need to deal with Quebec Counsel, Class Counsel was expanded to include Desmeules.

[80] Moreover, it was necessary to have negotiations that were really on two planes: first, with some of the Defendants and concurrently with Quebec Counsel and, then, with other Defendants.

[81] When the carriage motion was decided in December, 2000, it was the first carriage motion in Ontario. Six separate groups initially sought carriage of the Vitamins class actions. Ultimately, the Court gave carriage to Strosberg and Siskinds.

[82] In Quebec, similar jockeying went on. Initially, there was a dispute between Desmeules and the other Quebec law firms about who would have carriage of which Vitamin action in Quebec. Ultimately, all plaintiffs' counsel agreed to cooperate, but this took substantial time and effort on Class Counsel's part.

[83] Mr. Perry Borden Q.C. was one of the counsel in Ontario seeking carriage of the Vitamins class actions on behalf of retail purchasers or individual consumers. The affidavit of Ms. Patricia A. Speight of the Strosberg law firm, dated February 28, 2005, sets forth the history of the Borden court proceedings. Although other potential plaintiffs ceased their involvement after this Court's decision in respect of the carriage motion in favour of the present Class Counsel and consequential order dated December 4, 2000 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594, *supra*), Mr. Borden's clients did not.

[84] Mr. Borden has represented a series of persons seeking to commence a class action on behalf of retail purchasers. The putative representative plaintiff Horvath, represented by Mr. Borden, initially appealed the carriage order to the Court of Appeal. She abandoned her appeal on a without costs basis and Class Counsel state they anticipated that there would be no further proceedings.

[85] However, Mr. Borden then subsequently appeared on behalf of other individuals, being Messrs. Curran, Webster, Nightingale and Soderstrom, seeking to commence a new class action relating to retail purchasers. The motion for leave to commence a new action was dismissed by this Court September 14, 2001 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche*, [2001] O.J.

No. 3682) and the appeal of this order was quashed by the Court of Appeal May 14, 2002 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 2010).

[86] Leave to appeal was also sought by Mr. Borden in Divisional Court with several appearances in the fall of 2002, and a lengthy saga involving a multitude of proceedings, as set forth in Ms. Speight's affidavit, ensued, which proceedings are as yet incomplete.

[87] Class Counsel say that they have expended in excess of $250,000 in the value of their time in dealing with Mr. Borden's attempts to seek leave on behalf of his clients to commence actions on behalf of retail purchasers. I agree with the submission of Class Counsel that they could not reasonably have foreseen these continuing collateral attacks on their authority to prosecute the class actions following upon this Court's decision in respect of the carriage motion December 4, 2000.

[88] The following are reportedly the outstanding costs orders in favour of the plaintiffs relating to the interventions of Mr. Borden's clients:

(a) $10,000, inclusive of GST and disbursements, plus interest payable at the rate of 6% per annum, as a result of the dismissal of the leave application on September 14, 2001;

(b) $10,000 as a result of the Court of Appeal quashing the appeal of the September 14, 2001 order on May 14, 2002;

(c) $3,500 as a result of the November 4, 2002 order dismissing the motion for leave to appeal the September 14, 2001 order to the Divisional Court;

(d) $17,500 plus disbursements of $1,637.01, plus GST as a result of the November 7, 2003 decision of Madam Justice McFarland; and

(e) an amount, estimated by Class Counsel to be about $25,000, to be determined at a hearing scheduled for April 8, 2005, as a result of the August 21, 2003 order by the Divisional Court dismissing the motion for an order setting aside the November 4, 2002 order.

[89] On August 18, 2003, Mr. Curran paid $20,000 into court in partial satisfaction of the costs awarded against him. These monies have not yet been paid out.

[90] On April 8, 2005, the Divisional Court is scheduled to hear and determine the issue of costs as a result of its August 21, 2003 order. That is, the court will decide whether or not Mr. Borden's client and/or Mr. Borden must pay the costs of the appeal. Class Counsel estimate that the Divisional Court will fix costs in an amount of about $25,000.

[91] Mr. Borden commenced yet another new, pending application February 23, 2005 on behalf of Mr. Lars Soderstrom seeking to advance a claim on the basis of an alleged infringement of the *Canadian Charter of Rights and Freedoms.*

[92] The above proceedings relating to Mr. Borden's clients have been collectively referred to herein as "the Borden court proceedings." In my view, given the very exceptional circumstances of these continuing proceedings, it is reasonable that any recovery of costs in respect of the Borden court proceedings by Class Counsel should fairly go to Class Counsel, as requested, without reduction to the quantum of fees otherwise awarded to Class Counsel by the motion at hand in achieving a settlement.

[93] Class Counsel and The Cuneo Law Group obtained an order from Hogan J. granting the plaintiffs leave to intervene in the Niacin litigation pending in the District of Columbia (*In re Vitamins Antitrust Litigation,* 2001 WL 34088808). However, Hogan J. deferred his ruling on whether to allow Class Counsel to participate in the deposition and have access to documentary productions until authorized by the Ontario Court.

[94] Some Defendants then sought an order preventing or enjoining plaintiffs' access to the Niacin productions and depositions in the U.S. No such order had ever before been argued. By reasons released on January 26, 2001, this Court dismissed the motion, stating that there was "no consequential unfairness to the defendants" if the plaintiffs were given the access they sought to documents and depositions (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.,* [2001] O.J. No. 237).

[95] Some of the Defendants challenged the jurisdiction of the Ontario Court in some of the Ontario Actions. Counsel from Siskinds and Camp attended in the United States and Europe for the purposes of cross-examinations. On January 28, 2002, this Court dismissed the jurisdiction motions (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2002] O.J. No. 298). This Court held that it had jurisdiction over the Ontario Actions and that Ontario was the *forum conveniens*.

[96] The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable. Total recovery or the nature of payment is not the only criterion on which to judge the settlement. A court should also give weight to the relative ease or difficulty of access to the benefits achieved through the settlement for class members. *Parsons, supra,* at 289; *Gagne, supra,* at 424; *Roberts v. Morana* (1998), 37 O.R. (3d) 333 (Gen Div.) at 343, aff'd (2000), 49 O.R. (3d) 157 (C.A.).

[97] Class Counsel estimate that it would cost another $3,000,000 to prosecute the class actions to trial if the settlements were not approved. In such event, it is estimated it would take another three to five years before the class members might gain any compensation through a favourable result at trial.

[98] The overall settlement is based upon total damages of $140,676,928 (inclusive of interest). It is estimated the Administrator will have about $100,000,000 (after deduction for Settlement Credits) in its hands by the time of distribution.

[99] The amount of this settlement is the largest in Canadian legal history for price-fixing. It provides an expeditious claims process for a large number of Direct Purchasers who will receive the amount the Administrator calculates as due, unless a Direct Purchaser specifically disagrees.

[100] Class Counsel proposes a plan of distribution which fairly deals with all members of the classes. The constituent Funds achieve this result. The *cy-près* distribution protocols and governing rules developed are precise and detailed. The precise formulation of this settlement "demonstrated ingenuity and imagination" in the face of "real and substantial risk." *Roberts*, supra, at 343.

[101] The cost of prosecuting an individual action would be beyond the financial capability of most class members except for substantial Direct Purchasers. The disposition of these class actions through the overall settlement achieved represents an exemplary example of the public policy objective underlying the *CPA* of deterring wrongful conduct and achieving behaviour modification in the public interest. Put otherwise, public regulation by government authorities is often ineffectual. By encouraging the private sector of class action attorneys to police such behaviour through civil class actions (with the inducement of sizeable legal fees when successful) the realization of the public policy objectives of the regulators is enhanced. Wrongful anti-competitive behaviour through price-fixing in the marketplace is discouraged. Meritorious claims that would otherwise go uncompensated are effectively dealt with.

[102] IDRC, now known as Micronutrient Initiative, is a Crown corporation. It was the only Intermediate Purchaser which commenced an individual court action. IDRC contracted with Accucaps, a Direct Purchaser, to put vitamins into capsules. IDRC then distributed these vitamin capsules, without charge, through UNICEF to persons in Third World countries. IDRC was not a typical Intermediate Purchaser because it was involved in a unique, non-profit situation.

[103] The recovery of at least $11,400,000 for each of the Intermediate Purchaser Fund (see Schedule F to the Agreement) and the Consumer Fund (Schedule G to the Agreement) compensates these class members by means of a *cy-près* distribution.

[104] There are two factors specifically enumerated in the *CPA* to determine a multiplier. The first factor, specified under clause 33(7)(b), is the risk which class counsel "incurred in undertaking and continuing the proceeding." The second factor, set out under subsection 33(9), is "the manner in which the solicitor conducted the proceeding." Also to be considered is the degree of success achieved by counsel, either at trial or through settlement of the proceeding.

[105] In *Gagne* at 422 to 424, Goudge J.A. reasoned that a multiplier is a necessary ingredient if the *CPA* is to successfully achieve its goal of providing access to justice for claimants otherwise excluded.

[106] In *Gagne*, the Court concluded that the determination of a multiplier is an art, not a science. All relevant factors must be weighed in order to determine an appropriate multiplier. Goudge J.A. said at 425:

> In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

[107] Using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours." *In Re Warner Communications Securities Litigation*, 618 F.Supp. 735 at 747 (D.C.N.Y. 198); see also *Endean, supra* at para. 74.

[108] Class Counsel intend to continue to prosecute the Methionine Actions in respect of "Non-Settling Defendants." The existing Methionine Fund of $6,000,000 created as the result of a Settling Defendant is to be held for the benefit of the Settlement Class Members who are Direct Purchasers or Distributors of Methionine and shall be paid as the Court directs on later motions brought by Class Counsel.

[109] Class Counsel have advised that they may, at some future time, ask this Court to approve an amendment to the fee agreement with the plaintiffs in the Methionine Actions to provide, among other things, that if the plaintiffs in the continuing Methionine Actions become liable for costs, that the costs will be paid out of the Methionine Fund.

[110] As I have discussed above, I agree that Class Counsel have achieved remarkable results and a successful overall settlement. They are experienced, imaginative, thorough and diligent counsel. However, they embarked upon this venture on the basis of contingency agreements providing for, *inter alia*, 15% of the recovery. Class Counsel throughout the submissions and in their factum have emphasized that their claim to fees is justified in large part on the basis of the significant risk as to whether they might be successful ultimately and what might be recovered. With respect, in my view, that risk must properly continue in the determination of their ultimate fees. The risk of a shortfall in the anticipated recovery having an adverse impact upon fees (because of the 15% contingency fee arrangement) should not be shifted to class members in the event there are opt outs from the Settling Plaintiff classes.

[111] Class Counsel calculate their requested fees in the chart they prepared as part of their factum by emphasizing that they would receive not more than what they agreed upon with their clients through the contingency agreements, i.e. 15% of the recovery. Yet the regime in s. 18.1 is drafted to guarantee them about $15 million in Class Counsel Fees so long as the Agreement is not terminated due to the Opt Out Threshold being exceeded and Settling Defendants then making the election to terminate the Agreement. In effect, the s.18.1 regime transfers the risk of opt outs reducing the recovery below $100 million (but not being sufficient to trigger the termination) to the class members and means that Class Counsel Fees might rise beyond 15% of the actual recovery.

[112] It was argued in the course of submissions that the implicit multiplier of about 2.26 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The $15 million sought for fees is reasonable *if the actual recovery is $100 million*. In my view, the agreed-upon standard for fees of 15% of actual recovery as set forth in the bargained-for contingency agreements governing the Ontario actions must properly set a ceiling. Moreover, it is an appropriate ceiling. The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

[113] In my view, the Class Counsel Fees should be limited to being not greater than 15% of the actual recovery through the overall settlement. If the actual recovery is more than $100 million, counsel may receive slightly more than $15 million in Class Counsel Fees (but subject to the agreed-upon cap with the Settling Defendants in s. 18.1 (2) of $18 million (plus $75,000 in respect of the trailing, additional settlement agreements), less Administration Expenses, disbursements and applicable taxes). If their estimate of a recovery of $100 million proves accurate they will receive about $15 million. If there are opt outs such that the actual recovery falls below $100 million then they will receive less than $15 million in fees. Moreover, there should not be payment of fees until the actual recovery is known with certainty and precision.

[114] Taking all factors into consideration, in my view, and I so find, Class Counsel Fees to a ceiling of 15% of the actual recovered amount for the class members (i.e. *after* the impact of any opt outs) is fair and reasonable. For the reasons given, it is stipulated that the s.18.1 regime is to operate to accord with these Reasons for Decision. Considering all relevant factors, in my view, and I so find, the quantum of fair and reasonable Class Counsel Fees through the overall settlement at hand is fixed with a ceiling of 15% of the settlement funds or monetary award actually recovered.

DISPOSITION

[115] For the reasons given, subject to the Agreement not being terminated in accordance with its provisions, but rather coming into full force and effect, an order shall issue that accords with these Reasons for Decision:

(1) declaring that an amount up to a ceiling of $18,075,000, calculated in accordance with subparagraph (2), for Class Counsel Fees (plus qualifying disbursements and applicable taxes) and Administration Expenses relating to the overall settlement of the subject class actions is fair and reasonable;

(2) declaring that Class Counsel Fees shall be calculated and paid, after deduction for the payment of qualifying disbursements, applicable taxes and Administration Expenses, on the basis of being limited to 15 % of the actual recovery of monies for class members through the overall settlement; and

(3) declaring that it is fair and reasonable that Class Counsel are entitled to all costs and interest, if any, recovered in the Borden court proceedings and the methionine jurisdiction motion, in addition to the amount received under subparagraph (1) as calculated under subparagraph (2).

_____

CUMMING J.

Released: March 23, 2005

COURT FILE NO.: 00-CV-202080CP
DATE: 20050323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F.HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-LONZA CANADA INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CANADA LIMITED/LIMITEE and TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Biotin)

COURT FILE NO.: 00-CV-200045CP

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., OGER AWAD and MARY HELEN AWAD

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A., AVENTIS ANIMAL NUTRITION S.A., RHÔNE-POULENC CANADA INC., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN

Defendants

Proceeding under the *Class Proceedings Act, 1992*

(Bulk Vitamins
COURT FILE NO.: 00-CV-198647CP

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN l. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., NOVUS INTERNATIONAL, INC. and AVENTIS ANIMAL NUTRITION S.A.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Methionine)

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:

VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Niacin)

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID

Plaintiffs

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

Proceedings under the *class Proceedings Act*, 1992
(Supplemental Choline Chloride)

COURT FILE NO.: 42267CP

B E T W E E N:

GLEN FORD

Plaintiff

- and -

OVUS INTERNATIONAL (CANADA) INC.

Defendant

Proceeding under the *Class Proceedings Act*, 1992
(Supplemental Ontario Methionine)

REASONS FOR DECISION

CUMMING J.

Released: March 23, 2005

Note: Amended Reasons released April 5, 2005

Tab 32

Windisman v. Toronto College Park Ltd.

Most Negative Treatment: Not followed
Most Recent Not followed: Authorson (Litigation Guardian of) v. Canada (Attorney General) | 2006 CarswellOnt 5903, 277 D.L.R. (4th) 129, 57 C.C.P.B. 249, 152 A.C.W.S. (3d) 34, 36 C.P.C. (6th) 90, 36 C.P.C. (6th) 92 | (Ont. S.C.J., Sep 28, 2006)

1996 CarswellOnt 2970
Ontario Court of Justice (General Division)

Windisman v. Toronto College Park Ltd.

1996 CarswellOnt 2970, [1996] O.J. No. 2897, 10 O.T.C. 375, 3 C.P.C. (4th) 369, 65 A.C.W.S. (3d) 207

Anita Windisaman, on behalf of herself for the Plaintiff and all others similarly situated (Plaintiff) and Toronto College Park Ltd. (Defendant); Toronto College Park Ltd. (Plaintiff by Counterclaim) and Anita Windisman, on behalf of herself and all others similarly situated, Metropolitan Condominium Corporation No. 901 and Metropolitan Toronto Condominium Corporation No. 907 (Defendants to the Counterclaim)

Sharpe J.

Heard: June 27 and 28, 1996
Judgment: August 26, 1996
Docket: Doc. 93-CQ-38966

Proceedings: Additional reasons to (1996), 1 R.P.R. (3d) 119 (Ont. Gen. Div.)

Counsel: *J. Gardner Hodder* and *Andrew Frei*, for defendants to the counterclaim.
Jonathan H. Fine and *Jack D. Pappalardo*, for defendant/ plaintiff by counterclaim.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.h Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.G Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.16 General considerations on taxation or assessment
XXIV.16.h Miscellaneous

Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iv Contingency fees
VIII.5.a.iv.B Statutory provisions
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.a Agreements for fees
VIII.5.a.iv Contingency fees
VIII.5.a.iv.C Fair and reasonable requirement
Real property
X Condominiums
X.7 Agreement of purchase and sale
X.7.c Adjustments
X.7.c.ii Purchaser's right to interest on deposit
Real property
X Condominiums
X.7 Agreement of purchase and sale
X.7.c Adjustments
X.7.c.iii Miscellaneous

Headnote

Practice --- Costs — General considerations on taxation or assessment — Miscellaneous considerations

Practice — Costs — General considerations on taxation or assessment — Miscellaneous considerations — Class action — Successful plaintiff class's lawyer docketing substantial fees and hours in representing class — Complexity of matter being greatly enhanced by defendant's procedural tactics and substantive claims — Plaintiff class's claims being novel and considerably important to class members — Lawyers demonstrating skill and competence in litigation and obtaining excellent results for class members — Lawyers' fees being determined to be fair and reasonable and defendant being liable to pay them — Lawyers being entitled to multiplier to compensate for risk of taking action on contingency basis but order of solicitor and client costs not including multiplier — Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 33(7)(b), 33(8).

Practice --- Parties — Representative or class actions — General

Practice — Parties — Representative or class actions — Successful plaintiff class's lawyer docketing substantial fees and hours in representing class — Complexity of matter being greatly enhanced by defendant's procedural tactics and substantive claims — Plaintiff class's claims being novel and considerably important to class members — Lawyers demonstrating skill and competence in litigation and obtaining excellent results for class members — Lawyers' fees being determined to be fair and reasonable and defendant being liable to pay them — Lawyers being entitled to multiplier to compensate for risk of taking action on contingency basis but order of solicitor and client costs not including multiplier — Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 33(7)(b), 33(8).

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — Statutory provisions

Barristers and solicitors — Relationship with client — Fees — Agreements for fees — Contingency fees — Statutory provisions — Lawyers in class action being hired on contingency basis — Successful plaintiff class's lawyers docketing substantial fees and hours in representing class — Complexity of matter being greatly enhanced by defendant's procedural tactics and substantive claims — Plaintiff class's claims being novel and considerably important to class members — Lawyers demonstrating skill and competence in litigation and obtaining excellent results for class members — Lawyers' fees being determined to be fair and reasonable and defendant being liable to pay them — Lawyers being entitled to multiplier to compensate for risk of taking action on contingency basis but order of solicitor and client costs not including multiplier — Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 33(7)(b), 33(8).

Practice --- Costs — Persons entitled to or liable for costs — Miscellaneous issues

Practice — Costs — Persons entitled to or liable for costs — Representative plaintiff in class action — Representative plaintiff being entitled to compensation from plaintiff class for time and effort expended in litigating action because her efforts resulting in monetary success for class — Plaintiff's compensation being deducted from plaintiff class's net recovery.
Practice --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General
Practice — Costs — Particular orders as to costs — Costs on solicitor and client costs — Grounds for awarding — Defendant in class action bringing strenuous but unmeritous defence and raising numerous procedural hurdles — Defendant only being liable for party and party costs because not resorting to illegal or dishonest tactics.
The plaintiff class successfully brought a class action against the defendant, a developer who had sold condominium units to the class members. The class had made a pre-trial settlement offer, which turned out to be smaller than the amount the plaintiff class was awarded at trial, but the defendant rejected the offer. The class's lawyer undertook the action on a contingency basis pursuant to the *Class Proceedings Act, 1992* (Ont.). Following the trial decision, the plaintiff class brought a motion to determine the fees to which the plaintiff class's lawyers were entitled, the compensation to which the representative plaintiff was entitled for her time and effort expended in relation to the action, and the scale of costs to which the plaintiff class was entitled.
Held:
The motion was granted.
Pursuant to s. 33(8) of the Act, a lawyer who represents a representative party in a class action on a contingency basis is only entitled to recover a reasonable fee. In determining the reasonableness of the base fee, the following factors are to be considered: (a) the time expended by the lawyer; (b) the legal complexity of the matter; (c) the degree of responsibility assumed by the lawyer; (d) the monetary value of the matter; (e) the importance of the matter to the client; (f) the skill and competence demonstrated by the lawyer; (g) the results achieved; (h) the client's ability to pay; and (i) the client's expectation regarding the amount of the fee.
In this case, the plaintiff class's lawyers expended a substantial amount of time, which exceeded the normal amount of time expected for a complex commercial litigation. However, this expenditure was justified by the complexity of the litigation, since this was the first litigation under the Act, and the defendants raised a number of procedural hurdles and substantive arguments that considerably increased the legal costs of the proceeding. As well, the fact that this was a class action greatly increased the degree of responsibility assumed by the class's lawyers. The monetary value of the total claim ($2.6 million) was substantial, and the $5,000 claim brought by each member of the plaintiff class made the matter important to each class member. The class's lawyers demonstrated skill and competence in handling the litigation, and achieved excellent results for the plaintiff class by securing a substantial judgment. After taking all these factors into account, the fee charged by the class's lawyers was reasonable, although the number of hours docketed by the lawyers was high, and had to be reduced. A reasonable fee was $300,000, plus GST.
Under s. 33(7)(b) of the Act, the class's lawyers were entitled to a multiplier to the base fee in order to compensate them for the risk incurred in representing the plaintiff class on a contingency basis. The strenuous defence advanced by the defendant placed the lawyers at risk that they would not be paid if the plaintiff class's action did not succeed. They were entitled to be compensated for the risk inherent in litigating a case against a recalcitrant defendant. A fair and reasonable multiplier in this case would be 2.5, resulting in a fee of $750,000 plus GST.
The representative plaintiff was entitled to compensation on a quantum meruit basis for the time and effort she expended in assisting the prosecution of the action. While the Act does not specifically provide for compensation for a representative plaintiff, the purposes of the Act would be frustrated if representative plaintiffs were left out of pocket for their efforts in obtaining a benefit for the entire plaintiff class. Such compensation is permitted only if the representative plaintiff took an active and necessary part in preparing the case, and this assistance resulted in monetary success for the class. The compensation was to be deducted from the net recovery of the plaintiff class.
The plaintiff class was entitled to party and party costs up until the time it made its settlement offer, and solicitor and client costs thereafter. However, the solicitor and client costs should not include the multiplier. The multiplier's purposes, of permitting the plaintiff class and its lawyers to share in the potential recovery as a means to finance the litigation and provide incentives for class actions to proceed to court, in no way depends upon holding the defendant liable for more than the usual measure of costs. The plaintiff class was not entitled to solicitor and client costs for the period before the offer was made, even though the defendant mounted a strenuous but unmeritous defence, because the defendant had not resorted to illegal or dishonest tactics, and its conduct did not amount to an abuse of the process of the court.

Table of Authorities

Cases considered:

Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 27 R.P.R. (2d) 1, 95 D.L.R. (4th) 560, 58 O.A.C. 206 (C.A.) [leave to appeal to S.C.C. refused (1993), 101 D.L.R. (4th) vii (note), 154 N.R. 320 (note), 13 O.R. (3d) xvi (note), 63 O.A.C. 397 (note) (S.C.C.)] — *considered*

Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Gen. Div.) — *considered*

Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) — *referred to*

Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240 (U.S. S.D. Ohio 1991) — *referred to*

Foulis v. Robinson (1978), 21 O.R. (2d) 769 (C.A.) — *referred to*

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, *(*sub nom. *Nantais v. Telectronics Propriety (Canada) Ltd.)* 134 D.L.R. (4th) 470 (Gen. Div.) [leave to appeal to C.A. refused (1996), 28 O.R. (3d) 523n (C.A.)] — *considered*

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

generally*considered*

s. 32*referred to*

s. 33*referred to*

s. 33(7)(b)*referred to*

s. 33(8)*considered*

Condominium Act, R.S.O. 1990, c. C.26

s. 53(3)*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

R. 12*considered*

MOTION to determine fees to which lawyers in class action being entitled, to assess claim of representative plaintiff to compensation, and to determine scale of costs to which plaintiff class being entitled.

***Sharpe J.*:**

Ruling as to Fees and Costs

Introduction

1 In a judgment, dated February 13, 1996, I awarded the plaintiff class approximately on deposits paid pursuant to agreements to purchase condominium units, based on the *Condominium Act*, s. 53(3). The claim was in three parts. First was the appropriate rate of interest payable on deposits; second was whether interest was payable on deposits for parking and storage units; and third was whether interest was payable on a compound basis. The plaintiff class succeeded on the first two questions but not on the third. This motion is to determine the fees to which the solicitors for the plaintiff class are entitled, to deal with the claim of the plaintiff class for party and party costs against the defendant, and to settle various terms of the judgment with respect to distribution and other issues.

Issues

2

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the *Class Proceedings Act*?

2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?

3. Is the plaintiff class entitled to party and party costs and, if so, on what scale and in what amount?

4. Other terms relating to distribution and similar issues.

Analysis

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the Class Proceedings Act?

3 The solicitors for the plaintiff class undertook this action on a contingency basis. The representative plaintiff signed a contingency fee retainer form which set out the proposed basis for calculation of the solicitors' fees with reference to the applicable provisions of the *Class Proceedings Act*. The agreement indicated that fees would be based on hourly rates ranging from $75 for clerks and students to $200 for the senior solicitor and counsel. The agreement also indicated that, as the matter was being undertaken on a contingency basis, the solicitors would be asking for the application of a multiplier to the fee at the rate of 1.75. This fee agreement was modified subsequently in two respects. First, the solicitor indicated that his hourly rate had increased from $200 to $210. Second, the solicitor indicated that in light of the manner in which the action was being defended, it was his assessment that the risk of continuing had increased and that accordingly the multiplier to be sought would be at the rate of 2.5.

4 The fee agreement, as amended, was mentioned in the certification order. Accordingly, all members of the plaintiff class received notice of its terms. The *Class Proceedings Act* makes the following provision with respect to such agreements:

> 32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
>
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
>
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (4) If an agreement is not approved by the court, the court may,
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements;
>
> (b) direct a reference under the rules of court to determine the amount owing; or
>
> (c) direct that the amount owing be determined in any other manner.
>
> 33(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class member; or

(b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

(a) Base Fee

5 The material before me includes detailed dockets of the solicitors for the plaintiff class setting out, on a day-by-day basis, the work time devoted to the file. Initially, Mr. Fine, on behalf of the defendant, took the position that he should be allowed to cross-examine the solicitors on their docket entries with a view to testing the veracity of the material before me. During the course of argument, Mr. Hodder conceded that there was one error in his docket entries, reducing the number of hours by 8.3, but otherwise maintained that the entries were accurate. During the course of argument, Mr. Fine withdrew his submission that he should be entitled to cross-examine and he proceeded to argue the question of costs, fees and related issues on the basis of the material I have.

6 The dockets indicate that the solicitor on the file, Andrew Frei docketed 665.5 hours while J. Gardner Hodder, who acted as counsel, docketed 848.2 hours (after correction for error mentioned above). Junior lawyers docketed 119.7 hours, approximately 25 hours of student time were docketed and just over 200 hours of law clerk time were also docketed. On the basis of the solicitors' dockets, I have no hesitation in accepting that the hours docketed were indeed expended upon this matter.

7 The hourly rates claimed by the solicitors appear to me to be reasonable. Mr. Frei, a solicitor of eleven years experience, has charged his time at $210 per hour. In view of the written fee agreement, this rate should only apply after the date of the amending agreement. Otherwise, it is reasonable. Mr. Hodder, who subsequent to the trial on the proceeding was certified as a specialist in civil litigation, is charged at $200 per hour. The junior lawyers on the file are charged at $130 and $150 an hour and student's and clerk's time is billed at $75 per hour. The total amount claimed for fees, arrived at by multiplying the hours spent by the hourly rate is $349,372.25. The GST on this amount is $24,456.06.

8 Pursuant to s. 33(8) of *The Class Proceedings Act*, "the court shall allow only a reasonable fee" when determining the solicitor's base fee. It is common ground that in determining the reasonableness of the base fee, the usual factors are to be considered, namely:

(a) the time expended by the solicitor;

(b) the legal complexity of the matters to be dealt with;

(c) the degree of responsibility assumed by the solicitor;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by the solicitor;

(g) the results achieved;

(h) the ability of the client to pay; and

(i) the client's expectation as to the amount of the fee.

(See *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.).

9 I will proceed to consider these factors in relation to the circumstances of this proceeding.

Time expended and complexity

10 While the amount of time expended by the solicitors on this file is very substantial, undoubtedly far more than one would normally expect even for comparable complex commercial litigation, the second item on the list, the legal complexity of the matters to be dealt with, explains to some considerable extent the large amount of time expended. According to counsel, this was the first Ontario class action under the 1992 *Class Proceedings Act* to reach the trial stage. Accordingly, from the very beginning, they were in uncharted procedural waters of some considerable complexity.

11 The second aspect is that the complexity of the matter was significantly enhanced by virtue of the strategy, tactics, and positions taken by the defendant. The defendant chose to fight the plaintiff class every inch of the way, raising all available procedural hurdles and raising substantive arguments of considerable ingenuity with respect to the merits of the claim. While I was not involved in the pre-trial stage, it is apparent from the material before me and from the submissions of counsel that the combination of procedural novelty and defence tactics created a situation requiring a very considerable expenditure of time on the part of the solicitors for the plaintiff class. The defendant left no stone unturned in an effort to discourage the plaintiff class from proceeding with the action and to defeat the plaintiff's claim on the merits. The defendant not only counterclaimed against the individual members of the plaintiff class on the basis of its "package deal" argument relating its final closing package, but also counterclaimed against the condominium corporations themselves. Ms. Windisman's affidavit, filed in support of this motion, states that she perceived these strategies to be intended to scare off members of the plaintiff class and it is significant that in his affidavit, Mr. Cukierman chose not to deny those allegations (although they were strenuously resisted by counsel). While in my

view, the defendant was legally entitled to take these steps and to advance these arguments, there is no doubt that the posture of the defendant throughout this proceeding considerably increased the legal costs of prosecuting the matter to completion.

12 Mr. Fine characterized the hours docketed by the solicitors for the plaintiff during argument before me as a "docketing frenzy" and urged me to drastically reduce the fee claimed. I find that the while hours claimed are on the high side and subject to some reduction, many more hours were expended than would otherwise have been recorded solely by reason of the various procedural and substantive positions taken by the defendant.

Responsibility assumed

13 With respect to the degree of responsibility assumed by the solicitors, a relevant factor is the obvious one that this was a class proceeding. While the solicitors were legally entitled to deal with the representative plaintiff, the reality of the situation was that there were over 500 members of the plaintiff class, some of whom had a lively and active interest in the prosecution of the action. There can be little doubt but that managing a matter involving this added element of complexity increases the degree of responsibility assumed by the solicitors.

Monetary value

14 The monetary value of the matters in issue was substantial if one makes reference to the total amount of the claim. As indicated, the plaintiff class succeeded in obtaining a judgment in the approximate amount of 2.6 million dollars. While the average amount for each member of the class is just under five thousand dollars, this was a class proceeding and the relevant value to consider with respect to costs is the total amount of the claim.

Importance to Client

15 Similar considerations apply to determining the importance of the matter to the client. These claims would, in all likelihood, not have been adjudicated had it not been for the availability of the class action. In light of the strenuous resistance to the claims on the part of the defendant, it is virtually inconceivable to imagine how an individual plaintiff with a claim of five thousand dollars could have contemplated prosecuting the action. However, a claim of five thousand dollars is a significant one to almost any citizen and, in my view, as this is a class action, it is appropriate to look at the importance of the issues to the plaintiff class as a whole. From that standpoint, the matter was one of some considerable significance to over 500 individuals.

Skill and competence

16 The solicitors demonstrated skill and competence in the manner in which the action was prosecuted. While Mr. Fine submitted during argument that the solicitors had shown a lack of experience and care in the manner in which this action was prosecuted, it is my view that the facts do not bear out that submission. The case was considerably expedited by virtue of a summary judgment motion which, although unsuccessful, had the beneficial effect of narrowing the issues requiring evidence. The plaintiff class served a notice to admit and, with the assistance of Winkler J. who had heard the summary judgment motion, was able to streamline the trial action to some considerable extent. An agreed statement of facts ensued following the summary judgment motion, notice to admit and intervention of Winkler J.A trial that could have taken much longer was heard in approximately six days. Counsel for the plaintiff class relied largely upon a detailed written argument which admirably set out the issues and applicable authorities and significantly shortened the time taken for argument. In fairness to the defendant, it should be noted that the agreed statement of facts required the defendant's cooperation. However, this saving of court time came about as a direct result of the efforts of the solicitors for the plaintiff class and is indicative of skill and competence which benefited the court as well as the parties.

Results achieved

17 The results achieved were excellent. While the plaintiff class did not succeed in its argument that interest should be paid on a compound basis, it did succeed in all other respects and, as indicated, secured a very substantial judgment.

Ability to pay and client's expectation

18 The written retainer agreement indicates that the client did have some indication as to the amount of the fee to be charged and the evidence of Ms. Windisman is that she was kept very current with respect to the progress of the litigation and the charges she might expect as this matter proceeded. On this motion, Ms. Windisman testified and indicated on behalf of the plaintiff class that she thought the amounts claimed by the solicitors to be reasonable.

Conclusion

19 Taking all of these factors into account, I conclude as follows. In my view, the number of hours docketed is high and there must be some reduction. However, as I have indicated, there are a number of reasons for substantial expenditure of time beyond the control of the solicitors and, in light of those reasons, it would be unfair to the solicitors to reduce by any substantial extent the base fee which they claim. In my view, a reasonable fee, taking all of these factors into account, is $300,000 plus GST.

(b) Multiplier

20 The *Class Proceedings Act* makes a clear break with the past in authorizing contingency arrangements. The rationale for such an arrangement is fully explained in the report of the Ontario Law Reform Commission which led to the enactment of the *Class Proceedings Act*. As the example of this action demonstrates, the claim of an individual plaintiff may be significant but not sufficient to warrant that individual undertaking civil proceedings. The very purpose of class action procedure is to enhance access to the courts by individuals with such claims. As the Ontario Law Reform Commission Report indicates, the purpose of contingency arrangements permitting solicitors to undertake such actions on the basis that they are only to be paid if successful is to provide the necessary economic incentives to ensure that the goal of providing access to justice will be fulfilled. In *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.), Brockenshire, J. stated as follows:

> I am here dealing with a contingency fee arrangement, which is a new concept in Ontario. Mr. Justice Cory, in an unreported motion decision of the Supreme Court of Canada dated August 8, 1994 in *Coronation Insurance Company v. Florence*, had this to say regarding contingency fees:
>
> > The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. For many years it has been rightly observed that only the very rich and those who qualify for Legal Aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. .... Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the court's facilities in civil matters for the wealthy and powerful.

21 In view of the Act and this purpose, it seems to me that the solicitors for the plaintiff class are clearly entitled to a multiplier. In determining the appropriate multiplier, reference must be had to the degree of risk undertaken: s. 33(7)(b). At the start, this did not appear to be a particularly risky proceeding. As initially framed, the claim was only for a higher rate of interest, and did not include the claims for interest on the parking and storage unit deposits or the claim for compound interest. The plaintiff class had the benefit of the decision of the Ontario Court of Appeal in the *Ackland* [*v. Yonge-Esplanade Enterprises Ltd.* (1992), 10 O.R. (3d) 97 (C.A.)] case in its favour. However, the risk of continuing the action significantly increased at each step of the way by virtue of the strenuous defence advanced by the defendant. While the defendant conceded the point decided in *Ackland*, it insisted on presenting, both by way of defence and by way of counterclaim against individual members of the class, its elaborately conceived "closing package" argument. It became clear that nothing short of a final judgment disposing of the issues would persuade the defendant to pay *Ackland* interest and the risk of proceeding with the litigation was thereby enhanced. While I found the "closing package" argument to be without merit, it was hardly something the solicitors for the plaintiff could ignore. In my view, they are entitled to be compensated for the risk inherent in litigating a case against a recalcitrant defendant.

The claim for interest on parking and storage deposits clearly involved a higher degree of risk. While I found this claim to be well-founded, there were no prior decisions on the point and, again, this claim was strenuously resisted.

22 In my view, in light of the nature of the claims advanced and the positions taken by the defendant from both a procedural and substantive perspective, the solicitors for the plaintiff are entitled to a significant multiplier to compensate them for the risk of prosecuting this action. I find that the multiplier claimed, namely, 2.5, is appropriate. This would result in a fee of $750,000 which, in my view, is "fair and reasonable" within the terms of s. 33(7)(b) for the risk incurred in undertaking and continuing this proceeding.

(c) Disbursements

23 I am satisfied that the solicitors also incurred disbursements in the amount claimed, namely, $10,641.69, although that amount is to be reduced by $132 paid to file the Notice of Cross- Appeal, for a net claim of $10,509.69. This amount includes disbursements incurred by the plaintiff, Anita Windisman, in the amount of $541.28 which, in my view, is properly chargeable against the plaintiff class.

2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?

24 The solicitors also claim, as a component of their fees, $13,275 as compensation to Anita Windisman for the time and effort she expended in relation to this action.

25 At the solicitors' suggestion, Anita Windisman recorded her time and docket type entries indicating the manner in which her time was expended were submitted to me. A total of 81.2 hours were docketed and Ms. Windisman estimates her unrecorded time at a further 25 hours. Compensation is claimed at $125 per hour.

26 It is submitted on behalf of Ms. Windisman that proceedings of this nature may involve a very considerable expenditure of time and effort on the part of the representative plaintiff and that the very purpose of the *Class Proceedings Act* could be frustrated if representative plaintiffs are, in effect, left out of pocket at the end of the day.

27 Is there a basis in law for this claim? The *Class Proceedings Act* makes no reference to compensation for the representative plaintiff, and the issue appears not to have been considered by the Ontario Law Reform Commission in its very detailed report. In the United States, some courts have been prepared to make "incentive awards" to the class representative which have the dual function of encouraging class actions and compensating representative plaintiffs for their effort and for having assumed risks during the course of the litigation: see Dickerson, *Class Actions: The Law of the 50 States*, para. 2.02[5]; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (U.S. S.D. Ohio 1991). Commentators have suggested that such awards are justified, but only in special circumstances:

> ... such awards should only be made when the court supervising the award concludes, after taking all factors into account, that such an award is appropriate because of the special circumstances of the individual case. Awards should not be made as a matter of course. They should be granted only when the court finds unusual factors such as that the named plaintiff made an unusual contribution to the case (e.g. particular expertise or extraordinary time commitments), or that it was unlikely that other plaintiffs would have brought or continued the class action. Courts should also take into account whether there was unusual personal risk and whether the statutory scheme suggests that Congress intended to encourage class actions.

(The Report of the Commission on Professional Responsibility, Association of the Bar of the City of New York, "Financial Arrangements in Class Actions, and the Code of Professional Responsibility" 20 Fordham Urb. L.J. 831 (1993); see also Solovy, "The Head of The Class" (1990) vol 12, no. 51 National Law Journal 13.)

28 Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by

virtue of the representative plaintiffs effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. The evidence here is that Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

29 On the other hand, I find that the amount claimed by way of compensation for Ms. Windisman at the rate of $125 per hour is excessive. It bears no relation to Ms. Windisman's usual rate of compensation. In my view, the rate should be purely compensatory and, in that light, a rate of $40 per hour seems appropriate. There should also be a modest reduction in the time to exclude matters not strictly necessary to the prosecution of the action, such as dealing with the media after the judgment was rendered. For the very considerable amount of time and effort Ms. Windisman devoted to this matter, I would award her a total compensation of $4,000 which amount is to be deducted from the net recovery to the plaintiff class.

3. Is the plaintiff class entitled to party and party costs and, if so, on what scale and in what amount?

(a) Entitlement

30 In my view, there is no reason why the plaintiff class, as the successful party, should not be awarded party and party costs against the defendant. Such awards are clearly contemplated by the *Class Proceedings Act* and by Rule 12.

(b) Scale

31 The plaintiff class relies on an offer to settle dated May 10, 1995 in which the plaintiff class offered to settle all issues for the amount of the interest differential claim, namely, $590,054.08. It is undisputable that the plaintiff class did significantly better than the offer. In my view, the ordinary consequences should follow. There is nothing in the Rules of Court or Act to exclude this possibility. Reference was made in argument to the reservations in the Ontario Law Reform Commission Report as to the application of the payment into court and offer to settle rules. As I read the Ontario Law Reform Commission Report, its concern was that defendants might take unfair advantage of the plaintiff class if there were not some judicial scrutiny. Those concerns had no application to offers made by plaintiffs and, in any event, those recommendations of the commission were not adopted.

32 The material submitted by the plaintiff class indicates that approximately two thirds of the hours devoted to this matter were expended prior to the date of the offer to settle. The offer to settle was served very shortly after the certification order was made. The plaintiff class takes the position that it could not have served an offer any earlier as there would be no basis upon which the offer could be made or accepted absent a court order certifying the class as appropriate. However, Mr. Hodder did not go so far as to suggest that this factor was itself sufficient to warrant an order of solicitor and client costs effective at a date earlier than the offer. He did, however, suggest that the court should take into account the conduct of the defendant and that the combined effect of the defendant's conduct in this proceeding and the fact that an offer was made at the earliest possible opportunity was sufficient to justify an award of solicitor and client costs throughout.

33 I have already reviewed the manner in which the defendant chose to defend this proceeding. The defendant chose to mount a strenuous defence using every available argument and procedural tactic. However, the defendant did not, in my view, resort to illegal or dishonest tactics, nor did the conduct of the defendant amount to an abuse of the process of the court. A strenuous but unmeritorious defence is not grounds for ordering costs on a solicitor and client scale: *Foulis v. Robinson* (1979), 21 O.R. (2d) 769 (C.A.). The positions taken by the defendant do not, in my view, qualify as "harassment of another party by the pursuit of fruitless litigation" so as to bring the case within the principle of *Apotex Inc. v. Egis* (1991), 4 O.R. (3d) 321 (Gen. Div.) at 324. I have no doubt that many of the stratagems adopted by the defendant were designed to discourage the plaintiff class. I have already taken these tactics into account in fixing the reasonableness of the solicitor's fee which will be reflected

in the amount of party and party costs I award but, in my view, it would be wrong to go further and to impose a significant sanction of an order of solicitor and client costs throughout.

34 Accordingly, I find that the plaintiff class is entitled to be paid solicitor and client costs from the date of the offer which I fix at $100,000. The plaintiff class is entitled to party and party costs incurred prior to the date of the offer which I fix at two thirds of the $200,000 awarded as the base fee to the solicitors for that period, or $133,000. Accordingly, the plaintiff class is entitled to an award of party and party costs fixed at $233,000 plus GST and disbursements in the amount of $10,509.69.

35 Mr. Hodder submitted that any award of solicitor and client costs should include the multiplier if it is to achieve its stated purpose of giving the plaintiff class complete indemnity. In my view, this would be out of keeping with the scheme created by the *Class Proceedings Act* which provides for the multiplier and contingency arrangements with reference only to the fees chargeable to the solicitor against the plaintiff class. The rationale for a contingency fee arrangement is that the solicitor and the plaintiff class should be permitted to share in the potential recovery as a device to finance the litigation. Because the solicitor assumes the risk of not being paid, he or she is entitled to a premium. In my view, these arrangements are strictly a matter between the plaintiff class and the solicitor. As already noted, they are intended to create the incentives necessary to facilitate access to the courts and attainment of that objective in no way depends upon holding the defendant liable for more than the usual measure of costs. Moreover, I fail to see any basis for putting a defendant at greater risk with respect to costs when sued in an action brought on a contingency basis than where more usual fee arrangements are in place, a matter entirely beyond the control of the defendant.

36 Similarly, it is my view that the amount I have ordered by way of compensation to Anita Windisman for the time and effort she expended in relation to these proceedings is not a proper heading of costs awarded as against the defendant. It is conceded that there is nothing in the Act or Rules that would justify imposing those costs on the defendant and the basis for awarding those costs is that her effort benefited the class, a matter extraneous to the defendant.

4. Other terms relating to distribution and similar issues

37 It remains to settle the formal judgment and resolve certain issues regarding distribution. The parties filed written submissions in this regard but as there appear to be matters requiring argument, a further attendance before me is to be arranged to resolve those questions.

Conclusion

38 For the foregoing reasons I find as follows:

1. The solicitors for the plaintiff class are entitled to a fee of $750,000 plus GST and disbursements in the amount of $10,509.69.

2. The representative plaintiff, Anita Windisman is entitled to compensation from the fund recovered on behalf of the plaintiff class in the amount of $4,000

3. The plaintiff class is entitled to recover costs from the defendant fixed at $233,000 plus GST and disbursements in the amount of $10,509.69.

Motion granted.

Tab 33

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2006

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated,

Plaintiffs – Appellees,

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC.; SEISINT, INC.; REED ELSEVIER, INC.,

Defendants – Appellees,

v.

ADAM E. SCHULMAN,

Party-in-Interest - Appellant.

JAMES TAYLOR LEWIS GRIMMELMANN,

Amicus Supporting Appellants.

No. 14-2050

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED,

on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated,

Plaintiffs – Appellees,

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INCORPORATED; SEISINT, INCORPORATED; REED ELSEVIER, INCORPORATED,

Defendants – Appellees,

v.

MEGAN CHRISTINA AARON and the Aaron Objectors,

Party-in-Interest - Appellant.

JAMES TAYLOR LEWIS GRIMMELMANN,

Amicus Supporting Appellants.

No. 14-2101

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated,

Plaintiffs – Appellees,

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INCORPORATED; SEISINT, INCORPORATED; REED ELSEVIER, INCORPORATED,

Defendants – Appellees,

v.

SCOTT HARDWAY and the Hardway Objectors,

Party-in-Interest - Appellant.

JAMES TAYLOR LEWIS GRIMMELMANN,

Amicus Supporting Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, Senior District Judge. (3:11-cv-00754-JRS)

Argued: September 15, 2015 Decided: December 4, 2015

Before KING and HARRIS, Circuit Judges, and George J. HAZEL, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge King and Judge Hazel joined.

ARGUED: Richard Monroe Paul, III, PAUL McINNES LLP, Kansas City, Missouri, for Appellants. William Walter Wilkins, NEXSEN PRUET, Greenville, South Carolina; Joseph R. Palmore, MORRISON & FOERSTER LLP, Washington, D.C., for Appellees. **ON BRIEF**: Ashlea G. Schwarz, PAUL McINNES LLP, Kansas City, Missouri; Samuel Issacharoff, New York, New York; Thomas W. Bevan, Patrick M. Walsh, BEVAN & ASSOCIATES LPA, INC., Boston Heights, Ohio; Edwin F. Brooks, EDWIN F. BROOKS, LLC, Richmond, Virginia; Adam E. Schulman, CENTER FOR CLASS ACTION FAIRNESS, Washington, D.C., for Appellants. Michael A. Caddell, Cynthia B. Chapman, CADDELL

& CHAPMAN, Houston, Texas; Kirsten E. Small, Andrew A. Mathias, NEXSEN PRUET, Greenville, South Carolina; Leonard A. Bennett, Matthew J. Erausquin, CONSUMER LITIGATION ASSOCIATES, P.C., Newport News, Virginia; James A. Francis, David Searles, John Soumilas, FRANCIS & MAILMAN P.C., Philadelphia, Pennsylvania; Dale W. Pittman, THE LAW OFFICE OF DALE W. PITTMAN, P.C., Petersburg, Virginia; Ronald I. Raether, Jr., FARUKI, IRELAND & COX, PLL, Dayton, Ohio; David Neal Anthony, TROUTMAN SANDERS, LLP, Richmond, Virginia; Marc A. Hearron, Washington, D.C., James F. McCabe, San Francisco, California, Michael B. Miller, MORRISON & FOERSTER LLP, New York, New York, for Appellees. Daniel F. Goldstein, Matthias L. Niska, BROWN GOLDSTEIN & LEVY, LLP, Baltimore, Maryland; James Grimmelmann, Professor of Law, Francis King Carey School of Law, UNIVERSITY OF MARYLAND, Baltimore, Maryland, for Amicus Curiae.

PAMELA HARRIS, Circuit Judge:

The class action settlement at issue in this appeal is "the culmination of years of litigation and negotiations" between class counsel and the defendants, LexisNexis Risk and Information Analytics Group, Inc.; Seisint, Inc.; and Reed Elsevier Inc. (together, "Lexis"). Berry v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 3:11-CV-754, 2014 WL 4403524, at *1 (E.D. Va. Sept. 5, 2014). The dispute centers around Lexis's sale of personal data reports to debt collectors. According to the plaintiffs, Lexis has failed to provide the protections of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681, et seq., in connection with its reports. According to Lexis, its data reports do not qualify as "consumer reports" within the meaning of the FCRA, and so it is not required to comply with the Act.

After three separate lawsuits, extensive discovery, and a long series of mediation conferences, a deal was struck. Lexis would make sweeping changes to its product offerings in order to protect consumer information, and in exchange, the class members would release any statutory damages claims under the Act. The district court certified a settlement class under Rule 23(b)(2) of the Federal Rules of Civil Procedure and approved the settlement, finding that it would make Lexis "the industry leader among data aggregation companies in the protection of

customer information provided to debt collectors." Berry, 2014 WL 4403524, at *3.

Now, a group of class members claiming the right to opt out of the settlement class and pursue statutory damages individually (the "Objectors") seeks to undo that settlement.[1] We find no error in the release of the statutory damages claims as part of a Rule 23(b)(2) settlement, and no abuse of discretion in the district court's approval of the settlement agreement. Accordingly, we affirm the district court's decision in full.

I.

A.

The FCRA regulates the collection and dissemination of certain consumer data bearing on credit eligibility. Its protections are focused on the sale of "consumer reports" – communications (1) containing information related to any one of seven specific consumer characteristics (including credit standing and worthiness and other personal information), which are (2) prepared to assist buyers in making certain eligibility

[1] The Objectors consist of three separate groups of class members objecting to the settlement: the "Aaron Objectors," 20,206 members of the 23(b)(2) class; the "Hardway Objectors," another 7,289 class members; and Adam Schulman, a class member representing himself.

determinations, including credit eligibility. 15 U.S.C. § 1681a(d).

The Act imposes various obligations on "consumer reporting agencies" – companies that regularly prepare "consumer reports," 15 U.S.C. § 1681a(f) – and provides a wide panoply of protections for consumers. For example, consumer reports may be furnished only for certain uses, such as credit transactions. Id. at § 1681b(a)(3)(A). Consumers are given the right to view the information in their files, id. at § 1681g(a)(1), and if they dispute the information they find, the consumer reporting agency must conduct a reasonable investigation into the information's accuracy, id. at § 1681i(a)(1)(A). None of those protections applies, however, unless and until a "consumer report" has been issued.

Lexis is a data broker that sells an identity report called Accurint® for Collections ("Accurint"), used to locate people and assets, authenticate identities, and verify credentials. The Accurint database contains information on over 200 million people, and millions of Accurint reports are sold each year. For years, Lexis sold Accurint without complying with the FCRA, on the theory that Accurint is not a "consumer report" that triggers the Act's protections. Whether Accurint reports in fact constitute "consumer reports" under the FCRA is the crux of the parties' dispute.

B.

Class counsel and Lexis have a long history. This is the third national putative class action brought by counsel against Lexis, each alleging essentially the same thing: that Lexis violated the FCRA by selling Accurint reports without affording FCRA protections. Neither of the two prior suits resulted in any class settlement or court-ordered relief. In Graham v. LexisNexis Risk & Information Analytics Management Group, Inc., No. 3:09-cv-00655-JRS (E.D. Va. Jan. 21, 2011), the plaintiffs dismissed the claims after Lexis moved to dismiss for lack of standing. And in Adams v. LexisNexis Risk & Information Analytics Group, Inc., No. 08-4708 (D.N.J. October 28, 2010), the parties settled after the district court denied Lexis's motion for judgment on the pleadings. Over the course of these lawsuits, class counsel and Lexis negotiated numerous times, including at least nine in-person mediation conferences and many more telephone conferences.

Throughout this litigation, class counsel endeavored to prove not only that Lexis violated the FCRA, but also that it did so "willfully." That is because in addition to creating liability for actual damages sustained by an individual as a result of a violation, 15 U.S.C. § 1681o(a), the FCRA provides for statutory damages of between $100 and $1,000 for willful violations, id. at § 1681n(a), which would be available to all

class members. But willfulness is a high standard, requiring knowing or reckless disregard of the FCRA's requirements. Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 57, 69 (2007). Unless Lexis was "objectively unreasonable," id. at 69, in concluding that its Accurint reports were not "consumer reports" subject to the FCRA, then there would be no liability for statutory damages.

The Adams court's treatment of the willfulness issue, in particular, is relevant to the case we review today. Class counsel focused on the district court's refusal to dismiss the case on the pleadings because it would be "premature . . . to say that [the p]laintiff can produce no evidence to support [a willfulness] finding," No. 08-4708, 2010 WL 1931135, at *10 (D.N.J. May 12, 2010). But Lexis pointed to an Opinion Letter issued by the Federal Trade Commission in 2008 declaring that Accurint reports are not "credit reports" under the FCRA, see FTC Opinion Letter to Marc Rotenberg at 1 n.1 (July 29, 2008) ("FTC Opinion Letter" or "Opinion Letter"), and argued that it cannot be "objectively unreasonable" to adopt the view of the federal agency responsible for enforcing the FCRA. And indeed, as Lexis noted, the Adams court subsequently clarified that unless discovery showed that the FTC had reversed the view taken in its 2008 Opinion Letter, the Adams plaintiffs would have difficulty showing willfulness.

C.

This case began in 2011, when the named plaintiffs (the "Plaintiffs" or the "Class Representatives"), individuals who were the subject of Accurint reports, filed a putative class action against Lexis. The complaint alleged that Lexis violated the FCRA in three ways: by selling Accurint reports without first ensuring that buyers were purchasing the reports for uses permitted by the FCRA, refusing to allow consumers to view their Accurint reports, and refusing to investigate when consumers disputed information in Accurint reports. The Plaintiffs proposed three classes to match: an "Impermissible Use" class, including all persons listed in Accurint reports sold by Lexis; and "File Request" and "Dispute" classes, limited to consumers who interacted more directly with Lexis and were refused access to their Accurint reports or denied investigations when they filed disputes. The Plaintiffs sought both actual and statutory damages. But – as has become important to the Objectors' argument – because the FCRA does not provide expressly for an injunctive remedy in private actions, they did not seek injunctive relief.

Over a year later, after months of discovery and a series of negotiations with the aid of "three highly skilled mediators," including two federal judges, Berry, 2014 WL 4403524, at *14, the Plaintiffs and Lexis at last reached a

settlement agreement (the "Agreement"). Instead of the three classes contemplated by the Plaintiffs' complaint, the Agreement calls for just two. The first, not directly at issue here, consists of approximately 31,000 individuals who actively sought to treat Accurint reports as consumer reports under the FCRA by requesting copies or attempting to dispute information. Under the Agreement, those class members will release all potential FCRA claims against Lexis in exchange for financial compensation of approximately $300 per person. The district court's certification of that class (the "(b)(3) Class") under Federal Rule of Civil Procedure 23(b)(3) and approval of its settlement are not challenged on appeal.

The focus of this controversy is the second class, certified under Federal Rule of Civil Procedure 23(b)(2) (the "(b)(2) Class"). Much larger than the first class, the (b)(2) Class includes all individuals in the United States about whom the Accurint database contained information from November 2006 to April 2013 – roughly 200 million people.[2] And the settlement

[2] Given what is effectively a nationwide class, we must contend with the possibility that we ourselves are among the members of the (b)(2) Class. At oral argument, counsel for Lexis and for the Plaintiffs took the position that we are not class members under a fair and practical reading of the Agreement, which excludes from the class "the presiding judge in the action and his staff, and all members of their immediate family." J.A. 108. Counsel for the Objectors did not disagree and also volunteered to waive any potential conflict. While

provided the (b)(2) Class under the Agreement differs significantly from that provided the (b)(3) Class. First, unlike members of the (b)(3) Class, (b)(2) Class members retain the right to seek actual damages individually under the FCRA, though they waive any claim for statutory damages, as well as punitive damages. And second, what (b)(2) Class members receive in exchange is not monetary but purely injunctive relief – a fundamental change in the product suite that Lexis offers the debt-collection industry that "will result in a significant shift from the currently accepted industry practices." Berry, 2014 WL 4403524, at *3.

Specifically, under the Agreement, Lexis is to divide its Accurint report into two new products. The first, "Collections Decisioning," will be treated as falling within the FCRA's "consumer report" definition. This means, among other things, that Collections Decisioning reports can be used only for

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those representations may be sufficient to resolve any problem that otherwise would arise, we need not rely on them here. We agree with the view expressed in the Compendium of Selected Opinions for the Committee on Codes of Conduct that "[a] judge's inclusion as a class member in a Rule 23(b)(2) class action seeking only injunctive and declaratory relief, in which a substantial segment of the general public are also members, does not require recusal, unless the judge has an interest in the action unique from that of members of the general public included in the class." See Compendium § 3.1-6[4](d). Because any interest we may have in this litigation is common to the general public, recusal is not required.

permissible purposes under the FCRA, and so will be available only to buyers that have completed a detailed credentialing process. Consumers also will have the right to view the information in their reports, free of charge in certain circumstances, and to dispute information they believe to be inaccurate, all as provided by the FCRA.

The second suite of products, called "Contact & Locate," is intended only for the "limited purpose of finding and locating debtors or locating assets," J.A. 121, and will not include any of the "seven characteristic" information that makes a communication a "consumer report." Id. Accordingly, "Contact & Locate" is not treated as subject to the FCRA, and the Agreement stipulates that "the Contact & Locate suite of products and services do not constitute 'consumer reports' as that term is defined under the FCRA." J.A. 123. Nevertheless, consumers will be given certain FCRA-like protections in connection with Contact & Locate. For example, consumers will be able to obtain free copies of their Contact & Locate reports once each year, and they will be able to submit statements disputing the information they find.

In April 2013, the district court granted the parties' joint motion for preliminary certification of two classes for settlement purposes. The Objectors filed motions challenging certification of the (b)(2) Class and the terms of the

settlement itself. After a day-long final approval hearing at which the parties and the Objectors presented argument, the district court certified the (b)(2) Class and approved the settlement.

Certification of a settlement class under Rule 23(b)(2) was appropriate, the court ruled, because the relief sought by the class is injunctive, rather than monetary, and "indivisible" in that it "will accrue to all members of the Rule 23(b)(2) class." Berry, 2014 WL 4403524, at *11. The court dismissed the Objectors' claim that a lack of opt-out rights from the mandatory (b)(2) Class precluded certification, emphasizing that class members retained the right to sue for individualized relief in the form of actual damages and waived only non-individualized statutory damages, uniform as to all class members. Id. at *11-12.

The district court also approved the terms of the Agreement as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). According to the court, no concerns as to fairness were raised by the process leading up to the Agreement, involving "arm's-length negotiations by highly experienced counsel after full discovery was completed." Id. at *14. But most important, the court held, was the "relative strength" of the parties' claims and defenses. Id. at *15. Given the 2008 FTC Opinion Letter deeming Accurint reports outside the scope of

the FCRA, the district court found that the Objectors' prospects of recovering statutory damages for a willful violation were "speculative at best," making release of those claims in exchange for substantial injunctive relief demonstrably fair and adequate. Id.

Finally, the district court approved incentive awards of $5,000 each for the Class Representatives and granted class counsel's motion for attorneys' fees, awarding $5,333,188.21 in connection with the (b)(2) Class settlement. Id. at *15-16. The Objectors timely appealed, challenging certification of the (b)(2) Class, approval of the Agreement, and the award of attorneys' fees.

II.

The Objectors first challenge the district court's certification of the (b)(2) Class for settlement purposes. We review a district court's decision to certify a class only for "clear abuse of discretion." Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975). An error of law or clear error in finding of fact is an abuse of discretion. Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 317 (4th Cir. 2006). But short of such error, we give "substantial deference" to a district court's certification decision, recognizing that a "district court possesses greater familiarity and expertise than

a court of appeals in managing the practical problems of a class action." Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 179 (4th Cir. 2010).

A.

Under Rule 23(a) of the Federal Rules of Civil Procedure, a party seeking class certification, whether for settlement or litigation purposes, first must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Second, if the requirements of Rule 23(a) are met, then the proposed class must fit within one of the three types of classes listed in Rule 23(b). At issue here is Rule 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests

among its members." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998). Accordingly, Rule 23(b)(2) classes are "mandatory," in that "opt-out rights" for class members are deemed unnecessary and are not provided under the Rule. See id.; see also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011).

Federal circuits, including ours, have held that mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue. See Thorn, 445 F.3d at 331; Allison, 151 F.3d at 413-14. Where monetary relief predominates, Rule 23(b)(2) certification is inappropriate. Thorn, 445 F.3d at 331-32. But where monetary relief is "incidental" to injunctive or declaratory relief, Rule 23(b)(2) certification may be permissible. Allison, 151 F.3d at 415; see also Dukes, 131 S. Ct. at 2560 (discussing Allison). This rule follows from the premise underlying the mandatory nature of Rule 23(b)(2) classes: If a class action is more about individual monetary awards than it is about uniform injunctive or declaratory remedies, then the "presumption of cohesiveness" breaks down and the procedural safeguard of opt-out rights becomes necessary. Allison, 151 F.3d at 413; see Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997). And indeed, the Supreme Court clarified in Dukes that claims for individualized monetary relief – in that case, back-pay awards under Title VII

– are not "incidental" for purposes of Rule 23(b)(2) and may not be certified under that Rule. 131 S. Ct. at 2557.

B.

The Objectors' principal argument is that certification of the (b)(2) Class runs afoul of these limits. According to the Objectors, the statutory damages waived under the Agreement predominate over the injunctive relief awarded and are not of the "incidental" and non-individualized sort, see Dukes, 131 S. Ct. at 2557, 2560; Allison, 151 F.3d at 415, that may be certified under Rule 23(b)(2).[3]

We disagree. As the district court explained, this is a paradigmatic Rule 23(b)(2) case: The "meaningful, valuable injunctive relief" afforded by the Agreement is "indivisible," "benefitting all [] members" of the (b)(2) Class at once. Berry, 2014 WL 4403524, at *11. And the statutory damages claims released under the Agreement are not the kind of individualized claims that threaten class cohesion and are prohibited by Dukes. When it comes to statutory damages under the FCRA, what matters is the conduct of the defendant, Lexis – which, as the district court emphasized, "was uniform with

[3] We can assume for purposes of this opinion that a class settlement that releases damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that provides for damages. We note, however, that Lexis contests that premise, and we do not decide its validity today.

respect to each of the class members." Id. at *12. The availability of statutory damages in this case, in other words, is a simple function of Lexis's policies with respect to its Accurint reports, applicable to the entire (b)(2) Class.[4] If Lexis unreasonably failed to treat Accurint reports as "consumer reports" subject to the FCRA, then every class member would be entitled uniformly to the same amount of statutory damages, set by rote calculation. Id.

Indeed, this settlement appears to be structured precisely to comply with Dukes and with Rule 23(b)(2). There are, to be sure, individualized monetary damages claims at issue here – those for actual damages under the FCRA – but those claims, as the district court emphasized, are retained by the (b)(2) Class members. Id. In contrast, the monetary claims released – those for statutory damages – "flow directly from liability to the class as a whole" on the same set of claims underlying the

[4] Like the district court, we find unpersuasive the Objectors' contention that the Adams decision, see supra at Section I.B., effectively divides the (b)(2) Class into two groups differently positioned with respect to willfulness: (1) class members whose claims arose after the Adams decision put Lexis on notice that its Accurint reports were subject to the FCRA, making those members eligible for statutory damages; and (2) class members whose claims arose before Adams put Lexis on notice. In fact, the Adams court did not rule that Accurint reports qualified as "consumer reports" under the FCRA, as it subsequently explained to the parties: "I think there has been some misinterpretation of what my [motion for judgment on the pleadings] ruling was." J.A. 2367.

injunctive relief, making them non-individualized under Dukes and "incidental" for purposes of Rule 23(b)(2). Dukes, 131 S. Ct. at 2560 (quoting Allison, 151 F.3d at 415) (emphasis in original).

The Objectors also argue that the statutory damages claims released by the Agreement cannot be deemed "incidental" to injunctive relief because the Plaintiffs' original complaint did not seek any injunctive relief under the FCRA. Again, we disagree.

We may assume, as did the district court, that the FCRA, which does not provide expressly for a private right of action for injunctive relief, does not permit consumers to seek injunctive remedies. But like the district court, we think that is beside the point: "[I]n the settlement context, 'it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.'" Berry, 2014 WL 4403524, at *12 (quoting Local Number 93 v. City of Cleveland, 478 U.S. 501, 522 (1986)); see Sullivan v. DB Invs., Inc., 667 F.3d 273, 317 (3d Cir. 2011) (court may "approve a mutually agreed-upon stipulation enjoining conduct . . . regardless of whether the plaintiffs could have received identical relief in a contested suit"). And Lexis is free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent. Indeed, many FCRA class action disputes

are resolved in part through consent decrees. See, e.g., Serrano v. Sterling Testing Sys., Inc., 711 F. Supp. 2d 402, 409 (E.D. Pa. 2010).

Failing to acknowledge the critical role of the settlement agreement, the Objectors rely on authority from outside the settlement context that is unavailing here. Specifically, the Objectors point to decisions from the Fifth and Eleventh Circuits, each noting that the unavailability of injunctive relief under a statute would preclude certification of a Rule 23(b)(2) class. See Christ v. Beneficial Corp., 547 F.3d 1292, 1298 (11th Cir. 2008); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 977 n.39 (5th Cir. 2000). But in neither of those cases did the defendants agree to a settlement; instead, the defendants in both cases opposed certification. Christ, 547 F.3d at 1295-96; Bolin, 231 F.3d at 973. We can agree that in those circumstances, where the defendant is unwilling to settle and the relevant statute does not allow for injunctive relief, Rule 23(b)(2) certification would be inappropriate because the plaintiffs would have no prospect of achieving injunctive relief. But simply to describe those circumstances is to differentiate them from those before us now, where the (b)(2) Class members indeed will achieve substantial injunctive relief, by virtue of the parties' settlement, upon approval of the Agreement.

Nor does the failure of the Plaintiffs to seek injunctive relief in their original complaint independently preclude certification under Rule 23(b)(2). By its terms, Rule 23(b)(2) applies so long as "final injunctive relief . . . is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2) (emphasis added), and the corresponding Advisory Committee's Note likewise focuses on the "final relief" afforded in a Rule 23(b)(2) case, 39 F.R.D. 69, 102 (1966). We therefore look to the Agreement itself, and to the "final relief" it contemplates, to assess the propriety of any monetary remedy. Any other result would not only contravene the terms of Rule 23(b)(2), it would discourage settlement by binding plaintiffs to the choices they make at the earliest stages of litigation and foreclosing the kinds of remedial compromises necessary to achieve agreement.

That is not to say that the relief requested in a complaint may never inform the inquiry into whether monetary relief is truly "incidental" under Rule 23(b)(2). That inquiry is intended in part to guard against certification when an "injunction request is illusory," made only to justify a damages award that otherwise would be improper under Rule 23(b)(2). See Thorn, 445 F.3d at 329; Richards v. Delta Air Lines, Inc., 453 F.3d 525, 530 (D.C. Cir. 2006). So if, for instance, substantial monetary damages actually are awarded under a Rule

23(b)(2) class settlement, then the absence of a request for injunctive relief in the original complaint may give rise to concerns that it is the money and not the injunction that is driving the case. Cf. Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 224 (2d Cir. 2012) (Rule 23(b)(2) certification invalid where complaint did not mention injunctive relief and "damages . . . [were] the only remedy awarded that clearly applied to every class member"); Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 469 n.8 (E.D. Pa. 2000) (Rule 23(b)(2) certification inappropriate where plaintiff seeks substantial monetary judgment as part of settlement and did not seek injunction in original complaint). But here, where the only relief actually awarded to the (b)(2) Class is injunctive, those concerns are not present.

C.

In the alternative, the Objectors argue that even if the statutory damages claims released by the (b)(2) Class are incidental and not predominant, due process precludes certification of the class without opt-out rights. Here, the Objectors rely on dicta from the Supreme Court's decision in Dukes, noting the "serious possibility" that due process requires opt-out rights (and concomitant notice) under Rule 23(b)(2) even "where the monetary claims do not predominate." Dukes, 131 S. Ct. at 2559. But as the district court explained,

the Supreme Court did not go that far in Dukes, holding instead only that claims for individualized monetary relief may not be certified under Rule 23(b)(2). Berry, 2014 WL 4403524, at *12. Like the district court, we decline to go where the Supreme Court has not.

As discussed above, federal courts long have permitted certification of mandatory Rule 23(b)(2) classes involving monetary relief so long as that relief is "incidental" to injunctive or declaratory relief – meaning that damages must be in the nature of a "group remedy," flowing "directly from liability to the class as a whole." Allison, 151 F.3d at 415; see id. at 411 (collecting cases). In such circumstances, our court has held, opt-out rights are not required because individualized adjudications are unnecessary. See Thorn, 445 F.3d at 330 & n.25 ("By requiring that injunctive or declaratory relief predominate . . . Rule 23(b)(2) ensures that the benefits of the class action inure to the class as a whole without running the risk of cutting off the rights of absent class members to recover money damages and class members who want individualized evaluation of their claim for money damages.").

We do not believe that the Court's dictum in Dukes warrants or even authorizes overturning this established precedent. See United States v. Ruhe, 191 F.3d 376, 388 (4th Cir. 1999) (Fourth Circuit panels are "bound by prior precedent from other panels

in this circuit absent contrary law from an en banc or Supreme Court decision"). And we note that our unwillingness to jump ahead of the Supreme Court in this regard is shared by our sister circuits. Two other federal courts of appeals have considered whether, in light of Dukes, Rule 23(b)(2) certification remains permissible when monetary damages are involved. And both have affirmed the continued validity of Rule 23(b)(2) certification of monetary claims so long as the monetary relief is non-individualized and "incidental" to injunctive or declaratory remedies. See Amara v. CIGNA Corp., 775 F.3d 510, 519-20 (2d Cir. 2014); Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364, 369-71 (7th Cir. 2012); see also Douglin v. GreatBanc Trust Co., No. 1:14-cv-00620-RA, 2015 WL 3526248, at *5-7 (S.D.N.Y. June 30, 2015).

To be sure, and as the district court recognized, when a "proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented." Berry, 2014 WL 4403524, at *11 (citing In re Jiffy Lube, 927 F.2d 155, 158 (4th Cir. 1991)). But the premise behind certification of mandatory classes under Rule 23(b)(2) is that because the relief sought is uniform, so are the interests of class members, making class-wide representation possible and opt-out rights unnecessary. See Dukes, 131 S. Ct. at 2558; Thorn, 445 F.3d at 330 & n.25; Allison, 151 F.3d at

413-14. And before a class may be certified under Rule 23(b)(2), of course, a court must find under Rule 23(a)(4) – as the district court did here – that the interests of all of the class members will be fairly and adequately represented by the named plaintiffs and class counsel. Rule 23(e)'s settlement approval process provides additional protection, ensuring that Rule 23(b)(2) class members receive notice of a proposed settlement and an opportunity to object, and that a "settlement will not take effect unless the trial judge – after analyzing the facts and law of the case and considering all objections to the proposed settlement – determines it to be fair, adequate, and reasonable." Kincade v. Gen. Tire and Rubber Co., 635 F.2d 501, 507-08 (5th Cir. 1981). We see no reason to depart here from the general understanding that these procedural safeguards are sufficient to protect the due process rights of objecting Rule 23(b)(2) class members.

Indeed, the particular terms of this Agreement make opt-out rights especially unnecessary here. The Dukes Court was concerned about the "need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone – a choice Rule 23(b)(2) does not ensure that they have." Dukes, 131 S. Ct. at 2559 (emphasis in original). But here, the right to "go it alone" is built into the Agreement itself, under which any

(b)(2) Class member may pursue actual damages resulting from individualized harm under the FCRA. In this sense, (b)(2) Class members are "opted out" already, by virtue of the settlement in question. As the district court explained, the Agreement "preserves Rule 23(b)(2) class members' rights to bring claims for actual damages, thereby preserving their due process rights." Berry, 2014 WL 4403524, at *12.

Finally, the practical implications of the Objectors' position give us pause. What is being sought is a blanket right to opt out of a Rule 23(b)(2) settlement that provides purely injunctive relief solely because non-individualized statutory damages claims are released, while individualized actual damages claims are retained. That such a rule would discourage settlement seems undeniable; defendants like Lexis surely will not agree to settlements like this one if they cannot buy something approaching global peace. See Kincade, 635 F.2d at 507. And in light of all the other procedural protections already in place, not to mention the retention of actual damages claims under this Agreement, any marginal benefit that might accrue to disenchanted class members is unlikely to be worth this cost. As the Supreme Court has recognized, procedural due process is a "flexible concept," requiring varying degrees of protection "depending upon the importance attached to the interest and the particular circumstances under which the

deprivation may occur." Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985). We do not think it requires the rigid opt-out rule proposed by the Objectors here.

D.

We briefly address the Objectors' final argument against certification: that the (b)(2) Class's representation is inadequate under Rule 23(a)(4) because monetary payments of $5,000 to each Class Representative created a conflict of interest between those Representatives and the rest of the class. Though we appreciate that such awards can misalign the interests of class representatives and other class members in certain circumstances, we hold that the district court did not abuse its discretion in approving the payments here.[5]

Incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009). They are "fairly typical in class action cases." Id. at 958 (quoting 4 William B.

[5] Nor do we find any abuse of discretion in the district court's judgment that the (b)(2) Class members otherwise were represented adequately under Rule 23(a)(4). To the extent the Objectors argue to the contrary, we find their claims unpersuasive.

Rubenstein et al., Newberg on Class Actions § 11:38 (4th ed. 2008)). The district court found that awards of $5,000 were appropriate here because the Class Representatives acted for the benefit of the class, and it cited other cases in which district courts in our circuit have ordered similarly substantial payments.

The Objectors point us to cases from other circuits scrutinizing such awards when a "settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members," In re Dry Max Pampers Litig., 724 F.3d 713, 718 (6th Cir. 2013). And it is true that when incentive agreements are entered into at the onset of litigation, see Rodriguez, 563 F.3d at 959, and particularly when they are conditioned on class representative support for a settlement, Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1164 (9th Cir. 2013), large awards may raise concerns about whether named plaintiffs might "compromise the interest of the class for personal gain," Dry Max Pampers, 724 F.3d at 722 (quoting Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003)).

In this case, however, the incentive awards were not agreed upon ex ante, and they were not conditioned on the Class Representatives' support for the Agreement. Indeed, they were not negotiated until after the substantive terms of the Agreement had been established, making it significantly less

likely that the Class Representatives would have been influenced in the performance of their representative duties. And finally, this is not a case in which unnamed class members received "only perfunctory relief," see Dry Max Pampers, 724 F.3d at 718, – instead, the district court found that the class members were afforded substantial relief by significant changes in Lexis's consumer-protection practices – and there is no indication that the highly experienced class counsel pursued this lawsuit any less vigorously because of the Class Representatives' fee award. Under these circumstances, we defer to the judgment of the district court in approving the Class Representatives' awards and finding adequate representation under Rule 23(a)(4).

III.

The Objectors next challenge the district court's approval of the (b)(2) Class settlement, arguing principally that it is unfair and inadequate because it releases class members' statutory damages claims without providing for any monetary relief in exchange. Again, we afford the district court's decision substantial deference, reversing only "upon a clear showing that the district court abused its discretion in approving the settlement." Flinn, 528 F.2d at 1172 (citations and internal quotation marks omitted).

A.

As discussed above, a key procedural protection afforded Rule 23(b)(2) class members is that a settlement will not be approved over their objections unless a district court finds it to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see In re Jiffy Lube, 927 F.2d at 158. The fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." In re Jiffy Lube, 927 F.2d at 159.

The district court properly considered the factors we have identified as bearing on this inquiry: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [FCRA] class action litigation." Id. Noting the "extensive discovery" conducted through the course of three separate lawsuits, the district court concluded that the parties here "reached an agreement through arm's-length negotiations by highly experienced counsel after full discovery was completed," sufficient to demonstrate the fairness of the Agreement. Berry, 2014 WL 4403524, at *14. The Objectors do not and could not take serious issue with this assessment, and we see no reason to disturb the court's judgment.

As to the Objectors' primary complaint – that the Agreement is inadequate because it fails to provide any monetary compensation for the release of statutory damages claims – the district court emphasized the most important factor in weighing the substantive reasonableness of a settlement agreement: the "strength of the plaintiffs' claims on the merits." Flinn, 528 F.2d at 1172. In other words, the fairness of a deal under which class members give up statutory damages claims in exchange for injunctive relief depends critically on an assessment of the Plaintiffs' case that they are entitled to statutory damages in the first place.

The district court deemed that case "speculative at best," Berry, 2014 WL 4403524, at *15, and we think that is generous. In order to recover statutory damages under the FCRA, the Plaintiffs would have to show a "willful" violation by Lexis, 15 U.S.C. § 1681n, which in turn would require that Lexis have adopted an "objectively unreasonable" reading of the Act when it concluded that its Accurint reports were not covered as "consumer reports." Safeco, 551 U.S. at 69. As the district court noted, the Supreme Court has made clear that where "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation . . . a defendant who merely adopts one such interpretation" cannot be held liable as a willful violator. Id. at 70 n.20. And here, with agency

guidance expressly specifying that Accurint reports are not subject to the FCRA, see FTC Opinion Letter, it is hard to see how Lexis can be said to have acted unreasonably by adopting that reading.[6]

On the other side of the ledger, of course, is the benefit to the (b)(2) Class of "substantial [injunctive] relief without the risk of litigation." Berry, 2014 WL 4403524, at *15. The district court described the injunction in this case as implementing a "substantial, nationwide program that addresses the issues raised in the Complaint by the [(b)(2) Class] and will result in a significant shift" in industry practices, making Lexis "the industry leader" in consumer-information protection. Id. at *3. Indeed, the record includes a finding by an information privacy law expert that the injunctive relief provided in the Agreement provides consumers with benefits so substantial that their monetary value is in the billions of dollars. The Objectors' exclusive focus on the absence of monetary relief is unsupported by law and also imprudent as a matter of common sense: There was no realistic prospect that

[6] Nothing about the Adams litigation dictates a different result. Although the district court in that case denied Lexis's motion for judgment on the pleadings on the willfulness issue, it subsequently clarified on reconsideration that it was "very persuaded by the FTC's letter," J.A. 2377, and that if "the plaintiffs don't come forward with authority to the contrary . . . then . . . [they] have a difficult row to hoe," J.A. 2368.

Lexis could or would provide meaningful monetary relief to a class of 200 million people.[7]

We can find no reason to disturb the district court's assessment of the relative strength of the parties' legal positions or its fact-intensive analysis of the benefits provided the (b)(2) Class by the parties' settlement. In our view, the district court was well within its discretion in approving the settlement as fair, reasonable, and adequate under Rule 23(e).

B.

The Objectors bring one final challenge to the settlement, arguing that it impermissibly immunizes Lexis from future FCRA liability in connection with its new Contact & Locate product. We disagree.

The Objectors' claim appears to rest on two sections of the Agreement. In the first, the parties stipulate that "the

[7] For that reason and others, the fact that the much smaller (b)(3) Class received monetary relief under the Agreement does not by itself render unreasonable the non-monetary relief provided the (b)(2) Class. The (b)(3) Class, unlike the (b)(2) Class, consists of individuals who took some affirmative action against Lexis, seeking to view their Accurint reports or challenging information included in those reports, putting them in a fundamentally different position with respect to Lexis. And in exchange for the monetary relief provided by the Agreement, the (b)(3) Class releases all of its damages claims against Lexis, while the (b)(2) Class retains the right to sue for actual damages.

Contact & Locate suite of products and services will not involve the provision of 'consumer reports' as that term is defined under the FCRA." J.A. 120-21. In the second, the parties "acknowledge that the specific design and content of the Contact & Locate . . . suite of products and services may change over time to respond to the then current requirements of customers and the market." J.A. 122. According to the Objectors, the upshot is that Lexis has carte blanche to develop Contact & Locate into a product that is indeed a "consumer report" under the FCRA, while class members, bound by their stipulation, will be unable to respond.

We think that significantly overstates Lexis's freedom under the Agreement. It is true that the Agreement provides Lexis the discretion it needs to develop Contact & Locate according to market needs. But as the district court explained, it also sets boundaries for the design and implementation of Contact & Locate, which assure that the product cannot operate as a "consumer report" for purposes of the FCRA. Under the Agreement, for instance, Contact & Locate may include only information that does not contain any of the "seven characteristic" consumer information covered by the FCRA. J.A. 121; Berry, 2014 WL 4403524, at *4. And in the section of the Agreement labeled the "Rule 23(b)(2) Settlement Class Release," J.A. 129, the parties clarify that their agreement is only that

the "Post Settlement Products" (of which Contact & Locate is one) "shall not be 'consumer reports' within the meaning of the FCRA so long as [they] are not used in whole or in part as a factor in determining eligibility for credit" or any other purpose that could qualify them as consumer reports. J.A. 132-33 (emphasis added). Under that provision, Lexis has no free pass from FCRA liability; instead, the Agreement applies only so long as Contact & Locate remains true to the parties' intent and is not used in a manner that would make it a "consumer report."

Releases, of course, are a standard feature of class action settlements. Indeed, the release of claims that form the basis of litigation is the raison d'être of any settlement, so the Objectors do not dispute that it would have been appropriate for the (b)(2) Class to stipulate that Lexis's Accurint reports comply with the FCRA. But it is different and unreasonable, they argue, to release claims regarding Contact & Locate, because Contact & Locate does not yet exist. Again, we think this overstates the case. Contact & Locate is a new name, but it is a new name for what is essentially a scaled-down version of the old Accurint reports, without the features that allegedly made Accurint troublesome under the FCRA. In class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the "identical factual predicate." See, e.g., In re Literary Works in Elec.

Databases Copyright Litig., 654 F.3d 242, 248 (2d Cir. 2011). Although the name of the product has changed, now, as before, Lexis attempts only to sell information that will enable debt collectors to locate assets, and not information to be used for credit eligibility determinations. Because the (b)(2) Class can release claims against Accurint, it can do so for Contact & Locate, as well.

IV.

We are left with one final argument: a challenge by one (and only one) Objector[8] to the district court's approval of class counsel's approximately $5.3 million fee for securing injunctive relief for the (b)(2) Class. Federal Rule of Civil Procedure 23(h) permits "the court [to] award reasonable attorney's fees . . . that are authorized by . . . the parties' agreement." Fed. R. Civ. P. 23(h). We review attorneys' fee awards for abuse of discretion only. Carroll v. Wolpoff & Abramson, 53 F.3d 626, 628 (4th Cir. 1995). That review is "sharply circumscribed," and a fee award "must not be overturned unless it is clearly wrong." Plyler v. Evatt, 902 F.2d 273, 278 (4th Cir. 1990) (internal quotation marks omitted).

[8] Objector Schulman is the only Objector and member of the 200 million-member (b)(2) Class to contest the award of fees in this case.

Here, class counsel's fee was negotiated by the parties, and the Agreement allowed for a total attorneys' fee award of up to $5.5 million to be paid entirely by Lexis. The district court awarded the requested fee after analyzing it through the lodestar method. With regard to the Rule 23(b)(2) Class settlement, the district court found that "a lodestar of $3,349,379.95 and a multiplier of 1.99 are applicable and, in light of the fact that counsel allocated approximately 80% of their time to crafting injunctive relief for the Rule 23(b)(2) class, an award of $5,333,188.21 is appropriate."[9] Berry, 2014 WL 4403524, at *15. Objector Schulman argues primarily that the district court's explanation for its fee award was insufficiently detailed and, in particular, that the court failed to respond to his protests that class counsel's hourly rate and number of hours worked were unreasonable. And indeed, despite our very deferential review in this area, we do require district courts to set forth clearly findings of fact for fee awards so that we have an adequate basis to review for abuse of discretion. See Barber v. Kimbrell's, Inc., 577 F.2d 216, 226

[9] Under the lodestar method, the district court multiplies the number of hours worked by a reasonable hourly rate. And it can then "adjust the lodestar figure using a 'multiplier' derived from a number of factors, such as the benefit achieved for the class and the complexity of the case." Kay Co. v. Equitable Prod. Co., 749 F. Supp. 2d 455, 462 (S.D.W. Va. 2010).

(4th Cir. 1978) (adopting the twelve fee-shifting factors of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), whenever the district court is required to determine reasonable attorneys' fees).

We acknowledge that the district court's explanation of its fee award was brief, compressed into a single paragraph. And we stress the importance of addressing fee requests fully and carefully, so that we may engage in meaningful review. See Blankenship v. Schweiker, 676 F.2d 116, 118 (4th Cir. 1982) (vacating fee award where district court did not engage in thorough review). On balance, however, and under the circumstances of this case, we think that the district court's explanation was sufficient and that the court did not otherwise abuse its discretion in approving the fee award.

The district court provided the specific basis on which it awarded fees: that class counsel "expended large amounts of time and labor," and "achieved an excellent result in this large and complex action." Berry, 2014 WL 4403524, at *15. It went on to detail why the result was indeed "excellent," finding that the Agreement "provides substantial benefits for over 200 million consumers" and "forces [Lexis] to comply with the FCRA." Id. And the court compared the lodestar multiplier to those applied in similar cases. That explanation is in accord with several of the more prominent Barber factors, which "include such

considerations as the time and labor required, the novelty or difficulty of the issues litigated, customary fees in similar situations, and the quality of the results involved." In re MRRM, P.A., 404 F.3d 863, 867-68 (4th Cir. 2005).

As to the reasonableness of class counsel's hourly rate, it is not the case, as Objector Schulman would have it, that the court erred by relying solely on counsel's affidavit as evidence of prevailing market rates. On the contrary, the record contains multiple expert opinions, all backed by voluminous evidence, that both counsel's hourly rate and the time spent on the case were reasonable. The district court's findings rest not on unsupported and self-serving assertions from counsel, but on the testimony of experts like Professor Geoffrey Miller, comparing class counsel's rates to those charged in bankruptcy litigation as well as to rates awarded in similar class action cases, and opining that counsel's attestations to the time incurred were consistent with the complexity and the duration of the litigation. The court's reference to "large amounts of time and labor" may have been brief, but it was backed by substantial evidence on which the court was entitled to rely.

Moreover, this case does not raise the kind of concerns that might call for an especially robust or detailed explanation of a fee award by a district court. There is no reason to worry here that "the lawyers might [have] urge[d] a class settlement

at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." See Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991). As discussed above, given the size of the (b)(2) Class and the fragility of its legal position, there was never any realistic possibility of class-wide monetary relief; put bluntly, there is no reason to think that class counsel left money on the table in negotiating this Agreement. And it is not as if the injunctive relief ultimately achieved for the (b)(2) Class was below expectations. Again, the district court's assessment of the injunction as an "excellent result in [a] large and complex action" may have been on the terse side, but it is amply supported by the experts who opined on the fee award, characterizing the injunction as bringing about a "sea change" in business practices, J.A. 2015-16, and as a "serious advancement of consumer rights by a dominant member of the data broker industry," J.A. 583. See McDonnell v. Miller Oil Co., 134 F.3d 638, 641 (4th Cir. 1998) (finding that the "most critical factor in calculating a reasonable fee award is the degree of success obtained" (internal quotation marks omitted)).[10]

[10] Other features of this case further diminish any concern about the fee award and, accordingly, any need for heightened scrutiny by the district court. Because class counsel's fee is to be paid entirely by Lexis, it does not reduce the (b)(2) Class's recovery. Cf. Cook v. Niedert, 142 F.3d 1004, 1011 (7th

Finally, the fact that only one of the approximately 200 million members of the (b)(2) Class objects to the award of attorneys' fees is relevant to our decision. Notice of the proposed settlement in this case reached 75.1 percent of the (b)(2) Class members, but only Objector Schulman raised any concerns; indeed, the other Objectors specifically declined to join this portion of the challenge. That almost complete lack of objection to the fee request provides additional support for the district court's decision to approve it. See In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005) (noting that only two of 300,000 class members objecting to fee request is a "rare phenomenon" and evidence that the district court did not abuse its discretion in awarding fees); see also Flinn, 528 F.2d at 1174 (finding class action settlement reasonable where "[o]nly five members of the class filed any dissent from the settlement").

Cir. 1998) (when attorneys' fee reduces amount of common fund, court must carefully scrutinize fee application). Nor, of course, will it require the expenditure of taxpayer funds, which might warrant additional scrutiny. Cf. Perdue v. Kenny A., 559 U.S. 542, 559 (2010) (limiting the use of multipliers in lodestar-based fee awards against the government under fee-shifting statutes). Finally, the parties did not even begin to negotiate class counsel's fee until after the substantive terms of the Agreement were finalized, making it far less likely that counsel could have traded off the interests of class members to advance their own ends.

Again, we should not be understood to minimize the need for district courts to explain their attorneys' fee awards and to take account of relevant objections. But on the facts of this case, we find that the district court satisfied that standard, and committed no abuse of discretion in awarding attorneys' fees to class counsel in connection with the (b)(2) Class settlement.

V.

For the reasons set forth above, we affirm the decision of the district court.

AFFIRMED

Tab 34

Filed 2/26/14; pub. order 3/13/14 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SAUNDRA CARTER et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES, Defendant and Respondent; MARK WILLITS et al., Objectors and Appellants.	B241060 (Los Angeles County Super. Ct. No. BC363305)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Reversed.

Jose R. Allen; Schneider Wallace Cottrell Konecky, Guy B. Wallace; Goldstein, Borgen, Dardarian & Ho, Linda M. Dardarian for Objectors and Appellants.

Sarah Colby as Amicus Curiae on behalf of Objectors and Appellants.

Arias Ozzello & Gignac, Mark Arias, Mikael H. Stahle, Alfredo Torrijos; Law Offices of Morse Mehrban, Morse Mehrban for Plaintiffs and Respondents.

Michael N. Feuer, Los Angeles City Attorney, Gary G. Geuss, Chief Assistant City Attorney, Laurie Rittenberg, Assistant City Attorney; Ogletree, Deakins, Nash, Smoak & Stewart, David Raizman, Dennis Depalma, Benjamin Ikuta; Drinker Biddle & Reath, Christopher F. Wong for Defendant and Respondent City of Los Angeles.

Title II of the Americans with Disabilities Act (42 U.S.C. § 12132; the ADA), Section 504 the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.; Section 504), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and the California Disabled Persons Act (Civ. Code, § 54) prohibit discrimination against disabled individuals and require that public entities eliminate impediments to disabled access to public facilities. (See *Ability Ctr. of Greater Toledo v. City of Sandusky* (6th Cir. 2004) 385 F.3d 901, 907-908; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 177-178.) "For nearly two decades, [the ADA's] implementing regulations have required cities to make newly built and altered sidewalks readily accessible to individuals with disabilities." (*Frame v. City of Arlington* (5th Cir. 2011) 657 F.3d 215, 221.)

This class action litigation involves allegations that the City of Los Angeles violated the above statutes. After the parties conditionally agreed to certify a non opt-out class, settle the litigation for injunctive relief only, and release all claims for statutory damages, the trial court certified the class and approved the settlement, finding it to be fair and reasonable.

Appellants contend the settlement was meager and inadequate and the non opt-out provision violated due process. We disagree with the first contention but agree with the second. Therefore, we reverse.

FACTS AND PROCEEDINGS BELOW

a. The *Carter* and *Fahmie* Actions

On December 17, 2006, ten individuals led by Saundra Carter filed a class action complaint against the City of Los Angeles for violations of the Unruh Civil Rights Act and Disabled Persons Act, alleging city sidewalks lacked wheelchair ramps or cutouts. In their first amended complaint, which is operative, the *Carter* plaintiffs sought injunctive relief and "minimum statutory damages of $1,000 per violation of Civil Code sections 54 and 54.1."

On December 5, 2007, Nicole Fahmie filed a class action complaint against the City of Los Angeles for violations of the Unruh Civil Rights Act and Disabled Persons

Act, alleging, among other things, that city curbs lack ramps or cutouts. Fahmie sought injunctive relief, compensatory damages and trebled damages.

Neither the *Carter* nor *Fahmie* action alleged federal claims under the ADA or Section 504. The actions were eventually consolidated.

b. The *Willits* Action

On August 4, 2010, Mark Willits, a quadriplegic, Judy Griffin, who has muscular dystrophy, and Brent Pilgreen, also a quadriplegic, all of whom use motorized wheelchairs for mobility, and Communities Actively Living Independent and Free, an independent living center (objectors/federal plaintiffs), filed a representative action against the City of Los Angeles and its mayor and council members in federal court alleging causes of action pursuant to the ADA, Section 504, the Unruh Civil Rights Act and the California Disabled Persons Act. (The *Willits* action.) The federal plaintiffs alleged the city systemically and pervasively discriminated against persons with mobility disabilities by denying them meaningful access to the city's curb ramps, sidewalks, crosswalks, pedestrian crossings, and other walkways. They sought declaratory relief, preliminary and permanent injunctions for the class, and, on behalf of Willits, Griffin and Pilgreen individually, monetary damages.[1]

On December 10, 2010, the district court declined to exercise jurisdiction over the federal plaintiffs' state law claims in the *Willits* action, and dismissed them, and also dismissed all individual defendants, leaving only the City of Los Angeles as a defendant. The court then refused to dismiss plaintiffs' claims under the ADA and Rehabilitation Act, characterizing them as claims for "only equitable remedies under the ADA, such as injunctive relief." (The record does not disclose why the federal plaintiffs' damages claims were stricken.) (*Willits v. City of Los Angeles*, No. CV 10-05782 CBM; U.S. Dist. Court, Central District.)

On January 3, 2011, the district court certified a representative class defined as follows: "All persons with mobility disabilities who have been denied access to

[1] All parties request for judicial notice are granted.

pedestrian rights of way in the city of Los Angeles as a result of Defendants' [*sic*] policies and practices with regard to its pedestrian rights of way and disability access. The class is certified for injunctive and declaratory relief only. The class claims are Count I (alleging violations of the ADA) and Count II (alleging violations of the Rehabilitation Act) of Plaintiffs' Complaint." The court waived notice of certification to the class members.

c. *Carter* and *Fahmie* Settlement

In April 2011, the *Carter* and *Fahmie* actions settled. The settlement class was defined as all persons with any disability who at any time prior to April 25, 2011 through the term of the settlement (25 years) accessed or attempted to access a city sidewalk but were impeded by lack of a curb ramp or curb cut.

Pursuant to the settlement agreement, the City of Los Angeles agreed to install up to 1,000 curb ramps in the first year after settlement, at a cost of up to $3.5 million. After the first year, the city agreed to spend up to $4 million per year remediating curbs, contingent on the availability of certain types of funds, and to complete remediation, without limit as to cost, as to every curb identified as being in a "Transition Area," which was defined as comprising major commercial corridors, bus routes, and public buildings. The city agreed to conduct a citywide survey to assess curb locations requiring remediation, form an advisory committee to evaluate and make recommendations to the city about future curb appropriations, and periodically report to class counsel regarding settlement implementation status, with ongoing court jurisdiction.

Plaintiffs agreed to release all claims against the city for injunctive or declaratory relief or statutory damages (but not compensatory damages) that are based on conduct or conditions preceding entry of judgment. This would include release of appellants' federal claims and state law damages claims.

The settlement agreement provided that the settlement class would be certified in accordance standards applicable under the Federal Rules of Civil Procedure, rule 23(b)(2) (Rule 23(b)(2)), and that no class member would be permitted to opt out. The agreement

further provided that notice of the settlement would be made by distribution to ten organizations serving disabled persons and by publication.

d. Objections to the Settlement and Final Approval

Prior to the hearing on final approval, 30 individual class members objected to the settlement. Their main objection was that the settlement set no mandatory minimum city expenditure, instead making expenditure contingent on future tax revenue availability, did not require that enough curb cut or ramps be installed, and set no date for full compliance with disability access laws. Objectors also argued the settlement gave class members no money payments and no ability to opt out to seek statutory damages in another forum.

On January 11, 2012, the trial court issued a 38-page order granting final approval of the settlement. In the order the court outlined settlement terms, found them to be reasonable, and addressed the objectors' arguments. As to objectors' arguments that the settlement was meager and inadequate, the court reviewed the city's obligations under the settlement, finding them to be substantial, and noted that it would be a risky and time consuming proposition for class representatives to pursue litigation to obtain a better result. Regarding the non opt-out provision, the court stated the settlement was "equitable and not for a money judgment," so "[t]he requirement that class members be permitted to opt out . . . does not apply." The court also said, "statutory damages are a long shot" and the right to them "highly questionable" because no California court has considered a municipal entity to be liable under the Unruh Civil Rights Act or the Disabled Persons Act, and none likely would.

This appeal followed.

DISCUSSION

A. General Class Action Principles and Standard of Review

Under section 382 of the Code of Civil Procedure, a class action is authorized "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." "Drawing on the language of Code of Civil Procedure section 382 and federal precedent,"

our Supreme Court has "articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The purpose of the ascertainability question is to give notice to putative class members as to whom the judgment in the action will be res judicata so they will have an opportunity to opt out of the class. (*Bufil v. Dollar Financial Group, Inc*. (2008) 162 Cal.App.4th 1193, 1206-1207.) "'The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.'" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn*. (1998) 60 Cal.App.4th 1053, 1065.) "[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in *judicial administration*.'" (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 897.) "After the members of the class have been properly notified of the action, they are required to decide whether to remain members of the class represented by plaintiffs' counsel and become bound by a favorable or unfavorable judgment in the action, whether to intervene in the action through counsel of their own choosing, or whether to 'opt out' of the action and pursue their own independent remedies, such as negotiation with defendants, initiation of their own action, or intervention in some other action." (*Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006, 1010; accord, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group) ¶ 14:133, p. 14-80 (rev. # 1, 2010).) "The critical reason for notification of members of the class on whose behalf a class action has been brought is that notification makes possible a binding adjudication and an

enforceable judgment with respect to the rights of the members of the class. Absent such notification no member of the class need be bound by the result of the litigation." (*Home Sav. & Loan Assn*., *supra*, at p. 1011.)

The "community of interest" requirement embodies three elements: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]" (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) Common issues predominate when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810.) Class members "must not be required to individually litigate numerous and substantial questions to determine [their] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.)

The question of certification is essentially procedural and does not involve the legal or factual merits of the action. (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) The ultimate question is whether class treatment is "superior means of resolving the litigation, for both the parties and the court. [Citation.] 'Generally, a class suit is appropriate "when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." [Citations.]' [Citation.] '[R]elevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing.' [Citation.] '[B]ecause group action also has the potential to create injustice, trial courts are required to "'carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.'" [Citation.]' [Citation.]" (*Newell v. State Farm General Ins. Co*. (2004) 118 Cal.App.4th 1094, 1101.)

Trial courts have broad discretion in granting or denying motions for class certification because they are ideally situated to evaluate the efficiencies and practicalities of permitting a class action. (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) We will affirm an order granting class certification if any of the trial court's stated reasons is valid and sufficient to justify the order and is supported by substantial evidence. (*Id*. at pp. 326-327; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106 ["a certification ruling not supported by substantial evidence cannot stand"].) However, even a ruling supported by substantial evidence will be reversed if improper criteria were used or erroneous legal assumptions made. (*Sav-On*, *supra*, 34 Cal.4th at pp. 326–327; *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435-436.) A trial court's decision that rests on an error of law is itself an abuse of discretion. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311; *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 629.)

B. Approval of Class Action Settlements

The parties agree that the trial court's ruling is subject to an abuse of discretion standard of review. "[W]hether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).) A reviewing court has characterized appellate review of class action settlements as "gross at best and, given that 'so many imponderables enter into the evaluation of a settlement' [citation], an abuse of discretion standard . . . is singularly appropriate." (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1166-1167.)

When class certification is deferred to the settlement stage, a more careful scrutiny of the fairness of the settlement is required. "The fairness of a settlement of a legal dispute is like the adequacy of the consideration supporting a contractual promise: a matter best left to negotiation between the parties. A settlement is a contract, and normally the test for the fairness of a contract is strictly procedural: were the parties competent adults duly apprised of the basic facts relating to their transaction? The

problem in the class-action setting, and the reason that judicial approval of the settlement of such an action is required, [citation], is that the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals." (*Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co*. (7th Cir. 1987) 834 F.2d 677, 681-682.) This "makes it imperative that the district judge conduct a careful inquiry into the fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of the class members who do not opt out of the settlement." (*Ibid*.) The inquiry must "be especially careful and penetrating in a case such as this where class certification is deferred to the settlement stage." (*Ibid*.) But because so many imponderables enter into the evaluation of a settlement, we continue to review the trial court's decision to approve a settlement in such a case under the "abuse of discretion" standard.

Upon certification of a class the court must make an order determining whether notice to class members is necessary and whether class members may exclude themselves from the action. (Cal. Rules of Court, rule 3.766, subd. (c).) Approval of a class action settlement requires (1) the trial court's preliminary approval of the proposed settlement; (2) dissemination of notice to class members, if necessary, informing them of the proposed settlement and their right to object to the action; and (3) a final fairness hearing where class members may be heard regarding the fairness, adequacy and reasonableness of the settlement. (Cal. Rules of Court, rule 3.769, subds. (d)-(g).) To approve the settlement, the court must determine that "'the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

"[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1802.) The objector bears the burden to rebut the presumption. (*7-Eleven Owners for Fair*

Franchising v. Southland Corp., *supra*, 85 Cal.App.4th at p. 1166; *Dunk*, *supra*, at p. 1800; see 4 Conte & Newberg, Newberg on Class Actions (4th ed. 2002) § 11:42, p. 118-119.)

A general release—covering "all claims" that were or could have been raised in the suit—is common in class action settlements. (See, e.g., *Dupuy v. McEwen* (7th Cir. 2007) 495 F.3d 807, 809.) If a class member thinks a release is too broad, he can seek to remedy that problem through objection or intervention, and, if not satisfied with the result, he could appeal. (See *Toms v. Allied Bond & Collection Agency, Inc*. (4th Cir. 1999) 179 F.3d 103, 105–107.) Alternatively, he could simply opt out of the class and render the scope of the release irrelevant as to him.

C. The Settlement was Fair

Appellants argue the trial court lacked basic information to determine the range of plaintiffs' potential recovery at trial, and the *Carter*/*Fahmie* settlement is unfair because it guarantees funding for installation of only 1,000 curb ramps during the first year of the settlement and makes curb remediation in years two through twenty-five of the settlement contingent on availability of funds. Appellants argue 1,000 curb ramps constitutes less than one percent of the city's own estimate of 108,000 curb ramps it needs to install to comply with Title II of the ADA. The arguments are without merit.

The record discloses that the settlement was a product of extensive research and investigation of the conditions of curbs in Los Angeles. The settlement judge and trial court were well aware of the state of Los Angeles curbs and had the added benefit of objectors' presentation on that topic at the fairness hearing. The city's estimate that 108,000 curb ramps need to be installed to comply with the ADA was made in a 1998 memorandum; no evidence suggests this number is current. On the contrary, respondents presented evidence that the city has required private property owners to construct or repair curb cuts when performing construction and has itself constructed at least 32,000 curb cuts since the late 1990's. In addition, the settlement agreement calls for a comprehensive survey of Los Angeles city streets to determine where curb cuts are needed.

Furthermore, we would be in no position to overrule the trial court's determination that installation of 1,000 curb cuts in the first year of settlement is reasonable even if substantial research on the issue had been lacking. Appellants acknowledge the city has no obligation to install a curb cut on every corner. Under Title II of the ADA, the standard for compliance is "program access," that is, when viewed in its entirety, the city's system of sidewalks and pedestrian walkways must be "readily accessible to and useable by individuals with disabilities." (28 C.F.R. § 35.159(a); 45 C.F.R. § 84.22(a); Gov. Code, § 11135, subd. (b).) The number of curb cuts to be installed in the first year of settlement is significant, and when we consider that the curbs first remediated will be those chosen by class members themselves, and will therefore presumably address members' most immediate and pressing concerns, the possibly small proportion of initial fixes fades in importance.

We also agree with the trial court that the contingent funding provisions covering years two through twenty-five of the settlement are facially reasonable. When a city "has constructed curb ramps where necessary to provide access along highly-trafficked routes, has allocated funding and established a schedule for future curb ramp construction, and is addressing the particular intersections identified by plaintiffs as well as other intersections in accordance with ADA priorities," it is in compliance with its Title II obligations. (*Schonfeld v. City of Carlsbad* (1997) 978 F.Supp. 1329, 1341.)

Appellants argue the settlement guarantees less curb ramp installation than the city is already performing, as evidenced by a Bureau of Street Services report that the city installs from 1,500 to 1,800 per year. Whether a settlement requires more or less performance than a defendant is already providing voluntarily is irrelevant to whether the settlement is fair. The question is how many curbs will be guaranteed under the settlement, not how many were installed last year or how many the city intends to install voluntarily next year. That the city may not be obligated under the settlement to do more than it would do on its own goes to the value of the settlement to the city, not its fairness to plaintiffs.

Appellants argue the trial court improperly devalued their claims when it expressed doubt that the city's pedestrian rights of way and curb ramps were covered by Title II of the ADA or could be the subject of a private right of action. The point is irrelevant, as the reasonableness of the settlement stands on its own, independent of any concept of claim valuation.

We further note that of the 280,000 class members appellants claim exist, only 30 objected. This small percentage indicates the settlement was fair. Considering there was arm's-length bargaining; adequate investigation and discovery by experienced counsel; and a small percentage of objectors, we conclude the settlement was presumptively fair, adequate and reasonable, a presumption objectors have failed to overcome. (See *Dunk, supra*, 48 Cal.App.4th at p. 1801; *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 133.)

D. Certification of an Non Opt-Out Class Violated Due Process

One aspect of the settlement agreement here gives us pause, in that the agreement provided: "The Parties agree that the Settlement Class shall be certified in accordance with the standards applicable under Rule 23(b)(1) and/or Rule 23(b)(2) of the Federal Rules of Civil Procedure and that, accordingly, no Settlement Class member may opt out of any of the provisions of this Agreement." This provision is troubling for two reasons. Strictly speaking, parties to an agreement cannot logically bind nonparties with a provision stating the parties agree the nonparty cannot deny the agreement. So the provision is of no effect absent some mechanism by which nonparties are made party to the agreement, i.e., an order certifying the class. The non opt-out provision is of no force absent such an order. In that respect, then, the non opt-out class is best evaluated for whether certification was proper, not whether the settlement was fair.

The second problem with the settlement is it purports to bind the court to a particular sort of certification. This the parties cannot do. It is for the trial court, not the parties, to determine whether and in what manner a matter is best certified. The question is whether a non opt-out class should have been certified pursuant to Rule 23(b)(2). We conclude it should not.

E. Rule 23(b)(2) Classes

California law does not address when a trial court should afford class members a right to opt out. (*Bell v. Am. Title Ins. Co*. (1991) 226 Cal.App.3d 1589, 1602-1603.) We therefore look to federal law for guidance. (*Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.) The United States Supreme Court has recently provided guidance about Rule 23(b)(2) classes that is directly on point here.

Rule 23(b)(2) permits class treatment when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Claims for individualized relief do not satisfy the Rule. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2557 (*Wal-Mart*).) "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' [Citation.] In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." (*Ibid*.)

Classes certified under Rule 23(b)(2) share the most traditional justifications for class treatment—that "the relief sought must perforce affect the entire class at once." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2558.) For that reason, Rule 23(b)(2) provides no opportunity for class members to opt out, and does not oblige the trial court to notify class members of the action. (*Ibid*.)

Individualized monetary claims therefore do not belong in a Rule 23(b)(2) class. The procedural protections attending other types of classes—"predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is

no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so . . . . Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. [Citation.] While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." (*Wal-Mart, supra,* 131 S.Ct. at pp. 2558-2559.)

Strictly speaking, California class actions can nether be certified pursuant to Rule 23(b)(2) nor barred from certification by the rule, and even the Supreme Court's elucidation as to what is and is not permitted by Rule 23(b)(2) can be only advisory. But the takeaway from *Wal-Mart* is that the Due Process Clause requires notice and opt-out rights to class members unless "the relief sought must perforce affect the entire class at once." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2558; *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812.)

Here, appellants seek statutory damages under the Unruh Civil Rights Act and the Disabled Persons Act. The question is whether such damages would constitute individualized relief necessitating notice and opt-out rights or relief incidental to the equitable relief afforded by the settlement agreement, in which case no such rights are necessary.

"Incidental damages are damages 'that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.' [Citation.]" (*Molski v. Gleich* (2003) 318 F.3d 937, 949.)

Here, the released damages included statutory damages pursuant to the Unruh Civil Rights Act and the Disabled Persons Act. (Civ. Code, §§ 52, 54.3.) These damages

were not incidental because they do not flow directly from liability to the class as a whole.

The settlement and trial judges below deemed appellants' damages claims to be "incidental" because they were legally questionable. In other words, statutory damages were "a long shot" and the right to them "highly questionable" because no California court would likely consider a municipal entity to be liable under the Unruh Civil Rights Act or the Disabled Persons Act, the released damages claims were of minimal value and therefore incidental.

We happen to agree that statutory damages are unlikely here. The Unruh Civil Rights Act allows recovery of damages for discrimination "'by a "business establishment" in the course of furnishing goods, services or facilities to its clients, patrons or customers.'" (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1449.) A state prison is not a business establishment for purposes of the act unless it engages in behavior involving sufficient "businesslike attributes." (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764-765; see *Taormina v. California Department of Corrections* (S.D.Cal. 1996) 946 F.Supp. 829, 833; *Gaston v. Colio* (S.D.Cal. 1995) 883 F.Supp. 508; see also *Curran v. Mount Diablo Council of the Boy Scouts of America* (1998) 17 Cal.4th 670, 676-677 [organization is not a business establishment for purposes of the Unruh Act if the organization is not involved in the sale of access to the basic activities or services of the organization].) An organization has sufficient businesslike attributes to qualify as a business establishment when it "appears to have been operating in a capacity that is the functional equivalent of a commercial enterprise." (*Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 622.)

We think a public entity providing sidewalks and curbs to its citizens does so as a public servant, not a commercial enterprise. Appellants cite four federal cases to the contrary, three of them unpublished district court cases, and the issue is currently before our Supreme Court on certification of a question from the Ninth Circuit. (*Beauchamp v.*

City of Long Beach, No. S213420, rev. granted Nov. 26, 2013.)[2] We need not determine the issue definitively here because the overarching point is that appellants deserve to litigate the merits of their claims, not have them dismissed out of hand in a class action settlement.

The trial court appears to have considered appellants' damages claims to be "incidental" because they were of negligible value. With respect, that is not what is meant in the context of Rule 23(b)(2). The justification for denying notice and opt-out rights in a Rule 23(b)(2) class is that such rights are unnecessary where the monetary relief sought "must perforce affect the entire class at once," i.e., is an incident of the equitable relief sought. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2558.) Although Rule 23(b)(2) principles cannot themselves prescribe what may and may not be done with a class in California, the principles behind the Rule demonstrate that certification of a non opt-out class violated due process and should not be contemplated under Code of Civil Procedure section 382.

For that reason, the order certifying the settlement class and approving settlement must be reversed.

We need not address appellants' arguments going to other class certification requirements such as typicality and adequacy of class representation, which in a Rule 23(b)(2) class are of minimal importance anyway. (*Wal-Mart*, *supra*, 131 S.Ct. at pp. 2558-2559.)

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[2] Appellants' motion to stay these proceedings pending a resolution of *Beauchamp v. City of Long Beach* is denied. Respondents' motion to dismiss appellants' appeal of the trial court's April 3, 2004 order is denied.

DISPOSITION

The order granting class certification and approving final settlement is reversed. The parties are to bear their own costs on appeal.

TO BE PUBLISHED.

CHANEY, J.

I concur:

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Rothschild, Acting P.J., dissenting:

I respectfully dissent. The majority reasons that the resolution of individual claims for monetary damages in a non opt-out class settlement violates due process. The only authority for that proposition is a two-sentence passage in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541 (*Wal-Mart*). In that passage, the United States Supreme Court observed that "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. [Citation.]" (*Wal-Mart, supra,* 131 S.Ct. at p. 2559.) The Court followed that observation with this sentence: "While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read [Federal Rule of Civil Procedure] 23(b)(2) to include the monetary claims here." (*Ibid.*) The Court's suggestion that a due process violation is a "serious possibility" in the absence of notice and opt-out rights in a class action involving nonpredominating claims for monetary damages is the sole basis for the majority's conclusion that the superior court order before us violated due process.

I am not persuaded. First, the relevant sentence of *Wal-Mart* is not only dictum but also expressly acknowledges that the Court has "never held" that lack of notice and opt-out rights in a class action with nonpredominating claims for monetary damages *always* violates due process. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2559.) Second, that passage in *Wal-Mart* is inapplicable here in any event, because it refers to "absence of notice and opt-out" (*ibid.*), but here class members were given notice and the opportunity to object. *Wal-Mart* says nothing, even in dictum, about whether the absence of opt-out rights in these circumstances would violate due process. Third, the settlement in this case secures highly valuable benefits for all class members, and those benefits overwhelmingly predominate over the objectors' individual claims for monetary damages, which are probably worthless. Under the circumstances of this case, there is no "serious possibility" (*ibid.*) that certification of the class and approval of the settlement violates due process.

For all of the foregoing reasons, I would affirm the superior court's order. I therefore respectfully dissent.

ROTHSCHILD, Acting P. J.

Filed 3/13/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SAUNDRA CARTER et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES, Defendant and Respondent; MARK WILLITS et al., Objectors and Appellants.	B241060 (Los Angeles County Super. Ct. No. BC363305) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion filed in the above-entitled matter filed on February 26, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

ROTHSCHILD, Acting P. J. CHANEY, J. MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Tab 35

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSE THOMPSON, individually and on
behalf of all others similarly situated

C.A. NO. 01-1004

VS.

MERCK & CO., INC,
MERCK-MEDCO MANAGED CARE, L.L.C.

DONNA RODGERS, individually and on
behalf of all others similarly situated,

VS. C.A. NO. 01-1328

MERCK & CO., INC.

VALERIE CATES, individually and on
behalf of all others similarly situated,

VS. C.A. NO. 01-3011

MERCK & CO., INC.

CYNTHIA MARTIN, MARCELLA R. TAMS,
STEVEN C. LEE AND JAMES E. THOMAS,
individually and on behalf of all similarly-situated
African-Americans

VS. C.A. NO. 01-6029.

MERCK & CO., INC.

JOSEPHINE L. CHISOM AND
ADRIENNE S. DIXON, individually and on
behalf of all others similarly situated

VS. C.A. NO. 02-1196

MERCK & CO., INC.

CAROL STITH, individually and
on behalf of all others similarly situated

VS. C.A. NO. 02-4176

MERCK & CO., INC.

MEMORANDUM OPINION AND ORDER

WEINER, J. JANUARY 6, 2004

In the case of Webb v. Merck, 206 F.R.D. 399 (E.D.Pa. 2002), the twenty named plaintiffs brought an employment discrimination action against Merck & Co., Inc. ("Merck"), alleging that Merck engaged in intentional ("disparate treatment") discrimination in violation of

the Civil Rights Act of 1866, 42 U.S.C. 1981, Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. Plaintiffs sought to have this court certify a class to adjudicate "compensation disparity" claims made by or on behalf of the following class members: "All black employees who work (or former employees who have worked since January 1, 1989) for Merck & Co., (a) in the Merck Manufacturing Division at a plant in Pennsylvania, New Jersey or Georgia, or (b) as a Merck sales representative in the Mid-Atlantic Regional Business Group of Merck's United States Human Health Division." Webb, 206 F.R.D. at 401. Although plaintiffs sought compensatory and punitive damages, they sought class certification only as to liability issues as well as their damage claims seeking equitable relief regarding compensation issues.

We denied the motion for class certification. At the outset, we noted the enormity of the potential class. The class would have included "all black employees at every level and every grade at six separate facilities in five states, in two divisions, including union and non-union employees and their supervisors, managers and non-managers, sales representatives and secretaries and their supervisors and any other employee from vice-president to janitor." Id. We noted that plaintiffs themselves estimated that the number of potential class members could exceed 5000.

We found that plaintiffs could not satisfy the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure for class certification. We noted that "other than sharing the common position of being black employees of Merck, the plaintiffs' allegations are discrete and individualized. Plaintiffs were employed in different states, in different divisions, in different facilities and at different levels within the company hierarchy.

Their grievances are not susceptible to generalized proof or defenses. In essence, this action is nothing more than a consolidation of 20 accounts of individualized disparate treatment." Id. at 408. We also concluded that "resolution of the merits of the claims would degenerate into an unmanageable plethora of multiple individual determinations for each individual proposed class member." Webb, 206 F.R.D. at 406.

We also found that there were too many individualized issues to allow a class action to be maintained under Rule 23(b)(2). We stated that "in order to resolve each putative class member's claim, the fact finder will be forced to evaluate the individualized facts and circumstances surrounding compensation decisions relating to initial assignments, performance reviews, job postings, promotions and overall compensation." Id. at 409.

The plaintiffs sought permission with our Court of Appeals pursuant to Rule 23(f) of the Federal Rules of Civil Procedure to appeal this Court's ruling denying class certification. Plaintiffs' request was denied by Order dated June 18, 2002.

The above-captioned actions are all related to Webb and indeed were filed by the same counsel who represented the plaintiffs in Webb. Like Webb, the main impediment to class certification in these actions is that they challenge hundreds if not thousands of independent employment decisions. The Rodgers, Cates, Thompson, and Martin actions were filed on behalf of a class consisting of all African-Americans who have been employed or were denied employment by Merck during a relevant time period. The Stith action was filed "on behalf of present and former African-American employees who work(ed) at Merck's facility in Rahway, NJ." Stith Complaint at paragraph 7. The Chisom action was filed "on behalf of present and former African-American employees who work(ed) at Merck's facility in Whitehouse Station,

NJ. Chisom Complaint at paragraph 7. In all of the actions, plaintiffs contend they have been subjected to a continuous and pervasive pattern of racial discrimination by Merck in that Merck's managers and supervisors have created a racially hostile work environment, Merck's equal employment and anti-discrimination policies are applied by its managers and supervisors in aa subjective manner with little guidance from Merck, and Merck has condoned the general practice of discriminating against Blacks in the areas of hiring, compensation, promotion, demotion, job assignments, training, transfer, layoff, discharge and discipline. In all of the actions, plaintiffs seek declaratory and injunctive relief as well as compensatory and punitive damages "in amounts to be determined at trial." Presently before the Court is Merck's renewed motion to strike plaintiff's class allegations in all of these actions pursuant to Rules 23(c)(1) and 23(d)(4) of the Federal Rules of Civil Procedure. For the reasons which follow, the motion is granted.

At the outset, we note that plaintiffs argue that this court lacks authority to strike class action allegations from the complaint until after the plaintiffs have filed a motion for class certification. We do not agree. Rule 23(c) provides that the court should make a determination as to whether a class action is maintainable "as soon as practicable after the commencement of an action." If the court determines that the prerequisites of Rule 23 are not satisfied, then the court may issue an order "requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons." Fed.R.Civ.P. 23 (d)(4).

Despite the length of time which has expired since these actions were filed, plaintiffs have never filed a motion for class certification in any of them. There is no point in waiting any further. It is clear from the allegations in the complaints and the affidavits plaintiffs

have since submitted that plaintiffs' claims cannot satisfy the requirements of Rule 23(b)(2) or (b)(3). No amount of additional class discovery will alter this conclusion. To the contrary, additional discovery will in all likelihood further illuminate the subjective and intangible differences of each class member's individual circumstances.

To obtain class certification, plaintiffs must establish all four elements of Rule 23(a) of the Federal Rules of Civil Procedure along with one provision of Rule 23(b). Johnston v. HBO Film Management, Inc., 265 F.3d 178, 183 (3d Cir. 2001). If all four elements of Rule 23(a) are satisfied, the court must also find that the class is maintainable under Rule 23(b)(1), (2) or (3). In these cases, plaintiffs seek certification pursuant to either 23(b)(2) or 23(b)(3). Because plaintiffs cannot satisfy either Rule 23(b)(2) or (3), we need not address whether the proposed class meets the requirements of Rule 23(a).

Rule 23(b)(2) allows certification where, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Class actions certified under (b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory relief. Barnes v. American Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998), cert denied, 526 U.S. 1114 (1999). The reason for this restriction is that unnamed members of classes certified under Rule 23(b)(2) cannot opt out as they can in Rule 23(b)(3) actions. As a result, class cohesion is necessary and is presumed where a class suffers from a common injury and seeks class-wide injunctive relief. Id. at 142-143. In contrast, when a class seeks monetary relief, the class becomes less cohesive because assessing these damages often necessitates an examination into individual claims.

The Court of Appeals for the Fifth Circuit has held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief."Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

Incidental damages are those "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." Id. (emphasis in original). The Allison Court also identified the following three factors that would define "incidental" damages:

(1) whether such damages are of a kind to which class members would be automatically entitled;

(2) whether such damages can be computed by "objective standards" and not standards significantly reliant upon "the tangible, subjective differences of each class member's circumstances"; and

(3) whether such damages would require additional hearings to determine.

Id.

The Allison standard has been adopted by the Fifth, Sixth, Seventh and Eleventh Circuit Courts of Appeal. See Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 447-49 (6th Cir. 2002); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001); Lemon v. International Union of Operating Engineers, 216 F.3d 577, 589 (7th Cir. 2000). It has also been adopted by several courts within this Circuit. See Miller v. Hygrade Food Products Corp., 198 F.R.D. 638, 641 (E.D.Pa. 2001) petition for appeal denied, No. 01-8005 (3d Cir. March 21, 2001); Reap v. Continental Casualty Co., 199 F.R.D. 536, 546-547 (D.N.J. 2001); Osgood v. Harrah's Entertainment, Inc., 202 F.R.D. 115,

128-129 (D.N.J. 2001).

Our Court of Appeals has also indicated its intention to follow the Allison approach. In Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417 (3rd Cir. Jan. 24, 2003), our Court of Appeals issued an Order denying the plaintiffs' petition brought under Rule 23(f) of the Federal Rules of Civil Procedure seeking permission to appeal the district court's denial of their motion for class certification. In the Order, the Court of Appeals explained in detail their reasons for denying the petition by citing the Allison approach. The Order, while not published in the Federal Reporter, was published on both Westlaw and Lexis. The Order was also not marked "Judgment Order" or "Non-Precedential". Based on all the above authority, we elect to follow the Allison approach as well.[1]

In response to the motion to strike, plaintiffs have submitted 84 affidavits from potential class members attesting to alleged discriminatory practices they suffered at the hands of Merck. See Exhibits in Support of Plaintiffs' Opposition to Merck's Renewed Motion to Strike Class Action Allegations at B. If anything, however, these affidavits underscore the individualized nature of the plaintiffs' claims. Plaintiffs do not claim that their damages can be computed on the basis of some objective, uniform calculation or in an amount which naturally follows from an entitlement to a declaration or injunction against further harm. Rather, plaintiffs claim in each of the above six actions that they have been damaged in an "amount to be proven at

[1]We decline the plaintiffs' invitation to follow the minority view set forth by the Ninth Circuit in Molski v. Gleich, 318 F.3d 937, 949-950 (9th Cir. 2003) and the Second Circuit in Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147, 163-64 (2d Cir. 2001) cert. denied, 535 U.S. 951 (2002).(Both courts reasoning that to adopt a bright-line rule distinguishing between incidental and nonincidental damages for the purposes of determining predominance would nullify the discretion vested in the district courts through Rule 23.)

trial." Plaintiffs' request for compensatory and punitive damages on behalf of each class member would necessarily require individualized proof of injury. For example, evaluating claims for mental anguish and pain and suffering would necessarily involve a determination of whether and how each class member was personally affected by the alleged discriminatory conduct. Such damages, awarded on the basis of intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member's individual circumstances. As noted in Allison, "[t]he plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the case as a whole: what kind of discrimination was each plaintiff subjected to, how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on." Allison, 151 F.3d at 419. Plaintiff's claims therefore cannot as a matter of law satisfy the prerequisites for class certification under Rule 23(b)(2). [2]

Rule 23(b)(3) provides for certification where, "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Like (b)(2) certification, (b)(3) certification is precluded where individual issues predominate. Barnes, 161 F.3d at 143. Although all the plaintiffs claim they were discriminated against by Merck on the basis of their race, they allege

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[2]Plaintiffs' reliance on an unpublished decision by Judge Green in which he certified, pursuant to 23(b)(2), a class consisting of all African-American exempt employees of Sunoco, Inc. employed in the Philadelphia area from January 1, 1996 to the present is unavailing. Ketchum v. Sunoco, Inc., Civ. A. No. 01-1042 (E.D. Pa. July 11, 2003). The certification under 23(b)(2) was granted only after plaintiffs' counsel withdrew his request for individual money damages and announced he would seek only equitable damages for the class. See Sunoco decision at 2.

that they were exposed to the alleged discrimination in varying ways, by different people, for different amounts of time and experienced different injuries. For example, affiant Jeannette Brown avers that she was denied a promotion to a "position in Merck's Institute for Science Education" in Merck's MRL division at Rahway, NJ because that position "went to a Hispanic woman." J. Brown Aff. at 5, 9. Affiant Toya Copeland, who worked in Merck's Calgon subsidiary in New York from 1982 to 1995, claims that she was denied a promotion to a District Manager position in 1990. T.Copeland Aff. at 3, 5. Affiant Kimberly Grant avers that he was discharged from his service worker position at Merck's MMD facility in Albany, Georgia in 1995. K. Grant Aff. at 4. Affiant Patricia Harris avers that while she was employed in Merck's USHH division's ophthalmic sales organization in Chicago from 2000 to 2002, her supervisor unfairly reprimanded her. P.Harris Aff. at 9, 11.

Of course, Merck states that it has defenses that are unique to each individual claim. These include the statute of limitations, res judicata, signed settlement agreements and general releases by several of the affiants and a littany of potential, legitimate non-discriminatory reasons for taking action that are unique to each claimant. Simply put, no two plaintiffs were discriminated against in the same manner. Under such circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. Allison, 151 F.3d at 419. As in Webb, the fact finder would have to make individualized inquiries regarding the nature of each member's claim to determine whether he or she was the victim of intentional discrimination. These individualized fact issues would predominate during the liability phase of any trial as well as in the damage phase. As such, the individualized determinations that the fact finder would have to make to for each member of the proposed class

would clearly "predominate" over any common issues, thus precluding certification under Rule 23(b)(3).

For similar reasons, we find that plaintiffs have failed to meet the superiority requirement of (b)(3). Since individual issues dominate with respect to both liability and damages, the economies of time, effort and expense which are the very goals of the class action would not be achieved. Thus, the superiority of the class action is undermined.

For the foregoing reasons, we conclude that the classes presented here cannot meet the requirements of Rule 23(b) and therefore the class allegations must be stricken from the complaints.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSE THOMPSON, individually and on
behalf of all others similarly situated

C.A. NO. 01-1004

VS.

MERCK & CO., INC,
MERCK-MEDCO MANAGED CARE, L.L.C.

DONNA RODGERS, individually and on
behalf of all others similarly situated,

VS. C.A. NO. 01-1328

MERCK & CO., INC.

VALERIE CATES, individually and on
behalf of all others similarly situated,

VS. C.A. NO. 01-3011

MERCK & CO., INC.

CYNTHIA MARTIN, MARCELLA R. TAMS,
STEVEN C. LEE AND JAMES E. THOMAS,
individually and on behalf of all similarly-situated
African-Americans

VS. C.A. NO. 01-6029.

MERCK & CO., INC.

JOSEPHINE L. CHISOM AND
ADRIENNE S. DIXON, individually and on
behalf of all others similarly situated

VS. C.A. NO. 02-1196

MERCK & CO., INC.

CAROL STITH, individually and
on behalf of all others similarly situated

VS. C.A. NO. 02-4176

MERCK & CO., INC.

ORDER

The renewed motion of the defendant to strike plaintiffs' class allegations (C.A. No. 01-1004 Document # 14, C.A. No. 01-1328 Document #23, C.A. No. 01-3011 Document #10, C.A. No. 01-6029 Document #6, C.A. No. 02-1196 Document #10, C.A. No. 02-4176 Document # 7) is GRANTED.

All class allegations are STRICKEN from the above-captioned Complaints.

IT IS SO ORDERED.

CHARLES R. WEINER

SECONDARY SOURCES

Tab 36

Advisory Committee Report

REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM

FEBRUARY 1990

- The Committee, in ss.4(d), selected the word "preferable" over other words such as "reasonable" or "superior", as it was thought that the word "preferable" would best draw the court into a consideration of whether or not the class proceeding was a fair, efficient and manageable method of advancing the claim. The class proceeding should also be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on.

- The Committee endorses the conclusions reached by the O.L.R.C. at p.465 of its Class Action Report as follows:

  - the proposed Act should contain no express provisions respecting third party claims, cross-claims, consolidations or co-ordination of related claims.

  - the Rules of Civil Procedure and the Courts of Justice Act, 1984 (as it is now called) as amended should apply as in other litigation.

- Section 4(4)(b) should be read in the context of section 5. It should be noted that in the case of aggregate awards or claims for injunctive or declaratory relief the individual members of the class and their exact number may be undeterminable. In such cases they need not be identifiable on an individual basis.

- The Committee recommends that the Law Society of Upper Canada consider changes to the Rules of Professional Conduct to resolve potential conflicts between the lawyer's respective obligations to the representative plaintiff and members of the class. Consideration of a special written retainer may be necessary.

REMOVAL OF SUBSTANTIVE BARRIERS

5. - The court shall not refuse to certify a proceeding as a class proceeding on the ground only that the relief claimed,

(a) includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant, or

(b) arises out of or relates to separate contracts between members of the class and the defendant(s),

(c) seeks different remedies for different members of the class or subclass,

or that the number of members or identity of every member of the class is unknown.

Discussion

- With respect to (c), some plaintiffs may claim damages while others may claim specific performance. This should not preclude certification.

- Sub-classing is a process by which the larger class is divided into more distinct and representative groups. A sub-class will have an issue of law or fact common to itself and therefore requires separate representation in order to protect interests that it has separate from the larger class. Inherent in sub-classing is the need to ensure that the sub-class is not prejudiced by being in conflict with the larger classes' interests.

EVIDENCE AT CERTIFICATION

6. - Upon a motion for certification under section 4, the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Discussion

- While the motion for certification would in most respects follow the normal procedure, this section requires the representative plaintiff to file affidavit material with the court. There is no corresponding obligation on the defendant.

- The Committee notes that there would be an entitlement to cross-examine on the affidavits filed.

OPT-OUT ENTITLEMENT

7. - Any person who is a member of a class on whose behalf a proceeding has been certified may opt-out of the proceeding in the manner prescribed by the order of certification.

Discussion

- This provision sets out a class member's entitlement to withdraw from the class proceeding and, if desired, start an individual proceeding.

- The provision was a part of the Committee's mandate as described in its terms of reference.

- Once a class proceeding is commenced members of the class are presumed to be in the proceeding unless they take concrete steps to "opt-out".

- The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in one law suit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.

ORDER FOR CERTIFICATION

8. - (1) An order certifying a proceeding as a class proceeding shall describe:

(a) the class on whose behalf the proceeding is brought;

(b) the nature of the claim(s) made on behalf of the members of the class and specify the relief claimed;

(c) define the issues of fact or issues of law arising therefrom common to the class; and

(d) the manner in which members of the class will be permitted to exclude themselves from the class proceeding and specify a point after which members of the class may not exclude themselves.

(2) The court may at any time upon the motion of the representative plaintiff or defendant amend an order certifying a proceeding as a class proceeding.

(3) In the case of an order certifying a proceeding as a class proceeding the court may make such similar orders as are needed with respect to sub-classes at any time in the proceeding.

Discussion

- Section 8(1)(d) provides that the court may specify a "cutoff" date for opting-out. The Committee believes

that those who wish to launch individual proceedings or simply not be in a lawsuit should be given a reasonable opportunity to opt-out. However, once a certain point in the litigation has passed, those who are class members must stay involved with the claim. "Fence sitting" undermines the action, is unfair to the defendant and can be prevented by a fixed cutoff date.

DECERTIFICATION OR AMENDMENT

9. - (1) Upon the motion of a party or member of the class, where it appears to the court that the conditions in subsection 4(4) are no longer satisfied, the court may amend the order under s.4(4), and may decertify the proceeding or may make any other order it considers appropriate.

(2) Where the court makes an amending order pursuant to subsection (1) it may make amendments to the proceedings to eliminate any reference to the representation of members of the class, and the proceeding may proceed accordingly.

(3) Where, upon a motion pursuant to subsection (1) for decertification of the proceeding, the court is satisfied that the proceeding satisfies subsection 4(4) in all respects except with respect to adequacy of representation by the plaintiff, the court may make an order substituting another member of the class as the representative plaintiff.

Discussion

- The class must meet certain standards in order to qualify as a class proceeding and be certified. It may be that some proceedings will fall below the standard after certification. For example, the representative plaintiff may discover that the class is not as numerous as first thought and that another procedure would be a preferable method of advancing the claim. In such circumstances the proceeding could be decertified and could then proceed as an individual claim or claims.

- If the only difficulty is the ability of the particular representative plaintiff to represent the class, then a new representative should be appointed without the loss of certification.

AMENDMENT OF PLEADINGS

10. - Where the court refuses to certify a proceeding as a class proceeding or makes an order under section 9, the court may order that the pleadings be amended to eliminate any reference to the representation of members of the class or make such other

Tab 37

The Law of Class Actions in Canada

THE LAW OF CLASS ACTIONS IN CANADA

Warren K. Winkler, Paul M. Perell,
Jasminka Kalajdzic and Alison Warner

CANADA LAW BOOK

to a litigant to instruct counsel and direct litigation, on the one hand, and the access to justice and judicial efficiencies of litigation on behalf of a group of persons, on the other. In other words, there is a tension between an individual litigant's autonomy to sue or not sue and the viability of a class proceeding as a means to provide access to justice and judicial economy when there has been a mass wrong. These tensions are resolved by giving persons who fall within the definition of a certified class the opportunity to exclude themselves from the litigation. This opt-out right is statutorily protected in all Canadian jurisdictions: all class members who are resident in the province in which the action is litigated may opt out of the certified class action.[24]

C. The Concept of Opting Out

What distinguishes opt-out class actions from opt-in class actions and from regular, non-representative litigation is that the court will take jurisdiction over absent plaintiffs --- class members who have not actively consented to the litigation being brought on their behalf, and who play no part in its prosecution.[25] By not requiring class members to take active steps to be included in the class, opt-out class actions maximize the size of the class and overcome the problems of class member apathy or inadequate awareness or notice of an opportunity to sue the defendant. Opt-out regimes are generally thought to be more effective in promoting access to justice, in that they ensure all persons affected by the defendant's conduct are bound by the resolution of the action. This leads to larger settlements and greater finality to the defendant's exposure. Opt-out regimes create large classes that can include national and sometimes international residents.

The existence of rights to opt out or to opt in of class proceedings is important beyond its doctrinal significance to the procedural fairness of class proceedings. Generally speaking, plaintiffs and plaintiffs' class counsel favour jurisdictions where class members must take active steps to opt out of the class, because human nature being what it is, class members are likely to take the easiest course, which is to do nothing and to abide by the outcome of the class proceeding. This human tendency results in the maximizing of class size in jurisdictions that require active steps to opt out,

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argued by several experts that the binding effect of a class-action procedure over absent class members residing in European countries could be contrary to public policy and that the outcome of such procedures can therefore not be recognized by domestic courts.").

24 See for example the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 9, which provides that "[a]ny member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order."

25 Craig Jones and Angela Baxter, "Fumbling Towards Efficacy: Interjurisdictional Class Actions after Currie v. McDonald's" (2006), 3 Can. Class Action Rev. 405, at p. 407.

which in turn, increases the pressure on the defendant to settle. Conversely, defendants may favour opt-in jurisdictions because class sizes tend to be smaller and those who do not choose to opt in to a class proceeding are also not likely to bring individual proceedings. Nevertheless, in some situations a defendant may favour an opt-out jurisdiction because it broadens the binding effect of a judgment favourable to the defendant or the extent of releases bargained for in a settlement.

The opt-out procedure is a cornerstone of the class proceedings regime and serves to protect class members' litigation autonomy; the presumption is that by not opting out the class members have made a decision to participate in the class action.[26] The opt-out process is not a vote about whether the class action should proceed; rather, it is the means by which individual class members decide whether they will share in the benefits and the burdens of the action being brought on their behalf. If a class member opts out, he or she foregoes any right to share in the success of the lawsuit but avoids being bound by an unfavourable outcome. If a class member opts out of the class proceeding, he or she is a stranger to the lawsuit, which will proceed without him or her.[27]

Under an opt-out regime, the court may not order that members of a class (whether a plaintiffs' class or a defendants' class) cannot opt out of the proceeding.[28] Courts in Ontario have also interpreted the opt-out provision to mean that members of a class may not opt out against only some defendants.[29] So, for example, if there is a consent certification in the context of a settlement with some, but not all, defendants, class members must opt out of the entire proceeding and not just as against the settling defendants.[30] However, if a certification order for settlement purposes is designed so that class members are bound only if they make a claim under the settlement, then it is not necessary to provide an opt-out right to class members because they, in effect, opt out by not making a claim.[31]

Provided that there was adequate notice, in partial or progressive certifications of a class action, the right to opt-out is a procedural right that may only be exercised once.[32] Thus, where there are multiple defendants and where the action is certified against different defendants at different times, a class member will only have one opportunity to opt out of the action and may not opt out selectively, *i.e.*, a class member may not opt out

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26 *Silver v. Imax Corp.*, 2013 ONSC 1667 (Ont. S.C.J.), at para.73.

27 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 (Ont. C.A.), at para. 52.

28 *Berry v. Pulley* (2001), 197 D.L.R. (4th) 317, [2001] O.J. No. 911 (Ont. S.C.J.), at paras. 38-45.

29 *Nutech Brands Inc. v. Air Canada* (2008), 59 C.P.C. (6th) 166 (Ont. S.C.J.), at paras. 17-21.

30 *Nutech Brands Inc. v. Air Canada* (2008), 59 C.P.C. (6th) 166 (Ont. S.C.J.), at paras. 17-21.

31 *Ronald Smith & Associates Inc. v. Intuit Canada* (2009), 78 C.P.C. (6th) 49 (Ont. S.C.J.).

32 *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.), at paras. 29-32; *Nutech Brands Inc. v. Air Canada* (2008), 59 C.P.C. (6th) 166, [2008] O.J. No. 1065 (Ont. S.C.J.).

against some but not all of the defendants.[33] The practice of permitting only one opportunity to opt out in a class proceeding is salutary because it solidifies class size and thus facilitates further settlements; conversely permitting a renewed right to opt out might compromise bar orders and thwart additional settlements.[34]

Although legislation may allow the court to impose a deadline for making individual claims or for participating in a settlement once the action has been certified, a deadline for making claims cannot be made a term of a certification order because this would depart from the opt-out scheme of the act and require a person who has not opted out to then opt in in order to remain a member of the class.[35] While class proceedings statutes allow the court to impose a deadline for making individual claims or for participating in a settlement once the action has been certified, a deadline for registering with the plaintiff's law firm, a so-called "claims bar", cannot be made a term of a certification order because this would depart from the opt-out scheme of the Act.[36] The court will not approve a procedure that would convert the opt-out process to one requiring a member to opt in before obtaining the benefit of the class proceeding.[37]

Even though courts will fix a deadline by which class members must opt out or be bound by the result in the class action, courts may extend the time for opting out of a class action.[38] Further, where the class definition is amended to enlarge the class, the new class members must be given notice of their right to opt out of the class action.[39] There is no jurisdiction to add members to a class that would not be given notice of the proceeding or their rights to opt out or who would either be unrepresented, or not adequately represented.[40]

Class members are entitled to a fair and informed opt-out process in which they are protected from coercion and from misleading, incomplete, biased or otherwise inappropriate information.[41] Where necessary to uphold the integrity of the opt-out process, the court can impose conditions on communications among parties, class members, and third

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33 *Nutech Brands Inc. v. Air Canada* (2008), 59 C.P.C. (6th) 166, [2008] O.J. No. 1065 (Ont. S.C.J.); *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.); *Guercio v. Stone Paradise Inc.* (December 2006), London 46460CP/45604CP (Ont. S.C.J.) per Rady J.

34 *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.), at para. 31.

35 *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 (Ont. S.C.J.).

36 *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 (Ont. S.C.J.).

37 *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 (Ont. S.C.J.), at paras. 41 and 42; *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (Ont. S.C.J.), at para. 117; *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.), at para. 150; *Silver v. Imax Corp.*, 2013 ONSC 1667 (Ont. S.C.J.), at para. 70.

38 *Harrington v. Dow Corning Corp.*, 2001 BCSC 221 (B.C. S.C. [In Chambers]).

39 *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399 (Ont. S.C.J.).

40 *Paramount Pictures (Canada) Inc. v. Dillon* (2006), 29 C.P.C. (6th) 13 (Ont. S.C.J.).

41 *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Ont. Gen. Div.).

Tab 38

Report on Class Actions

REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME II

Ministry of the
Attorney
General

1982

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

Derek Mendes da Costa, Q.C., LL.B., LL.M., S.J.D., LL.D., *Chairman*

H. Allan Leal, Q.C., LL.M., LL.D., *Vice Chairman*

Honourable Richard A. Bell, P.C., Q.C.

William R. Poole, Q.C.

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M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada M5C 1C5.

During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

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mandatory proofs of claim, would be fundamentally inconsistent with the access to justice rationale that we have endorsed as a basic justification for an expanded class action procedure in Ontario. Therefore, this Commission is of the opinion that individual class members should not be obliged to take affirmative action after certification in order to include themselves in the class action. Since we believe that the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, class members should not be denied whatever benefits are secured by the class action by failing to act at this stage of the proceedings. To the extent that one believes that individual interests should be afforded recognition in a class action procedure, this can be effected by the incorporation of an opt out procedure, the operation of which will not prejudice the less sophisticated members of the class. Consequently, it is the recommendation of this Commission that the proposed Ontario *Class Actions Act* should neither require class members to opt in to class actions after certification nor permit the imposition of a proof of claim procedure in the exercise of the court's discretion to administer class suits or to send notice to the class.[68]

(b) An Opt Out Regime

Having rejected an opt in regime for the proposed *Class Actions Act*, it remains to be considered whether, and to what extent, class members should be permitted to exclude themselves from a class suit. This requires an exploration of two issues. First, there is the threshold question whether class members should be given an opportunity to opt out of class actions at all. Secondly, if sound policy reasons do favour allowing class members to withdraw from a class action, there is the further issue whether there should be a general right, available in all class suits, or whether the right to opt out should be subject to judicial discretion.

Before we begin our consideration of these issues, we should reiterate our awareness that the existence of a right of exclusion would constitute a factor favouring the distribution of some form of notice to the class. Since any type of notice will involve costs and administrative burdens, we are loath to require that notice be given when it is not necessary. If an opportunity to opt out of the class were superfluous in certain circumstances, notice for this purpose would be unnecessary, thereby reducing the expense and complexity of the class action.

In determining whether class members should be permitted to withdraw from class actions, we shall consider first the reasons why a class member might wish to exclude himself. There would appear to be two such reasons. First, as the Advisory Committee on Civil Rules that drafted Rule 23 has acknowledged,[69] a class member might wish to withdraw from the class in order to bring his own separate action against the defendant. Secondly, a class member might simply prefer not to sue the defendant at all.

In our view, each of these possible motives for exclusion reflects a

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[68] See Draft Bill, ss. 18(1) and 20.

[69] See *supra*, note 17 and accompanying text.

legitimate concern on the part of individual class members that should be recognized in the proposed *Class Actions Act*, unless there are sound countervailing policy reasons. We do not believe, however, that the incorporation of a general right to opt out is necessary in all class actions. Rather, we are of the view that these individual interests will be accorded sufficient protection if the proposed *Class Actions Act* gives the court a discretion to decide whether, in a particular class suit, some or all of the members of the class should be accorded a right to withdraw from the action.

In this respect, we differ from the drafters of Rule 23. The treatment of opting out in Rule 23 reflects the so-called "categorical approach" to class actions. As we have pointed out, opting out is automatically available to all class members in class actions brought under Rule 23(b)(3), which is the subdivision under which class actions seeking damages usually are brought. By contrast, there is no right of exclusion in class actions brought under Rule 23(b)(1) and Rule 23(b)(2), those subdivisions of the Rule under which class actions seeking injunctive or declaratory relief ordinarily are prosecuted. While we do agree that the propriety of extending a right of exclusion depends, in part, upon the type of class action that is asserted, we have earlier rejected a categorical approach to the design of a class action procedure in favour of a functional analysis that looks to the underlying purposes of each of the possible constituent elements of the mechanism. It is this approach to the issue of opting out that has led us to our conclusion that a discretionary approach is to be preferred. Our reasoning is as follows. The first reason supporting a right to opt out – that a class member may wish to prosecute his claim in an individual action – does not, in our opinion, justify affording the class members a right of exclusion in all cases. When the claims of the class members are not individually recoverable, by definition, it would not be economically feasible for them to sue the defendant independently.[70] In such cases, the purported interest in bringing an individual action is only theoretical, and the extension of a right to opt out, therefore, will be no more than a gratuitous gesture. In deciding whether class members should be allowed to opt out, it would make sense, then, to consider the amounts of their individual claims.

Furthermore, a right to opt out would be meaningless in a case where, as a practical matter, a class member would be affected by a judgment notwithstanding his withdrawal from the class action. His interest is not "individual" in the sense that, by leaving the class and by bringing a separate action, he can effect a result different from that which would ensue had he remained a class member. There seems to be little reason in such circumstances to permit class members to opt out. In this respect, the failure of Rule 23 to extend a right to opt out to class members in actions seeking injunctive or declaratory relief is a sensible policy decision, as the class members might be affected by the judgment in any event.[71]

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[70] See Homburger, "State Class Actions and the Federal Rule" (1971), 71 Colum. L. Rev. 609, at 637; Newberg, *supra*, note 16, Vol. 5, Appendix Item 2, at 1491-92; Wright and Miller, *supra*, note 13, Vol. 7A, §1786, at 149; and Fisch, "Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action" (1973), 38 Mo. L. Rev. 173, at 199-200.

[71] In the case of an injunction, class members clearly would be affected by an order of the

The second possible reason for exclusion similarly does not support a general right to opt out. If a class member does not wish to sue the defendant, his dissent can be accommodated easily within the structure of any class action for monetary relief. In order to avoid forcing class members to participate in a recovery, which in effect would compel them to sue the defendant, it is not necessary to grant them an opportunity to withdraw from the class, with its concomitant notice requirement. Rather, a class member who prefers not to sue need not pursue his individual share of the recovery; he may simply decline to take the necessary action after a determination of the common questions.[72]

Accordingly, the Commission recommends that the proposed Ontario *Class Actions Act* should contain a provision giving the court a discretion in all cases to determine whether class members should be permitted to exclude themselves from a class action. A person who excludes himself from a class action should no longer be a member of the class for any purpose and should not be entitled to any relief awarded in the class action.[73] It is our expectation that ordinarily the court would consider the opt out issue at the certification hearing.[74]

The overall policy underlying our opt out procedure is to acknowledge the importance of the individual interests that we have described. We do not believe, however, that the existence of individual interests should be dispositive of the issue of whether a right to opt out should be extended to class members in a particular case. Even if the court finds that there is a cognizable interest in withdrawal from the action, it should be able, in our opinion, to deny class members a right to opt out if it believes that these individual interests are outweighed by the desirability of securing a broad binding effect for the judgment, or by the public interest in achieving judicial economy and consistency of judgments.

In order to afford proper guidance to the courts in making the decision whether to permit opting out, we further recommend that the proposed *Class*

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court. Whether a class member would be affected by a declaration would depend upon the type of declaration sought in the particular case. For example, where a court makes an order declaring a legislative provision *ultra vires*, a class member would be affected, irrespective of his desire to opt out of the suit.

[72] See Fisch, *supra*, note 70, at 200. If monetary relief is distributed by the court or by the defendant without the participation of the class, a class member can return the cheque or refuse to cash it: see Moore, "The Potential Function of the Modern Class Suit" (1973), 2 C.A.R. 47, at 61, *n.* 112.

[73] See Draft Bill, s. 20(1) and (5).

[74] Exceptionally, the opting out issue may arise at a subsequent stage of the class proceedings. If, for example, the description of the class were amended after certification to include persons not previously part of the class, the court might wish to consider whether the new class members should be permitted to exclude themselves.

Ordinarily, the opt out issue would be determined by the court based on the arguments of counsel for the class and counsel for the defendant. If the court wished to hear further submissions from the class members or to secure additional information concerning whether a particular case was an appropriate case for opting out, it could invite submissions in a notice sent to the class.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act, 1992*

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